

Additional Questions to SG of the Commission Catherine Day

Memorandum of Understanding OLAF/ Commission and OLAF/ IAS/ IDOC

1. The document SEC(2003)871 “Memorandum of Understanding between OLAF and the Commission” is not available in the internet. Could the Commission put the document online?

Commission's answer:

The document SEC(2003)871 is published in the Register of Commission documents and can be accessed by the public via the following link:

<http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=home>

2. Could the Commission also provide the current text of the Memorandum of Understanding between OLAF and the IAS and IDOC (originally SEC(2003)884/2 and SEC(2003)885/2)?

Commission's answer:

The current text of the Administrative Arrangements between the Commission and OLAF was signed on 29 January 2014. It includes in annex II and III the specific provisions on cooperation between OLAF and IDOC and OLAF and the IAS, and can be accessed via the link referred to under question 1 (cf. document SEC(2015)79, annex II and III).

Minutes of the Clearing House Meetings and participation of the Supervisory Committee

3. Can the Commission provide the Supervisory Committee with the minutes of the Clearing House meetings?

Commission's answer:

As explained to the CONT Committee during the hearing of 27 January, the Clearing House meetings help the Commission's services to adopt mitigating measures in order to protect the financial and reputational interests of the Institution as appropriate. There is no legal basis for the Supervisory Committee to be involved in that.

Tracking and Tracing of Tobacco Products - Study

4. The Commission has issued a study on the feasibility of tracking and tracing of Tobacco products which had been contracted by European Agency for Health and Consumers (EAHC - now CHAFEA) to Eurogroup Consulting Portugal (Contract No 201362505 (/2013/Health/11)).

According to the specifications attached to the invitation to tender, the tendering procedure was open to “all natural and legal persons coming from within the scope of the Treaties of the European Union and to all natural and legal persons in a third country which has a special agreement with the European Union on the conditions laid down in that agreement”. As such, the tender did not fall under the scope of the WTO’s Government Procurement Agreement (GPA). Furthermore, the tender specification excluded organisations or their staff with conflicts of interest specifically those who have worked for the tobacco industry for the last 5 years. The Commission awarded the conduct of the Study to the only applicant Eurogroup Consulting a company that apparently had no specific competence in the field of the study. Therefore, Eurogroup Consulting subcontracted the study to an American firm to Sovereign Border Solutions (SBS). SBS was founded by a senior management staff of SICPA (a solution provider for tracking and tracing systems of tobacco products) who left SBS only in December 2012 and therewith circumventing the 5 year cooling-off period demanded in the tender specifications.

Commission's Preliminary comments/clarifications:

- The Call for Tender was not issued/launched by the Commission, but by the European Agency for Health and Consumers (then EAHC – today CHAFEA). The Call for Tender did not relate to track and trace systems only, but also to security features.

- Eurogroup Consulting – the main contractor – had specific expertise/competence in the field covered by the Call for Tender. In particular Eurogroup Consulting had extensive experience in cost-benefit-analysis, which is central to two of the six tasks of the study. For the remaining tasks experts/companies with the appropriate expertise/experience were sub-contracted. One of them is Sovereign Border Solutions LLC.

- The Terms of Reference, based on the Financial Regulation, allowed for subcontracting. The terms set out that the contractor shall be a natural or legal person from any of the EU Member States or from EEA countries, Former Yugoslav Republic of Macedonia, Albania or Montenegro. According to the CJEU (here General Court) it is not required that subcontractors have their seat/domicile in any of these countries¹.

¹ According to JUDGMENT OF THE GENERAL COURT of 15.10.2013, T-457/10, point 69 (available at: <http://curia.europa.eu/juris/document/document.jsf?docid=143003&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=434103>), “Articles 106 and 107 of the Financial Regulation, to which the applicant refers, merely require that the Commission allow undertakings established in countries which have ratified the Agreement on Government Procurement or in countries which have with the

- Sovereign Border Solutions LLC was previously operating as Sovereign Products Pty. Ltd in South Africa (as of 2010). In July 2012 a U.S. based entity was created upon the joining of Mr Doyle as equity partner. As stated in the Company Resolution, Mr Doyle was employed by the company until the end of December 2012 (i.e. less than six months), whereupon he resigned to take a job with another company. Southern Border Solutions was thus not founded by a senior management staff of SICPA.

- The Call for Tender was launched on 6 April 2013, i.e. following the departure of Mr Doyle. Therefore the rules on conflict of interest do not apply to him. For the sake of clarity it should be underlined that in the offer of Eurogroup Consulting Mr Doyle was not listed as expert that would work on the study. Mr Doyle did not participate in any meetings/telephone conferences between the Commission/CHAFEA and the contractor (including subcontractor). He also was not copied into any written exchanges between the Commission/CHAFEA and the contractor or subcontractor. Mr Doyle was not involved in the project at all.

- a. How does the Commission usually safeguard the compliance with tender specification?

Commission's answer:

CHAFEA/the Commission apply the provisions of the Financial Regulation (articles 111(4) and 111(5) FR, as well as 157 and 158 of the Rules of Application), which state that an Opening and an Evaluation Committee, consisting of members who are not in a situation of conflict of interest, have to be appointed by the Authorising Officer, in order to proceed with the opening and the assessment of the offers. Tenders that are found compliant by the Opening Committee are then evaluated on the basis of the exclusion, selection and award criteria as indicated in the tender specifications.

