

Decision in own-initiative inquiry OI/7/2016/MDC on the decision of the European Union Delegation to Armenia not to conclude a Grant Contract

Decision

Case OI/7/2016/MDC - **Opened on** 15/06/2016 - **Decision on** 19/02/2018 - **Institution concerned** European Commission (No maladministration found) |

This own-initiative inquiry is based on a complaint made by an association of Armenian NGOs called the Citizens' Protection League (CPL). It concerns the decision of the European Union Delegation to Armenia not to conclude a Grant Contract with CPL following the Delegation's discovery of an error in its initial assessment of the CPL application. CPL argued that the Delegation's decision was not based on sound reasons.

In the course of the Ombudsman's inquiry, the European Commission acknowledged that the action taken initially by the Delegation, once it realised that an error had occurred in the evaluation process, was not appropriate. However, the Commission also showed that the error detected required that the evaluation of CPL's application be redone and, thus, that the Delegation was not in a position to conclude the Grant Contract with CPL.

The Ombudsman therefore closed the inquiry with a finding of no maladministration.

Background to the complaint

1. This own-initiative inquiry is based on a complaint submitted by an association of Armenian NGOs called the Citizens' Protection League (hereinafter, 'CPL') [1] which responded (as the main applicant) to a restricted Call for Proposals (EuropeAid/137-009/DD/ACT/AM-1 *Civil Society Organisations and Local Authorities in Development - Actions in partner countries (Lots 1 & 2) - Armenia*) [2] .

2. According to the Guidelines for grant applicants (hereinafter, the 'Guidelines'), applicants first had to submit a 'Concept Note' and then, if pre-selected, a Full Application. The proposals were to be assessed in three steps. **Step 1** ('Opening & Administrative checks and Concept Note evaluation') involved the assessment of the Concept Note. In the course of **Step 2** ('Evaluation of the Full Application'), the Evaluation Committee had to assess, among other things, the financial and operational capacity of the applicants and affiliated entity(ies).



3. Applicants who were provisionally selected after having successfully completed Step 2 had to submit supporting documents. These supporting documents were assessed in the course of **Step 3** ('Verification of eligibility of the applicants and affiliated entity(ies)' [3] .

4. CPL was informed that it had passed Step 1 on 15 July 2015 and was invited to submit a full application. On 6 November 2015, CPL received a letter from the EU Delegation to Armenia (hereinafter the 'EU Delegation') which essentially informed CPL that it had passed Step 2 of the evaluation process. The EU Delegation also asked CPL to provide some information and documents [4] .

5. On 23 December 2015, the EU Delegation informed CPL that it had conducted its final step (Step 3) of the "*Evaluation pertaining to the verification of eligibility of the applicants and co-applicants*". It added: "*According to the Guidelines point 2.1.1. the Applicant must be directly responsible for the preparation and management of the action with their partners, not acting as an intermediary. In this case, the Applicant ... has no proven track record of any financial activities or experiences of its own. The CPL experiences referred to in the proposal are coming from other organisations, the latter being neither Co-Applicants, neither Affiliated entities with respect to this particular proposal.*"

In light of the above, we consider that CPL as Applicant did not meet the eligibility criteria and consequently we will not be in position to award you any grant under this particular call. .."

6. In its complaint to the Ombudsman, CPL contended that the decision of the EU Delegation, not to conclude a Grant Contract with it, was not based on sound reasons. It argued that, according to the Guidelines, Step 3 was aimed at verifying (i) any incoherence between the Declaration by the applicant and the supporting documents, and (ii) the eligibility of the applicants, the affiliated entities and the action. However, there was no incoherence and the applicant was eligible (the applicant is an association of NGOs and a legal entity in its own right). Moreover, nothing in the Guidelines suggests that an applicant with "*no proven track record of any financial activities or experience of its own*" was ineligible. If that had been the case, the Guidelines should have stated so.

