

Otsus juhtumi 1144/2009/(KRK)OV kohta - Väidetav haldusomavoli nõukogu hoonete sisetöödega seotud pakkumismenetluses

Otsus

Juhtum 1144/2009/(KRK)OV - **Alguskuupäev:** {0} 19/06/2009 - **Otsuse kuupäev:** {0}
09/12/2010

Kaebuse esitaja on Belgia maalrifirma, kes osales Euroopa Liidu Nõukogu Brüsseli hoonete sisetööde lõpetamiseks nõukogu korraldatud pakkumismenetluses. Pakkumise pidi võitma odavaima vastuvõetava pakkumise teinud pakkuja. Valitud kandidaatidele saadetud pakkumisdokumendid olid prantsuskeelsed. Nõukogu hoonetes korraldatud ringkäigu ajal esitas kaebuse esitaja mitu küsimust. Ta esitas oma prantsuskeelse pakkumise viis päeva enne tähtpäeva. Kui kaebuse esitajale teatati, et tema pakkumist ei valitud, saatis ta nõukogule kaks arvukaid küsimusi sisaldavat kirja. Nõukogu vastas mõlemale kirjale.

Oma kaebuses ombudsmanile väitis kaebuse esitaja, et nõukogu (i) ei avaldanud pakkumisdokumente hollandi keeles, kuigi kaebuse esitaja oli seda taotlenud; (ii) ei vastanud kaebuse esitaja küsimustele; (iii) ei vaadanud hinnapakumisi täielikult läbi ja (iv) kuulutas pakkumise võitjaks äriühingu, kellel oli pakkumise kohta teatud eelnevat teavet.

Oma arvamuses väitis nõukogu, et (i) kaebuse esitaja ei olnud palunud hollandikeelseid pakkumisdokumente; (ii) nõukogu oli kaebuse esitaja küsimustele vastanud ning (iii) vastavalt pakkumiskutsele oli võitja madalaima hinnaga pakkumine. Ühtlasi selgitas nõukogu, et pakkumise võitja oli eelnevalt tegutsenud varem nõukogu heaks töötanud äriühingute alltöövõtjana.

Ombudsman ei leidnud tõendeid, et kaebuse esitaja oli selge sõnaga taotlenud hollandikeelsete pakkumisdokumentide esitamist. Samuti järeldas ta, et sedavõrd, kui kaebuse esitaja mitmesuguseid küsimusi oli võimalik kindlaks määrata, oli nõukogu neid kas oma vastustes või käesoleva kaebuse kohta esitatud arvamuses käsitleanud. Samuti leidis ombudsman nõukogu toimikuga tutvumisel, et hindamiskomisjon oli hinnapakumisi hoolega uurinud ja võrrelnud. Lõpuks leidis ombudsman, et kaebuse esitaja ei esitanud konkreetseid tõendeid, et võitnud äriühingul oli pakkumise kohta eelnevat teavet. Seepärast järeldas ombudsman, et nõukogu tegevuses ei esinenud haldusomavoli, ja lõpetas juhtumi.



The background to the complaint

1. The complainant, a painting firm, participated in a Call for tenders launched by the Council of the European Union, which acted as the Contracting Authority. The Call, which was published in the Supplement to the Official Journal of the European Union, concerned the completion of interior works (painting, floor covering and wall covering works) that were to be carried out in various Council buildings in Brussels.
2. By letter of 19 October 2007, the General Secretariat of the Council informed the complainant that its candidature had been retained and that it would be sent the tender documents in the following weeks.
3. By letter of 17 March 2008, the General Secretariat sent all the selected candidates the tender documents in French. Point 14 of the tender documents, which dealt with the "Award criteria", stated that the tender would be awarded to the tenderer who made the cheapest offer among the eligible tenders, as outlined in Annex 3. The deadline for tenders to be submitted was 28 April 2008.
4. On 7 and 8 April 2008, the General Secretariat organised visits of its buildings for the candidates that had been selected. Attendance at the visit was optional. The complainant visited the buildings on 7 April 2008. On 10 April 2008, the General Secretariat sent all the candidates a letter accompanied by a 5-page summary of questions and of the answers given during the visits.
5. On 23 April 2008, the complainant submitted its tender. In the letter accompanying the tender, the complainant listed 15 points concerning certain aspects of the tender documents, and provided explanations concerning its tender. In particular, it expressed its regret that, although the questions it asked during the visit of 7 April 2008 had been replied to in Dutch, the tender documents were not available in that language. The complainant argued that the technical specifications were very brief and did not stipulate the minimum quality criteria for the materials to be used. It drew attention to the fact that its prices were calculated on the cost of high quality materials, and that if the Contracting Authority were willing to accept materials of a lower quality, this could have a positive influence on the price it could offer.
6. The Evaluation Committee evaluated the tenders on 15 May and 12 June 2008. The complainant's tender was ranked fourth out of five tenders made. Another company ('firm A') was selected as the winning tenderer.
7. On 17 June 2008, the complainant sent a letter to the General Secretariat asking it to take a position on the remarks made in its letter of 23 April 2008.
8. By letter of 20 June 2008, the General Secretariat informed the complainant that its tender had not been retained because it was not the cheapest. It went on to state that the Evaluation Committee had taken into consideration the remarks made by the complainant in its tender, and in its letter of 23 April 2008.