In this concrete case, the Evaluation Committee assessed in detail the compliance with the exclusion criteria (e.g. absence of conflict of interest), selection criteria for technical and professional capacity (assessment made on the combined capacities of the tenderer and subcontractors) and the award criteria, all specified in the tender specifications. The assessment was made on the basis of the documents submitted in the offer (including information about both Contractor and Subcontractors) and additional clarifications received.

Since the beginning of the contract, the Commission and CHAFEA had held regular conference calls and meetings with the contractor to ensure quality control. They monitored closely the services provided and compliance with the tender specification. The need to provide objective

European Union a special agreement in the field of public procurement to participate in calls for tenders. Those articles do not preclude participation by undertakings established in countries which are not signatories to the Agreement on Government Procurement or undertakings which use subcontractors established in those countries in calls for tenders launched by the Commission.”

information was recalled throughout the contract and factors that would have required the contract to be discontinued were not identified.

- b. Is it common practice that the Commission allows firms to circumvent the tender specification by subcontracting arrangements? After all the contract was awarded to an American firm (when originally American firms were excluded) that was founded by a person with vested interests...

Commission's answer:

CHAFEA/the Commission apply the provisions of the Financial Regulation, which foresee the possibility to subcontract services in order to ensure that the necessary expertise and experience is present to complete the deliverables specified. This approach is in line with the case law of the CJEU (see above) and does not constitute a circumvention of tender specifications.

It is important to point out that the main contractor (here Eurogroup Consulting) is/remains solely responsible for the proper performance of the contract.

Please also note that the assessment of the absence of conflict of interest (general and professional conflict of interest) is applied to the contractor and the subcontractors alike. This assessment was also carried out in the case at stake.

- c. When the Commission discussed the preliminary findings of the study with experts, was the Commission made aware of ...
- i. the limited consultation of providers of existing solutions related to security features as well as traceability? Apparently only selected solution providers were asked in the second phase of the feasibility study to provide comments to the four options for security features and traceability?

Commission's answer:

CHAFEA and the Commission are confident that a comprehensive consultation of stakeholders was carried out in the project: as a first step a very broad spectrum of track and trace solution providers as well as security feature providers was identified. The list consisted of established operators, a mix of new and emerging technology solution providers and organisations with/without affiliation to the tobacco industry.

Following validation of that list an online survey was sent to 267 organisations. In total 43 organisations completed the survey response. Following discussions with the CHAFEA/the Commission key stakeholders were identified. Site visits were agreed and conducted at the

premises of these stakeholders. In parallel conference calls and meetings took place with other stakeholders and further information was collected. Extensions of deadlines were granted to accommodate participants' time constraints where needed.

Feedback on the four potential options regarding security features was requested from a sample of those participants that completed the initial survey and provided relevant feedback on overt (visible) and covert (invisible) security elements in the context of the problem statement.

Other stakeholders, including stakeholders engaged in traceability systems, will be given an opportunity to comment on the final report, when it will be published.

- ii. that Optically Variable Ink (OVI), a trademark of SICPA, features in all four proposed options for Article 16 (security features) selected for assessment in the feasibility study?

Commission's answer:

The contractor has been tasked to propose a set of possible options for security features. The contractor has not proposed one single solution (let alone a specific technology). Ultimately, it is the task of the Commission – following exchanges with Member States (Regulatory Committee, Expert Group) - to decide on the appropriateness of the options proposed or to develop/opt for alternatives.

Please note that in all cases where the use of OVI has been mentioned as a possible option by the contractor, an alternative option has also been identified. Further information on the potential options will be made available in the Final Report.

- d. How has the Commission ensured that the methodology applied in the study provides a representative, fair and unbiased image of the feasibility of possible options?

Commission's answer:

CHAFEA and the Commission sought to ensure objectivity of the report from the outset. As indicated they closely monitored the work of the contractors.

The Commission also sought to ensure objectivity by ensuring that input from all relevant Commission services is provided, in particular services with expertise in IT systems, tobacco taxation and illicit trade. In addition the Commission has discussed the interim results with Member State experts.

The contractor itself has carried out extensive research and outreach to key stakeholders and solution providers (see above).

As indicated it is intended to publish the Final Report, which will provide an opportunity for further discussions.

- e. Will the Commission validate the neutrality of the methodology applied in the study again?

Commission's answer:

Please see answers above.

International Management Group (IMG)

5. When was the OLAF report (OF/ 2011/ 1002/ A4) on investigations regarding the IMG, transmitted to the Belgian Federal Prosecutor's Office? What are the amounts to be recovered?

Commission's answer:

In the light of the current stage of the case, OLAF is under a duty to refrain from commenting on this matter. The possible amounts to be recovered are subject to further evaluation.

6. We would like to remind you about the previous discharge questionnaires to Commissioner Piebalgs for the hearing on the 26th of November 2013, the follow-up questionnaire to Commissioner Piebalgs of 9th of January 2014, questionnaire to Commissioner Mimica for the hearing on 11th of December 2014 where the Commission has always stated that it has assessed IMG as an International Organisation. Why has the Commission misled the European Parliament in this question?

Commission's answer:

In its oral and written replies in 2013 and 2014, the Commission stated that it concluded in 2004, and confirmed in 2008, that IMG was an international organisation.

Moreover the specific procedure for delegation of budgetary implementation tasks to international organisations was only applied to financial agreements concluded with IMG after the completion of all required conditions (pillar assessment) end 2010.

The Commission has not misled the EP in the answers to this question and is still analysing the OLAF report transmitted to the Commission on 15 December 2014.