7. When asking the Commission to reply to CPL's arguments, the Ombudsman noted that, upon a reading of the Full Application submitted by CPL (especially Section 2.2 entitled 'Applicant's experience'), it could be concluded that it was true that CPL had already informed the Evaluation Committee that it had very little experience of its own and that its experience was based on that of the NGOs which formed it. It appeared that any questions as to CPL's experience and prior financial activities should have been raised in the course of Step 2 of the Evaluation process since, during that step, the Evaluation Committee had to assess, among other things, the "*financial and operational capacity*" of applicants. However, such questions should not have been raised in the course of Step 3 of the Evaluation process, since it appeared that the exclusive purposes of Step 3 were to verify points (i) and (ii) mentioned in the preceding paragraph. It was also pointed out that CPL had submitted a document which attested to the fact that CPL is a legal entity and was registered with the State as such on 22



April 2003.

8. In its reply to the Ombudsman, the Commission stated that, “*following the assessment of the procedure in the context of [CPL’s] complaint to the Ombudsman,*” it concluded that there was an error of assessment in the decision of 6 November 2015 (relating to Step 2). This was because the Evaluation Committee had not properly followed Step 2 of the evaluation process. The Commission therefore decided to reconvene the Evaluation Committee in order to re-evaluate CPL’s proposal. The re-evaluation was to be limited to the first point of the evaluation grid, relating to the ‘financial and operational capacity’. The Commission also instructed the EU Delegation to annul the decision of 23 December 2015 (relating to Step 3) because the decision on the award was to be taken on the basis of the re-evaluation.

9. CPL considered the Commission’s suggestion unacceptable because (i) CPL’s proposal had already been evaluated and graded and CPL was acknowledged as one of the winners of the tender, and (ii) neither the content of CPL’s complaint (which related to the issue of abuse of authority) nor the Guidelines justified a re-evaluation of the proposal. CPL proposed that, if the problem was the lack of financial experience of CPL, then CPL should be replaced by the NGO Hakastver as the applicant, since it was a co-founder of CPL and its team had prepared the proposal. It had extensive financial experience and an impeccable financial history. However, the EU Delegation cautioned CPL that if it wished to go ahead with such a replacement, “*the Evaluation Committee will have to consider whether such new proposal ... will constitute a substantial change that would call into question the principle of equal treatment ... and whether such change is therefore acceptable at this stage of the procedure*” [5] .

Lack of sound reasons for the decision of the European Union Delegation to Armenia not to conclude a Grant Contract with CPL

10. In November 2016, in the course of the inquiry, the Ombudsman’s inquiry team made a proposal for a solution which took into account the arguments and opinions put forward by the parties. The proposal was “**that the Commission (i) maintain its decision to instruct the Delegation to annul its decision of 23 December 2015 (relating to Step 3 of the evaluation process), (ii) withdraw its request to the Delegation that it reconvene the Evaluation Committee in order to re-evaluate the proposal in accordance with Step 2 of the evaluation process, and (iii) conclude a Grant Contract with CPL without delay**”.

11. The Commission did not accept the proposal.

The Commission’s reply to the proposal for a solution

12. The **Commission** argued that the Evaluation Committee’s evaluation of CPL’s Full Proposal was based on a flawed premise, given that the financial activity and experience listed in the application was in fact not CPL’s, although it was presented as such. Indeed, in section 2.2 (“*Applicant’s experience*”) of the Full Proposal several projects were mentioned. However,



none of these projects had been implemented by CPL. In Section 2.2 it is stated that these projects were implemented by some of CPL's founders (member organisations) with the participation of the project team members [6] . Since they had been included under the section for the main applicant's experience, these projects were erroneously considered by the Evaluation Committee as being projects implemented by CPL, the applicant.

13. The Commission went on to state that under Section 2.4 “ *Affiliated entity(ies) experience* ”, there was no information as regards CPL's founders (member organisations). Moreover, in reply to the question “ *Is your organisation linked with another entity?* ”, found in Section 3.2 “ *Profile* ”, CPL selected “ *No, independent* ”, rather than mentioning the Parent entities and their EuropeAid ID, as requested by the form.

14. The Commission added that the “ *presentation of the information included in CPL's proposal misled the Evaluation Committee's reflection as regards the lead applicant's experience and the affiliated entities; the Evaluation Committee should have asked CPL to clarify whether any of these entities were affiliated entities in the proposal. Hence, it was concluded that there was a manifest error in the evaluation under Step 2 as regards the financial and operational capacity of CPL. This error was detected while the eligibility check was performed. Therefore, the Contracting Authority informed CPL that a grant could not be awarded because the NGO was not eligible.* ”

15. The Commission stated that, although the financial and operational capacity had been satisfactorily evaluated by the Evaluation Committee, it would have been appropriate, once this error was detected, to reconvene the Evaluation Committee in order to re-evaluate the proposal based on this additional information. Once the Ombudsman's inquiry was underway, the Commission proposed that CPL's proposal be re-evaluated by the Evaluation Committee.