9. By letter of 4 July 2008, the complainant informed the General Secretariat that it disagreed entirely with the decision taken, since the reasons on which it was based had not been properly explained. The complainant expressed its regret that, despite its request during the visit of 7 April 2008 to be sent a Dutch version of the tender documents, such a version had not been made available to it. It went on to argue that possession of such a language version might have had a positive influence on its price offer. It then submitted the following thirteen questions to the General Secretariat: " 1) Which firm submitted the cheapest offer? 2) Was the tender awarded to that firm? 3) What was the total price per year offered by this firm? 4) What are the total prices per chapter offered by this firm? 5) In what percentage are we more expensive than the cheapest offer? 6) Did the cheapest firm already work directly for the Council before June 2008? 7) Did the cheapest firm already work indirectly for the Council before June 2008 (in subcontract)? 8) Can you provide us with details of all the tenderers respecting hereby their anonymity? 9) How did you ascertain that the cheapest tenderer did not foresee an overlapping in the works to be carried out as foreseen in chapters I and II? 10) How did you control - in accordance with PC 124 - the wages as requested in chapter II? 11) In which way did you take into consideration my comments - which form an integral part of our tender? 12) How did you analyse my proposal on quality and price reduction? 13) Why did we not receive a copy of the eventual questions you put to our competitors as a consequence of our remarks? "

10. By letter of 8 July 2008, the General Secretariat replied to the complainant. It recalled that, according to point 14 of the tender documents, the tender would be awarded to the tenderer who made the cheapest eligible offer. The General Secretariat informed the complainant that the tender had been awarded to firm A. The General Secretariat included in its reply a table in which it compared the complainant's price offer (EUR 1 652 338) with the winning tenderer's offer (EUR 1 097 920.90). It stated that what had been taken into account was the "total amount of the offer" as stated in Annex 3 to the tender documents ("*Prices and other financial conditions*"). It pointed out that, in the complainant's case, this amount (EUR 1 603 293) differed slightly from the complainant's price offer. The General Secretariat also recalled that, since the tender had been awarded on the basis of the lowest price, only the price had been taken into account, and no other elements such as quality. It further stated that the Council had not needed to ask additional question regarding any of the complainant's remarks, or those of the other tenderers, and added that none of these remarks had indicated non-conformity of the tenders. The General Secretariat pointed out that it could not provide further information concerning the content of the tenders of the complainant's competitors (for instance as regards the price per chapter), because the tenders were confidential, and fair competition between tenderers needed to be ensured. It also informed the complainant that the contract would be signed with the winning tenderer after the expiry of a period of 14 calendar days following the notification of the awarding and rejection decisions. As regards the tender documents, the General Secretariat submitted that it never received an explicit request from the complainant to make them available in Dutch.

