

Decision of the European Ombudsman on complaint 653/97/HMA/XD/BB against the European Commission

Decision

Case 653/97/BB - Opened on 04/09/1997 - Decision on 09/06/1999

Strasbourg, 9 June 1999 Dear Mr B., On 8 July 1997 you made a complaint to the European Ombudsman concerning the European Commission's administration of the procedure for awarding a tender contract in Zambia within the framework of the European Development Fund (EDF). On 4 September 1997, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 18 December 1997 and I forwarded it to you with an invitation to make observations, if you so wished. On 19 March 1998, I received your observations on the Commission's opinion. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The call for tender procedure in question was opened in order to engage training consultancy services and technical assistance for the Zambia Centre for accountancy studies and it was carried out within the framework of the Lomé IV Convention. The complainant made a tender offer in 1994. The complainant claims that his tender offer was the lowest one without taking into account the reimbursable costs (air tickets, etc.). According to him the original tender document stipulated that the contract price which would determine the award of the contract would be based on the lowest contract price before the addition of reimbursable expenses. The National Authorising Officer (NAO) in Zambia made the evaluation of the tenders and proposed the tender of the complainant's company. The complainant alleges that the Chief Authorising Officer (CAO) in the Commission overturned the decision made by the NAO to award the tender contract to the complainant's company. Finally, the complainant wishes for an independent review of the CAO's decision in order to re-award the tender contract.

THE INQUIRY

The Commission's opinion In its opinion the Commission stated that in EDF tenders the Administration of the ACP State in question is the Contracting Authority. It is the NAO of that state who makes the evaluation of the tender and the proposal for award of contract. Before the award of contract can be made, however, the NAO has to seek the approval from the European Commission in order to secure EDF funding. Depending on the type of contract and the results of the tender, it is either the Head of Delegation of the Commission in the ACP State or the CAO in the Commission who approves the selection. In accordance with Article 317 (g) (ii) of the Lomé IV Convention, in respect of a tender for a service contract, the Head of Delegation has



been delegated power to approve the NAO's proposal. This does not, however, preclude the Head of Delegation from referring a proposal to the CAO. There was no decision from the Commission Delegation in Zambia which was overturned, since the Head of Delegation did not approve the proposal for the award of contract, but instead forwarded the proposal to the CAO for an approval. According to the Commission, the selection was carried out in accordance with the selection criteria set out in the tender documents and with the General Regulations for works, supply and service contracts financed by the EDF (1). The tender document does not state that only the fixed cost components will be taken into account in the selection. Furthermore, the break down price mentioned in Annex D of the tender specifies that the reimbursable costs have to be specified. **The complainant's observations** The complainant maintained his complaint and requested that the Ombudsman would ask for copies of the tender document, the NAO's report, the proposal of the tender which was selected.

FURTHER INQUIRIES

On 11 May 1998, the Ombudsman requested copies of the call for tender from the Commission, the reports made by the NAO and CAO, as well as of the application of the successful tenderer. **The Commission's second opinion** The Commission sent a complementary opinion to the Ombudsman on 27 July 1998 confirming its previous opinion. As to the selection of the lowest tender, the Commission explained that the tender dossier indicated that the award of the contract would be made to the tenderer submitting the most technically proficient and economically advantageous offer among those found to be responsive according to Articles 34 and 36 of the General regulations for works, supply and service contracts financed by the EDF. At the time of the tender in question the policy was that the lowest offer was to be judged on the basis of the total price including reimbursable costs. The policy has now been changed and the tender dossiers for service contracts include a standard provision that the prices will be compared on fixed costs only. As regards the request for copies of documents, the Commission explained that it does not want to reveal the communications between the CAO and the NAO as these documents are covered by Article 34.10 of the General Regulations which provides that *"the evaluation proceedings shall be recorded in properly signed minutes which shall not be made public or communicated to the tenderer"*. **The complainant's second observations** The complainant maintained his complaint. He pointed out that, as the Commission has indicated, the contracts are now awarded on a fixed cost basis only. He rejected the Commission's indication that the policy was to accept the lowest offer inclusive of reimbursable costs as this is not stated in the tender document. The complainant claimed that Article 36 of Section C provides that the Administration should bear the travelling expenses of each team member and the members of their family. Furthermore, this Section provides that the Administrator shall bear the travelling expenses. Accordingly, there is no element of tendering in respect of the reimbursable costs. Finally, he claimed that the Commission should fully disclose the relevant documents to the Ombudsman. **Complementary inquiries** On 7 January 1999, the Ombudsman wrote again to the Commission requesting, on the basis of Article 3 (2) of the Statute of the European Ombudsman, that his services could examine the communications between the CAO and the NAO about the content of the evaluation reports mentioned by the Commission in its opinion dated 27 July 1998. On 12 February 1999, the Commission forwarded all the relevant documents which it has in its possession in relation to this tender procedure. As these documents included material relating



to the evaluation proceedings which according to Article 34.10 of the General regulations shall not be made public or communicated to any tenderer, the Ombudsman decided to inspect these documents confidentially in accordance with Article 4 of the Statute of the European Ombudsman.

