



EUROPEAN COMMISSION
Employment, Social Affairs and Inclusion DG

The Director-General

Brussels, **26 NOV. 2012**
EMPL/H1/FM dv(2012)

Ms Barbara Page-Roberts
Bulgarian Business Leaders Forum
Association (BBLF)
Consultant - Tourism, CSR and
EU Projects
42, Slavyanska Street
BG – 1000 Sofia

per e-mail only:

ask+request-245-e9b5fc21@asktheeu.org

Subject: Your request for public access to documents – GESTDEM 2012/4910

Dear Ms Page-Roberts,

I refer to your e-mail of 24 October 2012, registered on the same day, by which, pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter ‘the Regulation’), you lodged, via the AsktheEU website², an application for access to:

“(...) documents which contain (...) the [details of the] cost [invoiced] to the (...) [Employment, social affairs and inclusion Directorate-General (‘DG’)] (...) [relating to] the audit of (...) [grant agreement No] VS/2008/0362 which was carried out by Moore Stephens in August (...) 2011.”

I also refer to the holding reply of 15 November 2012 sent by my services and extending the time-limit to 7 December 2012.

¹ OJ L 145, 31.5.2001, p. 43.

² <http://www.asktheeu.org>.

I. BACKGROUND INFORMATION AND SCOPE OF YOUR REQUEST

The documents you seek access to relate to an audit of the eligible expenditure relating to a number of grant agreements, including Grant Agreement No VS/2008/0362 signed on 14 October 2008 and amended on 24 July 2009, between the European Communities and the Bulgarian Business Leaders Forum Association (hereafter 'BBLF'), which is based at 42 Slavyanska Street, 1000 Sofia, Bulgaria.

The subject of the Grant Agreement was a financial contribution from the European Commission to the operation entitled 'Corporate Social Responsibility in the Tourism Industry in Bulgaria: the Facts and the Future' under the Progress programme, which aims to support policy development work relating to employment, working conditions, gender equality, social inclusion and social protection, non-discrimination and diversity.

The audit relating to the Grant Agreement was carried out pursuant to specific contract No 03-01-184, signed on 16 June 2011, which implements framework contract No 30-CE-0135779/00-80 Lot 3, signed on 23 July 2007. For the purposes of the Grant Agreement, Moore Stephens L.L.P., which is based at 150 Aldersgate Street, London, EC1A 4AB, United Kingdom, conducted an on-the-spot check from 17 to 19 August 2011.

I have identified one document and annexes falling within the scope of your request. The document is an invoice submitted by Moore Stephens L.L.P. to the Commission for the audits of the afore-mentioned grant agreements and underlying expenditure³.

Please find enclosed a complete list of the documents concerned by your request.

After a careful and concrete assessment of the documents concerned in the light of the exceptions provided for in Article 4 of the Regulation, I regret to inform you that I have come to the conclusion that no access can be granted.

The reasons for this position are set out below.

II. THE PROTECTION OF THE ECONOMIC POLICY OF THE EUROPEAN UNION

Article 4(1)(a), fourth indent, of the Regulation provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) the (...) economic policy of the Community (...)."

³ Ref. Ares(2012) 582015.

Fair and undistorted competition is a major public interest within the economic policy of the European Union. Indeed, pursuant to Article 26 of the Treaty on the functioning of the European Union (TFEU), one of the aims of the Union is to ensure the functioning of an internal market comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed. Fair and undistorted competition is one the elements underpinning this internal market, so much so that Article 3(1) TFEU provides that the Union shall have exclusive competence, among other areas, in establishing the competition rules necessary for the functioning of the internal market.

The invoice and its annexes you seek access to reflect the offer made by the successful tenderer to Call for tender No 2006/S 210-223518 of 4 November 2006, i.e. in the case of framework contract No 30-CE-0135779/00-80 Lot 3, Moore Stephens L.L.P.

Against this background, disclosure of the requested document and its annexes would distort competition in the audit sector, at least concerning future Commission contracts, as specific prices could be deduced from the annexes to the invoice, combined with the identity of the contractor and the total price of the framework contract, which are already in the public domain. This could very well be used by tenderers responding to future calls for tenders to submit manipulated offers, thereby distorting competition in the sector concerned.

Such an outcome would clearly be in contradiction with Article 90(1), 3rd subparagraph, of the Financial Regulation⁴, which provides that certain information the disclosure of which “(...) *would harm the legitimate business interests of public or private undertakings or could distort fair competition between them*” (emphasis added) may not be published.

I therefore consider that the exception relating to the protection of the public interest as regards the economic policy of the Union applies to the requested document and its annexes, as their disclosure would undermine this policy.

III. THE PROTECTION OF COMMERCIAL INTERESTS

Article 4(2), first indent, of the Regulation provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a (...) legal person (...)”.