11. The tender procedure was closed on 5 August 2008. On 15 October 2008, the complainant sent a further letter to the General Secretariat, arguing that the latter had not replied to questions 6 and 7 contained in the complainant's letter of 4 July 2008, and that questions 8, 9,



10, 11, 12 and 13 had been insufficiently answered. The complainant also added the following further questions: " 1) *We note that the price offered by firm A is abnormally low in comparison with our offer. How did the Council take into account Article 110(4) of the KB [1] of 1.8.1996 (BS 26.1.1996)? This KB allows a deviation of only 15% from the average of the tenderers.* 2) *On the basis of the above, we note that firm A submitted abnormally low unit prices. Was firm A allowed to revise these unit prices? Did this revision have an impact on the ranking of its tender?* 3) *What do you mean with 'lowest regular offer'? In which way did you investigate the relationship between the quality and minimum salaries? ... We refer to our letter of 23 April 2008 ... in which we clearly set out that certain finishing indications and qualitative criteria were missing in your tender documents. You will understand that there is a direct link between the finishing percentage of the required works and the offered unit prices. Which finishing percentage did firm A offer in its tender? Against which unit prices? As clearly mentioned in our letter of 23 April 2008, our unit prices could be positively influenced (lower price) if you would have included a minimum quality criterion in your tender documents.* 4) *In which way will you control whether firm A will fulfil all the technical specifications of the tender, as well as all the legal obligations (cfr PC124) as you stated in your letter?* 5) *Is it that [the Call] only addresses finishing works or is it envisaged that entire buildings need to be painted, because in our opinion, the prices of firm A are abnormally low? ...* 6) *Can you send us an overview of all the tenderers and their price offers?* 7) *In which way did you make an assessment of the quantities as mentioned in your summarising table? ...* 8) *Why were product and/or brand names imposed for wall paper and floor covering works? This in contradiction to painting works. ... Was an offer of a similar product considered? "* The complainant also contested the General Secretariat's statement that it had not asked for a Dutch version of the tender documents. It pointed out that Mr T., acting on behalf of the complainant, had explicitly made this request during the visit of 7 April 2008, in the presence of the competitors.

12. On 5 November 2008, the General Secretariat replied to the complainant, referring to the previous correspondence, and pointing out that Belgian public procurement law was not applicable in the present case, which was to be assessed exclusively on the basis of the Financial Regulation applicable to the general budget of the European Communities [2] (the 'Financial Regulation') and the Implementing Provisions of the Financial Regulation [3] (the 'Implementing Provisions'). It concluded that it could not provide any further information.

The subject matter of the inquiry

13. In its complaint to the Ombudsman, the complainant pointed out that, when it submitted its tender on 23 April 2008, it made some technical and administrative remarks concerning (i) unclear technical specifications with regard to the Council's exact criteria as regards the quality required for the painting works; (ii) the fact that its unit prices could be lower if the quality criteria were clarified; (iii) the obligation to pay minimum wages; and (iv) the obligation to supply products from certain producers (carpet, vinyl).

14. The complainant pointed out that the reason for its complaint was that the Council had denied having been asked for a Dutch version of the tender documents. It added that, according



to the information available to it, it appeared that the winning tenderer had worked for the Council for more than 10 years and had advance knowledge concerning the tender, namely, that the quantities to be delivered would be lower than what was effectively required.

15. In its complaint, the complainant referred, among other things, to the prohibition on discrimination, contained in Article 5(3) of the European Code of Good Administrative Behaviour, the principle of objectivity (Article 9 of the Code) and the right to good administration (Article 41 of the Charter of Fundamental Human Rights) [4] .

16. The complainant stated that its complaint concerned the following alleged "infringements": (i) " *confusion* " and " *denial of language certainty* " [5] ; (ii) lack of reply or incomplete reply to questions; (iii) incomplete investigation of the price offers; and (iv) advance knowledge on the part of the winning tenderer. As regards point (ii), the complainant argued that the Council had not, or not completely replied to the questions concerning, in particular, (1) the " *Dutch language of the Call* "; (2) the " *history cheapest* " [sic] of firm A; (3) the " *details of the conformity* "; (4) remarks mentioned in the complainant's price offer; and (5) the questions which may have been put to other tenderers. The complainant noted that it presumed that certain information was being kept hidden from it.

17. In his letter asking the Council for an opinion on the complaint, the Ombudsman interpreted the complainant's submissions as meaning that the complainant wished to allege that the Council:

- 1) failed to make the tender documents available in Dutch, despite the complainant's request to that effect;
- 2) failed to reply to the complainant's questions;
- 3) incompletely examined the price offers; and
- 4) awarded the tender to a company which had certain knowledge about the tender that other companies did not possess.

The inquiry

18. The complaint was forwarded to the Council for an opinion. The Council sent its opinion on 22 September 2009, which was then forwarded to the complainant. The complainant sent its observations on 30 October 2009.