16. The Commission stated that it has established that the information on which the decision of 6 November 2015 (relating to Step 2 of the evaluation process) was based is not in accordance with the Guidelines for applicants (see paragraph 12 above). According to the Commission, it is beyond doubt that the scores given by each member of the Evaluation Committee in Section 1 of the Evaluation grid under Step 2 of the procedure erroneously referred to the experience and financial capacity of its founders and not of CPL. This error is also supported by the information provided by CPL under Sections 2.4 and 3.2 (see paragraph 13 above).

17. The Commission went on to state that the Evaluation Grid for Step 2 referred to in the Guidelines clearly mentioned that the financial and operational capacity under points 1.1 - 1.3 (section 1) refer to the applicant (and co-applicants) and “if applicable” to their affiliated entity(ies) while point 1.4 (section 1) refers strictly to the main applicant, CPL. It is evident, according to the Commission, that, since CPL did not mention under sections 2.4 and 3.2 any information as regards affiliated entities, the information included in CPL's Full Proposal under section 2.4 “ *misled the Evaluation Committee's reflection as regards the main applicant's experience, financial capacity and affiliated entities* ”. The Commission contended that it follows unquestionably that the score that CPL obtained under Step 2 was based on an error by the Evaluation Committee based on the confusing information provided by the applicant in the Full



Proposal that misled the Evaluation Committee.

18. The Commission considered that, although the misrepresentation of the information was not questioned at the time of the evaluation, the Evaluation Committee was not entitled to consider that CPL had the requisite financial and operational capacity as required by the Guidelines for applicants on the basis of the information provided by the applicant in its Full Proposal. The Evaluation Committee made an error of interpretation that allowed an applicant to be scored and provisionally selected for the next step of the evaluation procedure based on inaccurate information presented by CPL in the Full Proposal. Based on the information provided, CPL was not qualified to pass Step 2. Therefore, once this error came to the attention of the Contracting Authority, it was not an option but an obligation to immediately take action and correct it.

19. According to the Commission, the Guidelines give clear indications on the requirements for the main applicant to have financial activities or experience of its own (see the first sentence of paragraph 17 above). The Guidelines mention, regarding Section 1 of the Evaluation Grid, that “[i]f the total score for section 1 is less than 12 points, the application will be rejected. If the score for at least one of the subsections under section 1 is 1, the application will also be rejected.” [7]

20. Finally, the Commission stated that it was only because of the information provided by CPL during the eligibility check (Step 3 of the evaluation process) that the Contracting Authority became aware of the lack of experience and financial capacity of the main applicant. Although the Contracting Authority tried to correct this error, **the actions taken were not appropriate**. The Commission therefore instructed the Contracting Authority, in the course of the Ombudsman’s inquiry, to annul its decision of 23 December 2015 (relating to Step 3 of the evaluation process) and to reconvene the Evaluation Committee. The Commission stated that “*these two actions are mandatory in order to apply a coherent, transparent and equal treatment to all participants in this call.*” It added that a lawful decision can be taken only on the basis of the Evaluation Committee’s recommendations.

21. The Commission was of the opinion that the Evaluation Committee should re-evaluate (under Step 2 of the procedure) the Full Proposal submitted by CPL and consider its request to replace the main applicant, CPL, with the NGO Hakastver [8], in full respect of transparency and equal treatment principles.

CPL’s comments on the Commission’s reply to the proposal

22. **CPL** expressed its disagreement with the Commission’s position. In particular, it disagreed that it had misrepresented any information relating to the financial and operational capacity of CPL [9]. It also disagreed with the Commission’s proposal that the Full proposal be re-evaluated (under Step 2). CPL referred to the arguments it had raised in its complaint. It expressed its regret that the Commission had not agreed to its proposal that a contract be concluded with the NGO Hakastver “*within the format of the evaluated bid (step 2)*”.