The relevant legal provisions relating to transparency of expenditure incurred by the EU institutions confirm that such commercial interests exist in this area and need to be duly taken into account.

⁴ 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 L 248, 16.9.2002, p. 1).

More particularly:

- Article 30(3) of the Financial Regulation requires the Commission to make available information on the beneficiaries of funds deriving from the budget, but “(...) *with due observance of the requirements of confidentiality (...)*”.
- Article 118(4) of the Implementing Rules⁵ lays down the information which the EU institutions have to make public in relation to the performance of specific contracts based on a framework contract. In this regard, it must be noted that the notice of award of specific contracts based on framework contracts is not compulsory. In any event, this provision must be read in conjunction with the above-mentioned Article 90(1), third subparagraph, of the Financial Regulation. Accordingly, where disclosure of certain information would harm legitimate business interests, it cannot be published.

Against this background, the contractors’ commercial interests and those of the Commission itself need to be considered in turn.

A. Protection of the contractors’ commercial interests

The requested invoice and its annexes reflect the details of the execution of the audit and specify the amount invoiced to the Commission relating to the audit of the expenditure of the above-mentioned grant agreements.

Disclosure to the general public of such information relating to the execution of tasks under the specific contract at hand would clearly undermine the protection of the relevant contractors’ expertise, strategy and thus their commercial strength, not only as an undertaking in general but also more specifically as co-contractors of the Commission.

In addition, according to a well-established principle of law, contractual relations are to be governed by the principle of good faith. Such good faith also entitles the contractors to expect the Commission to respect the confidentiality relating to the performance of contractual relations where such confidentiality is necessary to protect their legitimate rights.

In this respect, it should be noted that the ‘commercial interests’ exception in the Regulation is an expression of the Commission’s obligation of professional secrecy, which flows from Article 339 TFEU and means that the Commission must take all necessary precautions to ensure that the protection of information about undertakings covered by professional secrecy and other confidential information is not undermined. It applies in particular to “(...) *information about undertakings, their business relations or their cost components*”.

⁵ 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 L 357, 31.12.2002, p. 1).

This is all the more relevant as the prices invoiced to the Commission by the contractor reflect the offer submitted by the successful tenderer. Therefore, any information which could reveal these offers must remain confidential in order to protect their commercial strategy and legitimate interests.

Moreover, in respect of the above-mentioned reasoning relating to the distortion of competition which would occur if manipulated offers were to be submitted, such distortion would also have an adverse effect on the commercial interests of the undertakings participating in calls for tenders in the sector concerned.

B. Protection of the Commission's own commercial interests

In order to fulfil its own needs for goods and services, the Commission acts both as a private and as a public entity. When it acts as a private entity, the Commission must benefit, like any other private operator, from the best conditions offered by undertakings in an open market. Being a public entity, the Commission must ensure that public monies spent in accordance with the principle of sound financial management, *inter alia* by finding the lowest bidder.

If the invoice and its annexes were to be disclosed, specific prices would be revealed to the general public. These prices would reasonably, in a highly competitive economy, foster the alignment of prices in the sector, thus undermining the sound spending of the Budget and the interests of the Commission.

Consequently, and in addition of the above-mentioned exceptions relied upon, the exception relating to the protection of commercial interests also applies to the protection of the commercial interests of the Commission and access to the invoice and its annexes must therefore be refused.

IV. PROTECTION OF PERSONAL DATA

Article 4(1)(b) of the Regulation provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of (...) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”

The documents concerned contain a number of names of the auditors working for Moore Stephens L.L.P. who carried out the audit at hand.

The applicable legislation to which Article 4(1)(b) of the Regulation refers is Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁶, which provides that such personal data may only be used for the purpose for which they have been collected.

Since the personal data contained in the invoice and its annexes have been collected as supporting data for the payment of the invoice, such personal data may not be disclosed to the general public pursuant to the public right of access to documents without the prior consent of the data subjects.

However, I do not see any public interest in consulting the persons concerned for the purpose of public disclosure.

The parts which contain such personal data cannot therefore be disclosed.

V. PARTIAL ACCESS

I have considered the possibility of granting partial access to the invoice and its annexes, in accordance with Article 4(6) of the Regulation, which provides that “[i]f only parts of the requested document[s] are covered by any of the exceptions, the remaining parts of the document[s] shall be released.”

However, for the reasons explained above, no meaningful partial access is possible without harming the interests described above. I have consequently come to the conclusion that the invoice and its annexes are all covered in their entirety by the exceptions to the public right of access invoked and that partial access cannot be granted.

VI. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Article 4(2), first indent, of the Regulation must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure.

I note that you are a consultant for the auditee of the audit at hand, i.e. BBLF.

However, the purpose of the Regulation is to grant public access to documents, disclosure of which will not harm a public interest or specific private interests. Documents disclosed under this Regulation fall within the public domain and will be made public by the Commission either through its public register⁷ or following subsequent requests.