19. On 21 April 2010, the Ombudsman decided that it was necessary to carry out an inspection of the Council's file. The inspection was carried out by the Ombudsman's services on 16 June 2010. On 28 June 2010, the Ombudsman sent a copy of the inspection report to the complainant, with an invitation to submit observations. The complainant submitted observations on 30 June 2010.



20. In its observations on the Council's opinion, the complainant stated that if maladministration were to be found, it wanted to receive appropriate compensation amounting to 10 % of its tender. In view of his conclusions on the original complaint (see paragraphs 28, 37 to 42, 52 and 57 below), the Ombudsman took the view that there was no need to take up this new claim for inquiry.

The Ombudsman's analysis and conclusions

A. Alleged failure to make the tender documents available in Dutch

Arguments presented to the Ombudsman

21. The complainant alleged that the Council failed to make the tender documents available in Dutch, despite its request to that effect.

22. In its opinion, the Council argued that the complainant's allegation did not correspond to reality, since there was not a single document on its file to show that the General Secretariat received such a request. The Council argued that, at no point before the submission of its tender on 23 April 2008 did the complainant ask questions in Dutch, or react to the fact that the tender documents were in French. Between 10 April 2008 (the date the report on the the visit of 7 and 8 April 2008 was sent to the tenderers) and 28 April 2008 (the tender submission deadline), no candidate asked for a translation of the tender documents into another language. The Council pointed out that the complainant is a company which operates in Wallonia, France and Luxembourg, and was therefore used to working in two languages, and was perfectly capable of understanding the documentation which the General Secretariat sent to all candidates. This was also confirmed by the detailed points which the complainant raised in the letter accompanying its tender, and the fact that its price offer was submitted in French. It was only when submitting its tender that the complainant expressed regret that it had not received the tender documents in Dutch. Even if this statement were to be considered as an implicit request for a translation of the tender documents into Dutch, *quod non*, and notwithstanding the fact that, on the basis of Article 141(1) of the Implementing Provisions, the General Secretariat was not obliged to reply to requests for documents made less than five working days before the expiry of the tender submission deadline, any such request would have been pointless, since the complainant had just submitted its tender on the basis of the French version of the tender documents, which it had received, understood, and analysed. The Council concluded that it had not committed any irregularity, either by sending of the tender documents in French, or with regard to "*language certainty*".

23. In its observations, the complainant stated that the Council wrongly refused to accept the implicit request for a translation of the tender documents into Dutch, which it submitted in its



letter of 23 April 2008. It pointed out that this request was made on time, namely, five days before the expiry of the tender submission deadline. The complainant also maintained its argument that it requested a Dutch version of the tender documents during the visit of 7 April 2008. It clarified that this request was addressed to a Council official whose mother tongue was Dutch, who had replied that the document would be provided to the complainant. The complainant submitted that the report on the visit was, therefore, incomplete. The complainant rejected as irrelevant the Council's argument that the complainant mastered French and operated in French-language territories and could thus understand the tender documents. The complainant submitted that the first official language in Belgium, the Council's host country, was Dutch. It further pointed out that point IV.3.6 of the Call states that Dutch could be used in the tender procedure. In the complainant's view, tenderers were, therefore, entitled to expect that the tender documents would be made available in a language other than French.

24. The complainant concluded that, given that it made a request for a Dutch version of the tender documents during the visit of 7 April 2008, and that it repeated its request in its letter of 23 April 2008, Article 41(4) of the Charter of Fundamental Rights concerning "*language certainty*" had been infringed.

The Ombudsman's assessment

25. The Ombudsman notes the complainant's argument that it made two requests for a Dutch version of the tender documents, namely, (i) first during the visit of 7 April 2008, and (ii) a second time in its letter of 23 April 2008. As regards the request allegedly made during the visit of 7 April 2008, the Ombudsman notes that the complainant did not submit any document to prove its allegation. It is true that the complainant argued that its request was made orally. However, no such request is mentioned in the report on the visit of 7 April 2008, which was forwarded to the complainant. If such a request was made and accepted during that visit, the question arises as to why the complainant did not write to the Council in order to draw its attention to the fact that the said report was incomplete. However, no such action appears to have been taken.