THE DECISION

1 Selection of the lowest tender 1.1 The complainant alleges that his tender offer was the lowest one exclusive of the reimbursable costs. According to the complainant the original tender document specifies that the contract price which would determine the award of the contract would be based on the lowest contract price before addition of reimbursable expenses. 1.2 In its opinion the Commission claims that there is no provision in the tender document indicating that only the fixed cost components would be taken into account in the selection. Furthermore, the breakdown price mentioned in Annex D of the tender specifies that the reimbursable costs have to be specified. The Commission mentioned in its complementary opinion that its policy has now changed and that the tender dossiers for service contracts include a standard provision that the prices will be compared on fixed costs only. 1.3 The Ombudsman observes that the price breakdown of Annex D of the tender contract indeed includes reimbursable costs. However, Article 36 of Section C of the tender contract foresees that the Administration shall bear the travelling expenses of each team. It also imposes limits for the refund of travelling expenses. This might confuse the tenderers. Nevertheless, the Ombudsman notes that the Commission has now modified the tender dossier for service contracts which include a standard provision that the prices will be compared on fixed costs only. 1.4. As regards the selection of the lowest tender, the Ombudsman observes that the Commission based its assessment on an objective criteria, namely, the total costs of the tenders, which was reflected both in Article 5 (h) and Section B of the Instructions to Tenders and of Annex D of the draft contract. 1.5 Against this background and after having examined the complementary documents sent by the Commission, the Ombudsman finds that the selection procedure was carried out in conformity with the rules of the call for tender and that there is no evidence to the effect that the Commission would have acted in an arbitrary or discriminatory way. **2 Refusal to approve the proposal made by the National Authorising Officer in Zambia**

2.1 The complainant claims that the Commission, as the Chief Authorising Officer, overturned the decision of the National Authorising Officer to award the tender contract to the company he represented. 2.2 In its opinion the Commission states that there was no decision which was overturned. The NAO has to evaluate the tender offers and make a proposal to award the contract. Article 317 (g) ii of the Lomé IV Convention specifies that the Head of Delegation has been delegated powers to approve the NAO's proposal. However, this does not mean that he cannot forward the decision of approval to the CAO. Furthermore, the Commission explains that it will only approve a proposal for the award of a contract if the selection of the contractor has been made in accordance with the EDF tender regulations and the tender dossier. At the time of the tender in question the Commission's policy, based on the General regulations and the provisions of the tender dossier, was that the lowest offer was to be judged on the basis of the total price including reimbursable costs. 2.3 The Ombudsman observes that according to Article 313 of the Lomé IV Convention the NAO shall transmit the result of the examination of the tenders and a proposal for placing the contract to the Delegate who shall give his approval. The Ombudsman further observes that Article 311 of the Lomé IV Convention provides that the CAO



shall approve the proposal for placing the contract, subject to powers exercised by the Delegate under Article 317 of the Lomé IV Convention. It appears that the existence of delegated powers does not preclude the Head of Delegation, when he considers it appropriate, from referring a proposal to the CAO. 2.4 The Court of Justice has held that the Community is responsible for preparing and adopting financing decisions on projects and programmes. It appoints the CAO of the Fund, whose task it is to ensure that all financing decisions are carried out and who is responsible for managing the Fund's resources. (2) . According to the Court, measures adopted by the Commission's representatives - either the Delegate or the CAO - during the tender procedure are solely intended to establish whether or not the conditions for Community financing are met. The Commission can be held liable only if, in the exercise of the strictly limited powers conferred on it by the Convention, it adopted an unlawful measure or engaged in improper conduct (3) . 2.5 The Ombudsman's inquiries indicate that the Commission acted in accordance with the provisions of the Lomé IV Convention, the EDF General Regulations and the tender dossier when it chose the lowest tender defined according to the principles applied at the time of the call for tender. Furthermore, no evidence has been put forward to the effect that the Commission would have acted unlawfully or was engaged in improper conduct when it decided not to give its approval to the proposal made by the NAO. **3 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman has therefore decided to close the case. The President of the European Commission will also be informed of this decision. Yours sincerely Jacob SÖDERMAN

(1) OJ L 382 of 31 December 1990

(2) Case 126/83 *STS Consorzio per Sistemi di Telecomunicazione via Satellite SpA v. Commission of the European Communities* [1984] ECR 2769 para 12.

(3) Case C-257/90 *Italsolar SpA v. Commission of the European Communities* [1993] I -9 para 33-35 and Case C-55/90 *James Joseph Cato v. Commission of the European Communities* [1992] ECR I -2533, para 18.