The Ombudsman’s assessment



23. The **Ombudsman** notes that the Commission has acknowledged that “ *the actions taken* [by the EU Delegation following Step 3 of the Evaluation process - the eligibility check] *were not appropriate* ”. Indeed, once the EU Delegation became aware of the lack of experience and financial capacity of CPL, the EU Delegation did not react as it should have. As the Commission itself has acknowledged, the EU Delegation should have immediately requested further information and ordered a re-evaluation of the Proposal. However, it is true that the Commission attempted to correct the EU Delegation’s error in the course of the inquiry.

24. The Commission has now shown that CPL’s Full Proposal misrepresented information, since Section 2.4 was left blank and an incorrect reply was given in Section 3.2. The Ombudsman accepts that these were errors, rather than the wilful concealment or misrepresentation of information. However, the fact remains that the misrepresentations contributed to the erroneous evaluation by the Evaluation Committee. This means that the retroactive withdrawal of the decision of 6 November 2015 (informing CPL that it had passed Step 2 of the evaluation process) was warranted. It also means that the decision of the EU Delegation (of 23 December 2015) not to proceed with the award of the contract to CPL was (despite being incorrect from a procedural point of view, as later acknowledged by the Commission) a sound decision. The Delegation could not and should not have awarded the contract when it had knowledge that the Evaluation Committee had not made a proper evaluation of CPL.

25. Against this background, the Ombudsman agrees with the steps taken by the Commission. The Ombudsman also agrees that, if CPL were to have been replaced as the applicant by the NGO Hakastver, the Evaluation Committee would have had to consider whether such a new proposal would constitute a substantial change that would call into question the principle of equal treatment and thus be acceptable at that stage.

26. The Ombudsman concludes (1) that the Commission has justified its decision not to accept the solution proposed by the Ombudsman’s inquiry team in November 2016 and (2) that in view of the action taken by the Commission in the course of this inquiry, there was no maladministration in the Commission’s conduct.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration in the Commission’s conduct.

CPL and the Commission will be informed of this decision .

Emily O'Reilly



European Ombudsman

Strasbourg, 19/02/2018

[1] The Treaty on the Functioning of the European Union and the Statute of the European Ombudsman set certain conditions as to the opening of an inquiry by the Ombudsman. One of these conditions is that the complaint must be lodged by a "*citizen of the Union or any natural or legal person residing or having his registered office in a Member State of the Union*". This condition was not met by CPL, which is based in Armenia. However, the Ombudsman considered that there were grounds for pursuing the complainant's case by means of an own-initiative inquiry, in accordance with Article 228 TFEU.

[2] CPL applied under Lot 1. The title of the proposed action was "*Support to poverty reduction in Tumanyan region of Armenia through the development of agritourism*" (Ref: NEAR-TS/2015/10).

[3] The Guidelines explained that during Step 3,

"• *The Declaration by the applicant (Section 8 of Part B of the grant application form) will be cross-checked with the supporting documents provided by the applicant. Any missing supporting document or **any incoherence between the Declaration by the applicant and the supporting documents** may lead to the rejection of the application on that sole basis.*

• *The eligibility of applicants, the affiliated entity(ies), and the action will be verified according to the criteria set out in Sections 2.1.1, 2.1.2 and 2.1.3* " (emphasis added).

[4] The letter also stated as follows: "*Please note that this letter does not give you the right to the grant. You will not acquire that right until both parties have signed the grant contract...*"

[5] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's solution proposal, available at: <https://www.ombudsman.europa.eu/cases/solution.faces/en/89909/html.bookmark> [Link]

[6] NGO Hakastver (2 EIDHR projects), NFO Femida (1 EIDHR project and several other projects), NGO Achilles Drivers' Rights Protection Society (several other projects).

[7] The Commission added that in its letter of 17 October 2016, CPL admitted that the main applicant's financial experience requirement was indeed included in the Guidelines.

[8] The Commission pointed out that the Contracting Authority has cautioned CPL that the Evaluation Committee would have to consider whether such a new proposal would constitute a



substantial change that would call into question the principle of equal treatment and thus be acceptable at that stage of the procedure.

[9] CPL contended that “ *the information relating CPL experience was clearly presented in section 2.2 of our application form, and the projects implemented by CPL-member-organisations with clear identification of member-organisations names. CPL is an association, and these organisations are members of CPL, it is clearly shown in CPL statute as well as in our application* .”