26. As regards the request allegedly made in the letter of 23 April 2008, the Ombudsman notes that, in this letter, the complainant merely expressed its regret at the fact that the tender documents were not available in Dutch. The Ombudsman is of the opinion that this letter could hardly be understood, as argued by the complainant, to constitute an implicit request for a Dutch version of the tender document, particularly in view of the fact that the letter of 23 April 2008 was the very letter by which the complainant submitted its tender. The Ombudsman considers that this fact shows that the complainant does not appear to have encountered any problem in submitting its tender on the basis of the tender documents in French. He also notes that when the complainant submitted its tender by letter of 23 April 2008, it thanked the Council for having replied to its questions in Dutch during the visit of 7 April 2008. In light of these circumstances, the complainant would have had to make an explicit request if it nevertheless wished to receive the tender documents in Dutch. However, no such explicit request was made in the complainant's letter of 23 April 2008.



27. The complainant referred to the right to good administration, and in particular to Article 41(4) of the Charter of Fundamental Rights which, according to the complainant, guarantees "*language certainty*". The Ombudsman would like to point out that this article provides that "[e]very person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language". This article thus deals with the issue of the language that needs to be used when replying to citizens' correspondence. It would, therefore, be relevant in the present context only if the Council had not replied to the complainant in the same language used by the latter in its correspondence with the Council. However, the Ombudsman notes that on 20 June, 8 July and 5 November 2008, the Council replied in Dutch to the complainant's letters written in Dutch.

28. In view of the above, the Ombudsman concluded that there was no maladministration by the Council with regard to this aspect of the case.

B. Alleged failure to reply to questions

Arguments presented to the Ombudsman

29. The complainant alleged that the Council failed to reply to its questions. It more particularly alleged that the Council did not, or did not completely reply to the questions concerning (1) the "*Dutch language of the Call*"; (2) the "*history cheapest*" [sic] of firm A; (3) the "*details of the conformity*"; (4) remarks mentioned in the complainant's price offer; and (5) the existence of questions which may have been put to other tenderers.

30. In its opinion, the Council stated that it considered that it had provided appropriate answers to all the complainant's questions. It argued that certain questions could not be answered with respect to substance because they went beyond, either the limitations of the Financial Regulation, (for example, the questions concerning information about competitors), or the framework of the tender procedure, which was closed on 5 August 2008, (for example, the questions in the letter of 15 October 2008). The Council stated that the general impression given by the complaint was that the complainant wanted to use its right to complain to the Ombudsman in the hope of obtaining access to information to which it was not entitled.

31. As regards the alleged failure to reply to the complainant's question contained in its letter of 4 July 2008 and concerning the "*history cheapest*" [sic] of firm A, the Council pointed out that this letter belonged to the category of correspondence between a rejected tenderer and the Contracting Authority. Article 100(2) of the Financial Regulation provides in this respect that, upon a written request of a rejected tenderer, the Contracting Authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and of the characteristics and relative advantages of the successful tender, and the name of the tenderer to whom the contract is awarded. The information requested by the complainant concerning the "history" of firm A clearly does not pertain to information as



defined in Article 100(2) of the Financial Regulation. The General Secretariat was thus entitled not to reply to this question.

32. As regards the alleged failure to reply to a question concerning whether the submitted tenders were in conformity with the minimum quality requirements, the Council pointed out that the Evaluation Committee analysed all tenders as to their conformity with the minimum requirements, since doing so was a pre-condition before proceeding to the financial evaluation of the tenders. It stated that all the tenders had been deemed to comply with the minimum requirements, and that it had informed the complainant accordingly in its letter of 8 July 2008.

33. As regards the alleged failure to reply to the complainant's question in its letter of 4 July 2008 as to whether questions had been put to other firms, the Council again pointed out that this issue did not pertain to information which the General Secretariat had to communicate to the complainant on the basis of Article 100(2) of the Financial Regulation. The Council stated that, on 5 June 2008, its General Secretariat had sent a letter to firm A, requesting it to clarify and confirm certain price offers, but that this did not constitute an infringement of the tender procedure rules. The General Secretariat was not obliged to inform the complainant of the clarifications which it received concerning the tenders of the complainant's competitors, since this could harm their commercial interests, and fair competition between tenderers.

