



Reports of Cases

Case T-136/15

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Parliament

(Access to documents — Regulation (EC) No 1049/2001 — Requests for quotation concerning all the lots covered by a call for tenders — Refusal to grant access — Absence of specific, individual examination of the documents requested — Exception relating to the protection of public security — Exception relating to the protection of commercial interests — Exception relating to the protection of privacy — Exception relating to the protection of the decision-making process — General presumption — Unreasonable workload)

Summary — Judgment of the General Court (Fourth Chamber), 14 December 2017

1. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Strict interpretation and application — Requirement that the institution should examine the documents specifically and individually — Scope — Exclusion of the requirement — Possibility to base reasoning on general presumptions applying to certain categories of documents — Limits*

(European Parliament and Council Regulation No 1049/2001, Art. 4)

2. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of the decision-making process — Conditions — Concrete, actual and serious detriment to that process — Scope*

(European Parliament and Council Regulation No 1049/2001, Art. 4(3) first para.)

3. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of commercial interests — Scope — Bids filed by tenderers for a public contract — Included — General presumption that the exception to the right of access applies — Applicability of the presumption to requests for quotation made by the contracting authority in performance of a framework contract — Precluded*

(European Parliament and Council Regulation No 1049/2001, Art. 4(2), 1st indent)

4. *European Union public contracts — Tender procedure — Decision not to accept a bid — Request for access to documents — Applicability of Regulation No 1049/2001 concerning access to the documents*

(European Parliament and Council Regulations No 1049/2001 and No 966/2012, Art. 102)

5. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of commercial interests — Scope — Calls for tenders made by the awarding authority in performance of a framework contract — Not included*

(European Parliament and Council Regulations No 1049/2001, Art. 4 and No 966/2012, Art. 102)

6. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Requirement that the institution should examine the documents specifically and individually — Examination proving particularly onerous and inappropriate — Derogation from the obligation to examine — Limited scope — Burden of proof lying with the institution — Obligation of the institution to liaise with the applicant*

(European Parliament and Council Regulation No 1049/2001, Arts 7(3) and 8(2))

7. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Requirement that the institution should examine the documents specifically and individually — Examination proving particularly onerous and inappropriate — Meaning*

(European Parliament and Council Regulation No 1049/2001, Arts 7(1) and (3) and 8(1) and (2))

8. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Requirement that the institution should examine the documents specifically and individually — Unreasonable burden of work — Obligation of the institution to liaise with the applicant — Limits — Lack of cooperation on the part of the applicant*

(European Parliament and Council Regulation No 1049/2001, Arts 6(3), 7(1) and (3) and 8(1) and (2))

1. See the text of the decision.

(see paras 37, 38, 47, 48)

2. See the text of the decision.

(see para. 58)

3. In matters of access to documents, the Court has recognised the existence of a general presumption applicable to categories of documents because of their nature in a number of cases, including as regards bids submitted by tenderers in the performance of public contracts. However, as regards requests for quotations sent by an institution to tenderers with which it has concluded a framework contract, a general presumption that commercial interests would be undermined cannot be based either on the case-law relating to access to the bids of tenderers, or, more generally, on that concerning the procedure for review of State aid, and concerning a merger. The cases which gave rise to the case-law in the fields of State aid and mergers had a common characteristic, namely the existence, in a specific regulatory framework distinct from Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, of rules precisely delimiting the access to the file or to documents which were requested, as regards both the persons and the information itself.

In that regard, unlike a contract notice and a contract award notice, a request for quotation drawn up by the contracting authority in performance of a framework contract is not the subject of any particular provision of Regulation No 966/2012 on the financial rules applicable to the general budget

of the Union or Regulation No 1268/2012 on the rules of application of Regulation No 966/2012, which precisely defines or restricts the information contained therein which must or may be communicated by the contracting authority to the tenderers or other bidders.

Furthermore, the institution concerned cannot argue that the disclosure of the requests for quotation will undermine its own interests, in that disclosure could reveal its purchasing profile on the market. In fact, even if disclosure of the relationship between the tasks to be performed and the number of working days necessary to complete them could enable the tenderers, in future public procurement procedures, to unveil the Parliament's costing technique, the fact that tenderers could know the prices quoted in the past for a corresponding service seems more likely to lead to a situation of genuine competition than to a situation where competition would be distorted.

(see paras 62-65, 71)

4. Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents and Regulation No 966/2012 on the financial rules applicable to the general budget of the Union have different objectives and do not contain any provision expressly giving one regulation primacy over the other, so that it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them. It is thus that the principle of transparency, referred to in Article 102 of Regulation No 966/2012, must be reconciled with the requirements of protection of the public interest, of the legitimate business interests of undertakings and of fair competition.

(see para. 67)

5. In order to attain the objective of the rules on EU public procurement, which is based on undistorted competition, it is important that the contracting authorities do not release information relating to public contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. In that regard, the economic and technical information in the tenderers' bids is such as to justify refusal by the institution concerned to grant access to the bid of the successful tenderer. That is the case in particular where such bids contain details of the specific skills of the tenderers.

However, that is not the case of a request for quotation drawn up by the contracting authority in performance of a framework contract. Having regard to the nature and purpose of such a request, it cannot be presumed that such a document contains economic and technical information on the contractor or details its specific skill. On the contrary, its request for quotation, which comes from the contracting authority and not from its contractors, includes as a general rule a description of the tasks which the contracting authority wishes to have carried out under the framework contract which it has signed with the contractor. In principle, it is only in response to that request for quotation that the contractor will provide details on the services which it considers it can provide to the contracting authority, the profile of the experts which it can make available and the cost of its services.

(see paras 68-70)

6. See the text of the decision.

(see paras 78-82)

7. With regard to a request for access to documents which would require the manual extraction of approximately 1 500 documents from among more than 10 000 documents in over 1 000 files and comprising on average 12 pages each, which represents a total of at least 18 000 pages, it must be concluded that an individual examination of all the documents requested would constitute a particularly heavy workload for the institution concerned.

That administrative task can be regarded as unreasonable to the extent that it would mean, in order to examine all the documents requested within the strict time limits laid down in Article 7(1) and (3) and Article 8(1) and (2) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, allocating a number of full-time staff to the examination of the documents requested, in a number of Directorates-General, solely for the interest of the applicant. That staff, recruited within the institution concerned to carry out tasks in the public interest and paid by public funds, would therefore no longer be in a position to carry out the tasks allotted to them as a priority to serve that public interest, which could seriously compromise the proper functioning of the services concerned. Thus, the institution concerned was entitled to weigh up, on the one hand, the interest in public access to documents and, on the other, the workload which that would cause, in order to safeguard the interests of sound administration.

(see paras 84, 90-92)

8. With regard to the obligations of an institution receiving a request for access to a large number of documents to seek to liaise with the applicant and to seek alternative, less onerous solutions, where the applicant's attitude has been one devoid of any cooperation and it has refused purely and simply the institution's proposal of an equitable arrangement, when it could perfectly well have designated the documents which, in its view, were a priority, it was impossible for that institution, within the strict time limit laid down in Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, to make other concrete proposals which would have made it possible to grant at least partial access to the documents requested, in order to reconcile the interest of sound administration with that of public access to the documents requested.

In those circumstances the institution concerned is entitled to claim an unreasonable burden of work in refusing to make a specific, individual examination of all the documents requested without being required, in the absence of other conceivable options, to set out in detail, in its decision, the reasons for which those other options would also mean an unreasonable workload. In consequence, the institution concerned is entitled generally to refuse access to those documents, without it being necessary to request it to produce a copy of the documents which it had actually examined.

(see paras 100, 102)