⁶ OJ L 8, 12.1.2001, p. 1.

⁷ See Article 9(2)(e) of Commission decision 2001/937, OJ L 345, 29.12.2001, p. 94; <http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en>

No specific interests of the applicant can therefore be taken into account while assessing whether access to a document can be granted on the basis of the Regulation. The General Court has confirmed this interpretation of the purpose of the Regulation in the *Sison*⁸ and *Franchet-Byk*⁹ judgments.

In this case, there are no elements at my disposal which could indicate the existence of an overriding public interest within the meaning of the Regulation that would outweigh the need to protect the commercial interests of both the contractor and of the Commission, as explained above.

Furthermore, it must be noted that, unlike cases where the Community institutions act as legislators and where wider access is granted pursuant to recital 6 of the Regulation, invoices and their supporting documents fall within the purely administrative functions of the Commission and do not carry the same weight as legislative activities.

Please note that the exceptions laid down under Article 4(1) of the Regulation must not be balanced against an overriding public interest.

VII. ANCILLARY REMARK

I note that you lodged your application via a third-party website.

I would point out that citizens can lodge applications for public access to documents easily and efficiently in filling out the form available on the Europa website¹⁰.

VIII. MEANS OF REDRESS

Lastly, I draw your attention to the means of redress available to you against this position.

If you wish to have this position reviewed, you should write to the Commission's Secretary-General at the address below, confirming your initial request, pursuant to Article 7(2) of the Regulation. You have 15 working days from the receipt of this letter in which to do so, after which your initial request will be deemed to have been withdrawn.

Within 15 working days of registration of your request, the Secretary-General will inform you of the result of this review, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of any further action you can take.

⁸ Judgment of 1 February 2007 in Case C-266/05 [2007] ECR I-1233.

⁹ Judgment of 6 July 2006 in joined Cases T-391/03 and T-70/04, not yet reported, paragraph 82.

¹⁰ <https://ec.europa.eu/transparency/regdoc/fmb/formulaire.cfm?CL=en>.

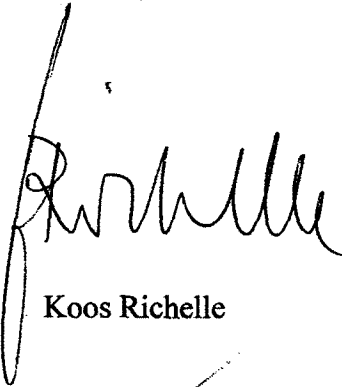
All correspondence should be sent to the Secretary-General, by post to:

The Secretary-General
Unit SG.B.5 Transparency, Relations
with Stakeholders and External Organisations
European Commission
B-1049 Brussels

or by e-mail to:

Sg-Acc-Doc@ec.europa.eu

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Koos Richelle', with a long vertical stroke extending upwards from the start of the signature.

Koos Richelle

Enclosure: 1

Annex I – List of the documents concerned by your request

No	Title of document	Access ¹¹
(1)	Invoice of 30 April 2012 submitted by Moore Stephens to the Commission (Ref. 4436/25/64668)	NA
Annex A	Summary table of all costs	NA
Annex B	Summary table of time worked	NA
B.1	Timesheet of auditor No 1	NA
B.2	Timesheet of auditor No 1	NA
B.3	Timesheet of auditor No 1	NA
B.4	Timesheet of auditor No 1	NA
B.5	Timesheet of auditor No 1	NA
B.6	Timesheet of auditor No 2	NA
B.7	Timesheet of auditor No 2	NA
B.8	Timesheet of auditor No 2	NA
B.9	Timesheet of auditor No 2	NA
B.10	Timesheet of auditor No 2	NA
B.11	Timesheet of auditor No 2	NA
B.12	Timesheet of auditor No 2	NA
B.13	Timesheet of auditor No 3	NA
B.14	Timesheet of auditor No 3	NA
B.15	Timesheet of auditor No 3	NA
B.16	Timesheet of auditor No 3	NA
B.17	Timesheet of auditor No 4	NA
B.18	Timesheet of auditor No 4	NA

¹¹ NA: no access.

B.19	Timesheet of auditor No 5	NA
B.20	Timesheet of auditor No 5	NA
B.21	Timesheet of auditor No 5	NA
B.22	Timesheet of auditor No 6	NA
B.23	Timesheet of auditor No 6	NA
B.24	Timesheet of auditor No 6	NA
B.25	Timesheet of auditor No 6	NA
B.26	Timesheet of auditor No 6	NA
B.27	Timesheet of auditor No 6	NA
B.28	Timesheet of auditor No 7	NA
Annex C	Summary table of travel and subsistence costs	NA
C.1	Flight boarding pass London/Sophia	NA
C.2	Flight boarding pass Sophia/London	NA
C.3	Flight invoice London/Sophia	NA
C.4	Flight invoice Sophia/London	NA