34. In its observations, the complainant pointed out that its allegation of failure to reply concerned more specifically the Council's replies relating to the insufficiently clear quality description contained in the tender documents, and the issue of minimum wages. The complainant argued that the Council did not contest the fact that the complainant had, in good time, that is, at least five days before the expiry of the tender submission deadline criticised the lack of clarity in the tender documents. It went on to point out that, in its letter of 23 April 2008, it had pointed out that the tender documents contained unclear technical specifications, more particularly with regard to the painting and the floor covering works. It further stated that the Council had admitted in its opinion that it had requested clarifications from firm A with regard to its price offer. In the complainant's view, this showed that there were problems with the technical and price specifications. In its observations on the inspection report, the complainant also stated that the Council was hiding behind the argument of bad translation.

The Ombudsman's assessment

35. The Ombudsman notes that, in its observations, the complainant appeared to shift the focus of its allegation from the Council's alleged failure to reply to its specific questions, to a criticism that the tender documents were not sufficiently clear regarding the works to be carried out, and that this had affected its price offer. However, the Ombudsman is of the opinion that what needs to be examined in the present case is the original allegation of failure to reply, which was contained in the complaint of 28 April 2009, and on which the Council was asked to submit an opinion. As regards the alleged lack of clarity of the tender documents, the Ombudsman simply wishes to point out that the alleged lack of clarity does not appear to have prevented the complainant from submitting an eligible and complete tender on 23 April 2008. It also appears



that the complainant does not seem to have raised the issue of the alleged lack of clarity of the tender documents before submitting its tender.

36. The complainant's original allegation was that the Council failed to reply to its questions. The Ombudsman notes that the complainant put forward a considerable number of questions, namely, 13 in its letter of 4 July 2008, and eight additional questions in its letter of 15 October 2008. In its complaint to the Ombudsman, however, the complainant indicated that it was particularly concerned by the Council's reaction to questions concerning the five issues mentioned in paragraph 29 above. The Ombudsman also notes that, in its letter of 15 October 2008, the complainant explicitly alleged that questions 6 and 7 of its letter of 4 July 2008 were not answered. The Ombudsman therefore considers that his examination should be limited to the Council's reaction to the said questions, in so far as they can be identified on the basis of the complainant's description.

37. Questions 6 and 7 in the complainant's letter of 4 July 2008 concerned whether the winning tenderer had already, directly or indirectly, worked for the Council. The Ombudsman notes that the Council failed to reply to those questions in its letters of 8 July and 5 November 2008. However, in the framework of its opinion on the allegation that the winning tenderer had certain advance information (see point D below), the Council explained that firm A had worked as a subcontractor for firms which had previously worked for the Council. Given that the Council has thus effectively addressed these two questions in its opinion, the Ombudsman considers that no further inquiries into this part of the case are necessary.

38. Turning to the alleged failure to reply to points (1)-(5) in paragraph 29 above, the Ombudsman notes the following. Concerning point (1) the "*Dutch language of the Call*", the Ombudsman notes that there were no questions about the language of the call in the complainant's letters of 4 July and 15 October 2008. The Ombudsman therefore assumes that the complainant wished to refer to the issue of making the tender documents available in Dutch. However, this issue has already been considered in the context of examining the first allegation, which led to the conclusion that the complainant did not request a translation prior to, or when submitting its tender. In the absence of such a request, the Council cannot be reproached with having failed to reply. No instance of maladministration was therefore found with regard to this aspect of the case.

39. Point (2) concerned the "*history cheapest*" [sic] of firm A. The Ombudsman notes that questions using these words were not asked in the complainant's letters of 4 July and 15 October 2008. In so far as this somewhat unclear expression might have to be understood as asking whether firm A had already worked for the Council in the past, its content would be the same as questions 6 and 7 in the complainant's letter of 4 July 2008. The Ombudsman therefore refers to his conclusion in paragraph 37 above.

40. As regards the alleged failure to reply to point (3) outlined in paragraph 29 above, namely, the "*details of the conformity*", the Ombudsman notes that it is not clear which specific questions the complainant wanted to ask. In any event, in its opinion the Council described in detail how it analysed the conformity of the submitted tenders. The Ombudsman therefore



considers that, in the absence of further details specifying which questions were not answered, no further inquiries into this part of the allegation appear to be necessary.

41. As regards point (4), where the complainant alleged that the Council failed to reply to remarks it made in its price offer, it is again not entirely clear which questions the complainant intended to ask. In fact, the letter of 23 April 2008, by means of which the complainant submitted its tender (including its price offer), does not contain any questions. Rather, it contains only a list of 15 points in which the complainant provided further clarifications concerning different aspects of its tender. In the absence of precise questions concerning these 15 points, the Ombudsman finds no instance of maladministration with regard to this aspect of the case.

