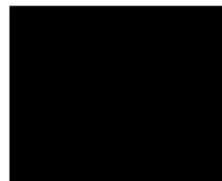




EUROPEAN COMMISSION
EUROPEAN HEALTH EMERGENCY PREPAREDNESS AND RESPONSE AUTHORITY

SANTE.DG/DDG1/C.3/KB

By registered letter with acknowledgment of receipt¹



Advance copy by email:

@fr
agdenstaat.de

Dear 

Subject: Your application for access to documents – GESTDEM2021/0863

We refer to your e-mail dated 18 February 2021 in which you make a request for access to documents, registered on the same date under the above-mentioned reference number.

We also refer to our email of 11 March 2021 extending the time limit to respond to your request in accordance with Article 7(3) of Regulation (EC) No 1049/2001.

1. Scope of your request

In your request, you ask, on the basis of Regulation (EC) No 1049/2001², access to the following document:

Das Angebot von Pfizer und Biontech über den Corona-Impfstoff von Juni 2020.

We have interpreted your request as referring to the bid submitted by Pfizer BioNTech in September 2020 in the framework of the negotiated procurement procedure.

2. Identification and assessment of relevant documents

We have identified 3 documents that fall within the scope of your request.

Subject	ARES number
CALL FOR TENDERS SANTE/2020/C3/043 -	Ares(2021)340523

¹According to standard operational procedure, the reply is usually also sent to you by registered post. Please note, however, that due to the extraordinary health and security measures currently in force during the COVID-19 epidemics, which include the requirement for all Commission non-critical staff to telework, we are unfortunately not in a position to follow this procedure until further notice. We would therefore appreciate if you could confirm receipt of the present e-mail.

² Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

OFFER - email 1 of 3	
CALL FOR TENDERS SANTE/2020/C3/043 - OFFER - email 2 of 3	Ares(2021)340593
CALL FOR TENDERS SANTE/2020/C3/043 - OFFER - email 3 of 3	Ares(2021)340474

Having examined the documents under the provisions of Regulation (EC) No 1049/2001, we have come to the conclusion, which is further explained in paragraphs 3 and 4, that no access can be granted to the requested documents, as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of the Regulation.

3. Reasons for refusal

Protection of personal data

With regard to the document you request access to a full disclosure is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain the following personal data:

- the names/initials and contact details of natural persons;
- other information relating to an identified or identifiable natural person, such as professional background, role etc.

Article 9(1)(b) of the Data Protection Regulation does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Consequently, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested document, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Protection of the commercial interests of a legal person - Article 4(2), first indent, of Regulation (EC) No 1049/2001

Protection of the decision-making process - Article 4(3), first indent, of Regulation (EC) No 1049/2001

Documents containing commercially sensitive information whose disclosure would undermine the protection of the legitimate interests of companies are covered by the exception of the protection of commercial interest (Article 4(2), first indent, of Regulation (EC) No 1049/2001). The documents you request access contain information relative to the commercial interests of Pfizer Inc. (“Pfizer”) and BioNTech Manufacturing GmbH (“Biontech”) which could potentially damage the competitive position of the company if they were made public.

The European Court of Justice has established that, as regards to bids, there is a special general presumption that access to the bids of tenderers, in the context of the performance of public contracts would, in principle, undermine the protection of commercial interests.³

³ See judgment in case T-734/17, *Viasat Inc. v European Commission*, par. 43 as regards bids.

The rationale behind the general presumption of non-disclosure is that “operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.”⁴ This rationale holds true also as regards contracts signed at the end of a negotiated procedure.

The scope of application of the general presumption covers confidential technical and economic information about the successful tender, from the mere pricing information to information concerning its competencies and working methods, its know-how, its internal organisation, business plans, information on research and developments, on costs. It is not limited to actual financial offers and the price schedule, and goes far beyond pricing information⁵.

Recently the General Court established that the general presumption applies regardless of whether the access request is submitted by an unsuccessful tenderer or a third party, which did not participate in the call for tenders in question⁶.

