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**Subject: Your application for access to documents**

**Ref.: GESTDEM 2018/2873**

Dear Sir,

We refer to the request for access to documents which you made on 8 May 2018, and which was registered on 25 May 2018 under the above-mentioned reference.

Your application relates to the following document:

- Evaluation report for DIGIT/A3/PN/2017/018 for TESTA-ng II on the negotiated procedure without prior publication of a contract notice. Document number digit.a.3.002(2017)3057339

## **1 PERSONAL DATA**

The document to which you have requested access contains personal data.

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 (hereafter the "Regulation"), access to a document has to be refused if its 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 applicable

legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 data<sup>1</sup>.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable<sup>2</sup>.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

### **1.1 Name of the members of the Evaluation Committee**

These personal data appear on pages 9 and 16 of the document.

We consider that, with the information available, the necessity of disclosing these personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the document requested expunged from these personal data.

### **1.2 Name and other personal data of the Authorising Officer**

These personal data appear on page 4 of the document.

Notwithstanding the considerations set out above, the Commission's current administrative practice is to grant access, in principle, to the names and functions of Commissioners and their cabinet members and staff in senior management positions.

DIGIT has therefore decided not to expunge the requested document from this particular set of personal data.

## **2 COMMERCIAL INTERESTS**

Article 4(2), first indent of the Regulation provides that "*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*".

### **2.1 The contractor's commercial interests**

The requested document contains information deriving from the offers provided by the contractor in the context of the original call for tenders (DIGIT/R2/PR/2011/039 – having resulted in Framework Contract DI/07180) and/or in the course of the negotiated procedure (DIGIT/A3/PN/2017/018), as well as from the offer provided by another

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<sup>1</sup> Official Journal L 8 of 12.1.2001, p. 1

<sup>2</sup> Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission / The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

economic operator in the context of a related call for tender (DIGIT/R3/PN/2016/040 - having resulted in Framework Contract DI/07550).

More particularly, on page 14, the requested document contains, for comparison purposes, DIGIT's monthly recurring costs (specific costs) for the following contracts: FWC n°DI/07550 (sTESTA), FWC n°DI/07180 (ongoing TESTA-ng) and a projection for the contract that will result from the negotiated contract (future TESTA-ng).

Against this background, it must, first of all, be recalled that the case-law has established a general presumption of non-disclosure under the above-mentioned exception in relation to the tenders submitted in reply to a procurement procedure. The contracting authorities must indeed protect the openness of public procurement through undistorted competition, and ensure that economic operators can freely communicate with them without having to fear that possibly damaging information, such as any business secrets, will be communicated to third parties<sup>3</sup>.

On page 6, the requested document also contains specific information on business strategies of the undertakings concerned or to their commercial relations, which are typically elements which may, if disclosed, seriously undermine the commercial interests and as such are considered covered by the "commercial interests" exception<sup>4</sup>.

This is *a fortiori* the case when considering the nature of the information contained in the requested document, which consists of specific elements of pricing which are more detailed than the total price of the successful offer reflected in the award notice<sup>5</sup>, and -in addition- relate partly to a contract which is still under implementation<sup>6</sup> (i.e. the contract resulting from the procedure DIGIT/A3/PN/2017/018 for TESTA-ng II).

## **2.2 Commission's own commercial interests**

The above-mentioned exception of non-disclosure, laid down in article 4(2), first indent, for the protection of commercial interests also covers the protection of the Commission's own interests, especially if the disclosure of (part of) the document would "*render more difficult the Commission's position in future negotiations for contracts of a similar kind*"<sup>7</sup>.

The document to which you request access contains commercially sensitive information, and more especially information on the negotiation strategy that the Commission

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<sup>3</sup> Judgments of the Court of Justice of 14 February 2008 in case C-450/06, Varec, paragraphs 33-55, and of the General Court of 29 January 2013 in joined cases T-339/10 and T-532/10, Cosepuri v EFSA, paragraphs 93-101.

<sup>4</sup> Judgment of the General Court of 7 February 2018 in case T-718/15, PTC Therapeutics International v European Medicines Agency (EMA), paragraph 84.

<sup>5</sup> Judgment of the General Court of 21 September 2016 in case T-363/14, Secolux v Commission.

<sup>6</sup> Judgment of the General Court of 27 February 2018 in case T-307/16, CEE Bankwatch Network v Commission.

<sup>7</sup> Judgment of the General Court of 27 February 2018 in case T-307/16, CEE Bankwatch Network v Commission, n° 111.

followed during the procedure DIGIT/A3/PN/2017/018 for TESTA-ng II (pages 9 to 11 and 12 to 13 of the document). The disclosure of such strategy is susceptible to render more difficult the Commission's position in later negotiations for similar cases as the Commission's strategy will then be known by the market.

### **2.3 No overriding public interest**

According to Article 4(2) in fine of the Regulation provides that the Commission shall refuse the access "unless there is an overriding public interest in disclosure".

The applicant does not refer to a public interest capable of outweighing the need to protect the contractor's and the Commission's commercial interests as set out above, and DIGIT has not been able to identify one.

Therefore, we are disclosing requested the document expunged from information related to specific prices and to the Commission's negotiating strategy (pages 6, 9 to 11 and 12 to 14).

You may reuse the document requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged, and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

In accordance with Article 7(2) of Regulation 1049/2001, 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-4  
BERL 5/282  
B-1049 Brussels (Belgium)

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu).

Yours sincerely,



Gertrud INGESTAD  
Director General

Enclosure:

Evaluation report for DIGIT/A3/PN/2017/018 for TESTA-ng II on the negotiated procedure without prior publication of a contract notice. Document number digit.a.3.002(2017)3057339 (**without personal data and commercially sensitive information**)