42. As regards, finally, the alleged failure to reply to the issue raised in point (5) of paragraph 29 above, concerning questions which may have been put to other tenderers, the Ombudsman notes that the Council addressed this question in its letter of 8 July 2008. In that letter it explained that it had not found it necessary to ask additional questions with respect to remarks made in the complainant's offers, nor in those of the other tenderers. In its opinion, however, the Council pointed out that it had asked firm A for a clarification and confirmation of certain price offers. During the inspection of the file, which was conducted on 16 June 2010, the Council's representatives submitted that the statement in its letter of 8 July 2008 was not contradicted by what it stated in its opinion, and that the apparent contradiction was due to a problem regarding the wording of the letter to the complainant of 8 July 2008, which had been translated from French. The Council's representatives explained that, while tenderers are not allowed to submit complements or additions to their offers after the tender deadline has expired, the Council may seek confirmation of prices, and that this subtlety was wrongly expressed in the letter to the complainant. It is true that the Council did not put additional questions to firm A, but instead requested it to confirm its price offer. The Council has thus answered the complainant's question and provided a reasonable explanation for what, at first sight, appeared to be a contradiction in its answers. The Ombudsman therefore considers that there was no maladministration with regard to this aspect of the alleged failure to reply.

43. The Ombudsman notes that, in its opinion, the Council referred several times to Article 100(2) of the Financial Regulation, arguing that certain information did not fall within the category of information which it had to communicate to other tenderers under that provision. Article 100(2) of the Financial Regulation provides that "[t]he contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected, of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing, of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded. However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings". The Ombudsman considers that this Article can hardly be interpreted as meaning that the Council could not release any information other than that mentioned in this provision. Article 100(2) of the Financial Regulation makes the provision of certain information mandatory. If a request for further information is made, such a request



should not be based on Article 100(2), but should be judged on its own merits, taking due account of the explicit limitations set forth in the said provision. The Ombudsman notes, however, that even though the Council argued that it could not provide the said information on account of Article 100(2) of the Financial Regulation, it nevertheless addressed the complainant's questions to a sufficient extent. There is therefore no need for a more detailed examination of the relevance of Article 100(2) of the Financial Regulation for cases such as the present one.

C. Alleged incomplete examination of the price offers

Arguments presented to the Ombudsman

44. The complainant alleged that the Council's examination of the price offers was incomplete.

45. In its opinion, the Council referred to point IV.2.1 of the announcement of the Call in the Official Journal and to point 14 of the tender documents, according to which the tender would be awarded on the basis of the criterion of the lowest price, namely, to the tenderer whose tender fulfilled the minimum quality criteria, and who proposed the cheapest price offer. This meant that the fact that a tender offered higher quality materials than the minimum quality required could have no influence on the ranking of that tender, since the only parameter which was taken into account was price. When the complainant submitted its tender on 23 April 2008, it informed the General Secretariat that it had opted for materials of high quality and that a lower quality of materials could have an influence on its price offer. The Council stated that it was only logical that (what the complainant considered to be) the higher quality of the materials offered in its tender resulted in a higher price offer. The Evaluation Committee took note of the additional information which the complainant provided together with its tender, but could not take this additional information into account for the purposes of ranking the candidates, since ranking was based just on the lowest price.

46. In its observations, the complainant argued that the Council's insistence on the fact that the decisive criterion for the award of the tender was the lowest price offer raised questions. It stated that there was no clear description in the tender documents of the painting works to be carried out. The complainant had therefore indicated in its letter of 23 April 2008 that, if the quality of the materials could be lower than that which it was offering, this could have a positive influence on its price offer.

The inspection

47. On 16 June 2010, the Ombudsman's representatives carried out an inspection of the Council's file. During the inspection, the Council's representatives explained that, under the Financial Regulation, tenderers can be asked for confirmation in the case of an abnormally low tender, and that in the present case, considering that certain prices quoted by firm A were



particularly low, the General Secretariat had asked it to confirm its prices. They further explained that the Evaluation Committee's evaluation was finalised on 12 June 2008, and that the file was then presented to the *Commission Consultative des Achats et Marchés* (CCAM) which gave a favourable opinion on 20 June 2008.