Furthermore, in the concrete case of COVID-19 vaccines, as you may be aware, there are negotiated procurement procedures for the award of contracts as the one with Pfizer and BioNTech which are still ongoing, In this regard, the Commission is acting as a central purchasing body in the name and on behalf of all Member States in order to ensure the advance purchase of vaccines against Covid 19, as provided for by the legislator in the ESI Regulation,⁷ under its Article 4(5)(b).⁸ It should be recalled that as indicated by this provision and as further confirmed in the Commission Decision on the advance purchase of Covid 19 vaccines and in the agreement with the Member States appended thereto⁹ this role has been granted to the Commission by the Member States, not individually for the management of each single procurement procedure, but to run the whole procurement process. The Commission considers therefore all individual negotiated procurement procedures as a unique process for the (advance) purchase of COVID-19 vaccines from different companies, as the final objective is to build a sound and diverse portfolio of vaccine candidates at disposal of Member States. In a procedure such as the current one, where the submission of bids by different tenderers was (and still is) not synchronised, releasing any information of an individually negotiated offer to the public is susceptible of harming the competitive position of the tenderer vis à vis other tenderers whose contracts are not yet signed, and vis à vis future procurement procedures they might wish to take part in, in connection with new call for tenders relating to similar services¹⁰

As regards the concrete effects that a public access to documents could have, given that the disclosure of documents under Regulation (EC) No 1049/2001 is reputed to have *erga omnes* effect and therefore considered as a disclosure to the general public¹¹, the Commission cannot disclose the offer submitted by Pfizer and BioNTech. Otherwise, potential competitors of this company, including those with whom the Commission is currently negotiating, could also get access either to commercial information from Pfizer

⁴ See judgment in case C-450/06, *Varec v Commission*, par. 36

⁵ Judgment of the General Court of 26 March 2020, *Viasat Inc. v European Commission*, T-734/17, EU:T:2020:123, paragraph 57 and Judgment of the General Court of 21 September 2016, *Secolux v Commission*, T-363/14, EU:T:2016:521, paragraphs 53-54.

⁶ *Ibid*, paragraphs 52,53 and 59.

⁷ Regulation (EU)2016/369, as modified by Regulation (EU) 2020/521.

⁸ “Emergency support under this Regulation may be granted in any of the following forms: [...] b) procurement by the Commission on behalf of Member States based on an agreement between the Commission and Member States”.

⁹ Commission Decision of 18.06.2020 approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures (C(2020) 4192 final.

¹⁰ Judgment of the General Court of 26 March 2020, *Viasat Inc. v European Commission*, T-734/17, EU:T:2020:123, paragraph 50.

¹¹ Case T-439/08, *Agapiou Joséphidès v Commission and EACEA*, par. 116.

and BioNTech or to any other possible information which could allow them to obtain a competitive advantage.

This would not only damage the company's commercial interests, but also undermine the objective of genuine competition in the still ongoing procurement procedures, as protected by Article 170(3) last subparagraph of the Financial Regulation¹². In the words of the Court, "it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures"¹³.

Finally, as the case-law has confirmed, the protection of commercial interests within the meaning of Article 4(2) of Regulation 1049/2001 can be validly argued also as regards further similar contracts, in which the Commission has the same position.¹⁴ Consequently, the commercial interests of the European Commission as a single purchasing body, negotiating on behalf of Member States, in securing the best and most advantageous conditions in the current and any future agreements would also be undermined by disclosure of the requested documents.

We have considered whether partial access could be granted to these documents, in accordance with Article 4(6) of the Regulation. However, based on the above, it follows that they are entirely covered by the above-mentioned exceptions laid down in Article 4 of the Regulation.

Therefore, no access can be granted to the documents listed above.

4. Overriding public interests

The exceptions to the right of access provided for in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosing the requested document. In your application you did not submit any grounds concerning a public interest on the basis of which the interests protected in Regulation (EC) No 1049/2001 would have to be overridden and we could not identify any such ground either. In these circumstances, we have to conclude that there is no evidence of an overriding public interest in disclosure, in the sense of Regulation (EC) No 1049/2001.

¹² Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, published in the OJ L 193, 30.7.2018, p. 1–222

¹³ Case C-450/06, *Varec v Commission*, par. 35.

¹⁴ Judgment CEE *Bankwatch Network v Commission*, T-307/16, EU:T:2018:97, para. 111, last sentence.

5. Means of redress

In accordance with Article 7(2) of Regulation (EC) No 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
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,

