



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR INFORMATICS

The Director-General

Brussels, 03 June 2013

Mr Jorge Castro
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Subject: Your application for access to documents

Ref.: GESTDEM 2817/2013

Dear Sir,

I refer to your e-mail dated 24 May 2013 in which you make a request for access to documents, registered on 27 May 2013 under the above mentioned reference number.

1. DOCUMENT TO WHICH ACCESS IS REQUESTED

Your application concerns the following document:

- Framework Contract No DI-06900-00 for high-level services related to Microsoft software products, signed on 2 May 2011 with Microsoft NV/SA following procurement procedure DIGIT/R2/PN/2010/28.

2. OUTCOME OF THE ASSESSMENT

I have examined the document requested under the provisions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹, hereafter “*the Regulation*”.

Following this assessment, I regret to inform you that your application cannot be granted, as disclosure is prevented by the exception concerning the protection of commercial interests (Article 4(2), 1st indent, of the Regulation). This provision reads as follows: “*The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property*”.

¹ OJ L 145, 31.05.2001, p. 43.

3. REASONS FOR THE APPLICABILITY OF THE EXCEPTION

3.1. Background

The relevant legal provisions related to transparency about contracts awarded and expenditure incurred by the EU Institutions confirm that commercial interests exist in this area and need to be duly taken into account. More particularly:

- Article 103 of the Financial Regulation² lays down the Commission's transparency requirements in relation with the publication of various types of procurement notices. However, Article 103(1), 3rd subparagraph, states that *“Publication of certain information after the contract has been awarded may be dispensed with where it would hinder application of the law, would be contrary to the public interest, would harm the legitimate business interests of public or private undertakings or would distort fair competition between them”*.
- Article 105(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 [requirement] of confidentiality”*.

Against this background, two different commercial interests need to be considered in turn: those of the Commission and the other EU Institutions, Agencies and Other Bodies, on the one hand, and those of the contractors, on the other hand.

3.2. Protection of the commercial interests of the Commission and the other EU Institutions, Agencies and Other Bodies

In order to fulfil its own needs for goods and services, the Commission (together, in this case, with a large number of other EU Institutions, Agencies and Other Bodies) acts both as a public body and as a private entity.

As a public entity, the Commission must ensure that public money is spent in accordance with the principle of sound financial management, *inter alia*, by applying the relevant procurement provisions.

When acting in its capacity as a private entity, the Commission must be able to preserve its capacity to benefit from the best conditions offered by economic operators.

The Framework Contract to which you request access contains detailed information:

- about the composition of the mix of services developed by the contractor in order to tailor their offers to match the awarding authority's needs as stated in the context of the relevant procurement procedure;
- about the prices quoted for those services;

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 L 248, 16.09.2002, p. 1).

- about the concessions made by the contractor as regards the standard contractual terms, taking into account the status of the Commission and the other EU Institutions, Agencies and Other Bodies as a major customer.

The disclosure to the general public of such sensitive information would clearly undermine the Commission's credibility as a reliable business partner, and thereby its capacity to ensure sound financial management by obtaining the best possible value for money in future procurement procedures.

3.3. Protection of the contractor's commercial interests

The requested Framework Contract contains details about the offer submitted by the contractor in the context of the relevant procurement procedure. This offer includes specific input from the contractor which reflects its technical and commercial know-how and the methodology it has put in place to provide the services, as well as price information.

In this context, it must be recalled that the exception concerning the protection of commercial interests, as laid down in the Regulation, is an expression of the Commission's general obligation of professional secrecy. This obligation flows from Article 339 of the Treaty on the Functioning of the European Union, which applies in particular to "*information about undertakings, their business relations or their cost components*". This means that the Commission must take all necessary precautions to protect the information about undertakings covered by professional secrecy and other confidential information.

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 from the Commission that it will respect the confidentiality about the performance of an on-going contractual relation where such confidentiality is necessary for protecting their legitimate rights.

The disclosure to the general public of such information would clearly undermine the protection of the contractors' expertise, strategy, creativity, capacity to innovate and thus their commercial strength, not only as an undertaking in general but also more specifically as co-contractors of the Commission.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of the Regulation, I have considered the possibility to grant you partial access to the Framework Contract.

In this regard, I have come to the conclusion that I am in a position to grant you partial access to the Framework Contract by providing you the model contractual documents from the Commission on which it was based, in the versions which were in force when the Commission and Microsoft negotiated the Framework Contract. These documents are, more particularly, the following:

- The model "Framework contract" - Version 1.4 – 27/5/2010.

- The model “General Terms and Conditions for Information Technologies Contracts”) - Version - 2.1 – 29/03/2006.

The differences between these models and the final version of the document to which you request access were the concrete result of the relevant procurement procedure and, therefore, correspond exactly to the information which —for the reasons stated in §3 above— is covered by the exception laid down in Article 4(2), 1st indent, of the Regulation.

In conclusion, by providing you these standard documents, I am granting you the largest possible partial access to the contracts, in conformity with the Regulation.

5. OVERRIDING PUBLIC INTEREST

The exception referred to in §3 above must be waived if “*there is an overriding public interest in disclosure*”.

Your request does not refer to any such interest, and I do not have any elements at my disposal which would indicate the existence of a public interest which would outweigh the need to protect the Commission’s and the contractors’ commercial interests.

6. RIGHT FOR REVIEW

In accordance with Article 7(2) of the Regulation, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit (SG-B-5)
BERL 5/327
B-1049 Brussels

or by e-mail to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Stephen QUEST

Enclosures: Model “Framework contract” - Version 1.4 – 27/5/2010
 Model “General Terms and Conditions for Information
 Technologies Contracts”) - Version - 2.1 – 29/03/2006