Further arguments presented to the Ombudsman after the inspection

48. In its observations on the inspection report, the complainant stated that the content of the tender file and the Council's replies were inconsistent. In the complainant's view, the report confirmed that the winning tenderer had proposed abnormally low prices. It also stated that it did not know the details of the Financial Regulation. The complainant finally requested access to the Council's file in order to obtain additional proof to support its complaint.

The Ombudsman's assessment

49. Point IV.2.1 of the announcement of the Call stated that the award criterion was the "*lowest price*". Point 14 (Award criteria) of the tender documents provided further details and stated that the tender would be awarded to the tenderer who presented the least expensive offer among the regular tenders. It further mentioned that the price to be taken into account for the calculation was the price covering the entire amount of the offer. The complainant's argument that questions should be asked as to why the Council insisted so much on the lowest price offer is thus difficult to understand, given that this was what the Call and the tender documents explicitly foresaw.

50. The inspection showed that the Evaluation Committee established a very detailed 8-page comparative Excel table in which the price offers of the five tenderers were compared to each other for every chapter, and then ranked from the cheapest to the most expensive offer.

51. It further emerged that, since the first evaluation of 15 May 2008 showed that certain unit prices proposed by firm A were particularly low, the Evaluation Committee decided to ask firm A to confirm those prices. The Council's letter of 5 June 2008 to that effect drew firm A's particular attention to the fact that the clarifications to be provided could not entail any modification of the conditions of its offer. The Evaluation Committee then met for a second time on 12 June 2008, and confirmed the ranking it had established on 15 May 2008, and proposed that the tender should be awarded to firm A.

52. On the basis of his inquiries, the Ombudsman concludes that the price offers were carefully examined and compared by the Evaluation Committee. The complainant's allegation is therefore unfounded. No instance of maladministration was thus found as concerns this part of the case.

53. As regards, finally, the complainant's request for access to the Council's file, the



Ombudsman would like to inform the complainant that, in accordance with Regulation 1049/2001/EC [6] , it should address its request for access directly to the Council.

D. Alleged advance knowledge on the part of the winning tenderer

Arguments presented to the Ombudsman

54. The complainant alleged that the Council awarded the tender to a company which had certain advance knowledge about the tender that other companies did not possess.

55. The Council pointed out that, in the past, firm A had worked exclusively as a subcontractor for firms that had previously worked for the Council, but that it had never been one of the Council's contractors, or participated in any previous tender procedures. It therefore rejected the complainant's allegation and also pointed out that it was not supported by any concrete evidence.

56. In its observations, the complainant argued that, although firm A had not directly been a Council contractor, the latter had not contested that firm A had already worked for it for many years as a subcontractor. This was also confirmed by the information on firm A's website. It could therefore be deduced that, on the basis of its experience, firm A was perfectly aware of the quality of work required, and of the relevant procedures. The complainant argued that this was an important fact, since there was a causal link between the lack of clarity in the tender documents on the one hand, and the award of the tender to a firm already familiar with the Council's requirements, on the other hand. Also, considering that the Council had asked firm A for clarification and confirmation of its price offers, the complainant submitted that this firm had had a clear advantage in the tender procedure. The complainant concluded that there had been no objective and equal treatment and that Articles 5(3) and 9 of the European Code of Good Administrative Behaviour had been infringed.

The Ombudsman's assessment

57. The Ombudsman notes that the complainant did not put forward any concrete evidence to show that firm A had certain advance knowledge about the tender which the other four tenderers did not have. The complainant's allegation appears to be based mainly on presumptions. The fact that firm A has worked as a subcontractor for firms which previously worked for the Council does not mean that it had advance knowledge of the tender in question. In the absence of any tangible evidence, the Ombudsman concludes that the complainant has not established his allegation. No instance of maladministration was therefore found with regard to this aspect of the case.



E. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There has been no maladministration by the Council.

The complainant and the Council will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 9 December 2010

[1] KB stands for "Koninklijk Besluit", i.e., a Belgian Royal Decree or decision of the government.

[2] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248.

[3] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357.

[4] Article 41(4) of the Charter of Fundamental Rights provides that "[e] *very person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language*".

[5] In Dutch: "ontsteltenis" and "ontkenning van de taalzekerheid".

[6] Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.