

Decision of the European Ombudsman on complaint 239/99/VK against the European Commission

Decision

Case 239/99/VK - Opened on 22/04/1999 - Decision on 02/10/2000

Strasbourg, 2 October 2000 Dear Mr. F., Dear Dr. K., On 4 March 1999, you complained to the European Ombudsman concerning the European Commission's handling of the INDRIS project of DG VII. On 22 April 1999, I forwarded the complaint to the President of the European Commission. On 5 July 1999 you sent further information to the Ombudsman. By letter of 2 August 1999, I received the opinion of the Commission. I forwarded it to you with an invitation to make observations, which I received on 1 October 1999. On 12 April 2000, you sent a further letter to the Ombudsman. By letter of 11 May 2000, I replied to your letter. I am now writing to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complainant is a German GmbH&Co (commercial partnership with a limited liability company as personally liable partner) which carried out preparatory work for the Commission project INDRIS of DG VII. The project's objective is inland navigation, in particular river information services and the harmonisation of communications on European inland waterways. The relevant facts, according to the complainant are as follows: The complainant was foreseen as a partner of the project as published in official information documents of the project. The complainant was then told by the co-ordinator of the Commission project that it would not be a contractual partner of the project as it did not provide the necessary documentary information. The complainant claims that this was not the case as it did supply the requested documents. The co-ordinator asked the complainant to complete its preparatory work as foreseen which it did. The complainant stated that it has not yet been paid for its work. Furthermore, the complainant alleged that the Commission failed to guarantee the protection of its know-how, a protection which is common practice for such projects. The complainant alleged that the Commission: (i) failed to establish the complainant as a contractual partner of the project even though this was promised, and failed to give reasons for it; (ii) failed to pay for work carried out by the complainant for the project; (iii) failed to protect the complainant's know-how even though this was promised to it.

THE INQUIRY

The Commission's opinion In its opinion, the Commission stated the following: INDRIS is a Research and Development project implemented under the Transport Research Programme of DG VII, co-financed by the European Commission and by a consortium composed of 13



partners from the Netherlands, Germany, France, Austria and Belgium. As regards the participation of the complainant as a partner, the Commission stated that in the original proposal (PL-97-2211) that was submitted in March 1997 for the fourth Framework Programme, the complainant was proposed as a partner by the INDRIS consortium. The proposal was evaluated in April 1997 and approved by the Commission in July 1997. The proposed budget amounted to 4 MECU of which 2 MECU were to be co-financed under the fourth Framework Programme, the part foreseen for the complainant amounted to 350.000 ECU. The project was co-ordinated by the Dutch Ministry of Transport, Public Works and Water Management. According to Article 2 of the General Conditions the key role of the co-ordinator is to act on behalf of the consortium for every legal and operational issue and it is thus the central and sole communication link between the Commission and the partners of the consortium. As regards the project, the Commission stated that it has to ensure that the participants have the necessary resources to co-finance their participation in order to carry out activities foreseen. The Commission stated that it had to eliminate those partners who could not demonstrate the origin of resources and the terms and conditions of their availability. As regards the complainant it turned out that it was unable to demonstrate its financial credibility within the appropriate timeframe. According to the principles set out above, the Commission could not sign a contract with the complainant. Therefore, the latter never became a full member of the INDRIS consortium. As regards the complainant's allegation that the Commission failed to provide reasons for denying it full partnership in the project, the Commission referred to the negotiations (technical and financial) with the co-ordinator started in September 1997. During the time of these negotiations, the complainant changed its legal status from Gesellschaft bürgerlichen Rechts (Partnership under the Civil Code) to become a new company in the form of a GmbH & Co (limited liability company). That new company replaced the previous one. During the negotiations the Commission detected several problems regarding the financial capacity of the complainant. The problems were due to the fact that as the company had just been established, there were no financial accounts available yet. Consequently, the Commission was not in possession of any official proof that the firm would be able to co-finance an amount of 175.000 ECU. In order to safeguard the Community's financial interests and to avoid obstacles in carrying out the activities described in the Technical Annex, the Commission's financial services asked for further information on the origin of resources and on the terms and conditions of their availability. As the information provided by the complainant was not to the satisfaction of the Commission's services, the Commission signed the contract with all principal contractors except the complainant. The signing of the contract was imperative at that time, as the corresponding financial commitment had to be made on the budget of 1997. As a result of these facts, and in order to protect the Community's financial interests as well as the full performance of the INDRIS project, the Commission never entered into a contract with the complainant. It was nevertheless orally agreed that the complainant could still join the INDRIS consortium as a full partner once the financial credibility issue had been solved. As regards the technical contribution of the complainant to the INDRIS project and the reimbursement for it, the Commission stated that at the initiation of the project, the INDRIS consortium, along with the EC approval, accepted that the complainant (as third party assistance) will carry out specific tasks described in the Technical Annex. The complainant worked at the state of the art and the feasibility study. In addition to the above-mentioned tasks, the INDRIS consortium requested the complainant to perform specific test demonstrations, fundamental for the evaluation of its



future performance in the project, in particular concerning its technical credibility and aptitude. However, as the partners of INDRIS considered the test demonstrations performed by the complainant in April 1998 unsatisfactory, its eventual introduction as a further partner to the INDRIS contract became unacceptable for the project manager. The discussions on the financial credibility were therefore stopped by DG VII, since the INDRIS consortium was no longer willing to accept the complainant as an additional partner. Nevertheless, for the complainant's costs, the co-ordinator - taking into account Article 3 of the general conditions to the INDRIS contract - proposed a reimbursement of approximately 100.000 ECU based on a sub-contract. The complainant refused to sign such a bilateral contract. In order to clarify its position, the Commission organised a meeting in Brussels in April 1999 under the chairmanship of Mr. Blonk, Director of DG VII-E. The participants included the management of the complainant, the project co-ordinator of INDRIS and the Austrian Ministry of Transport, representing one of the main end users. According to the draft minutes of the meeting, the chairman drew the following conclusions: a. There is no contract between the complainant and the Commission; b. The Commission tried to solve the question of financial credibility even after the conclusion of the contract with the other members of the consortium; c. Due to a disagreement on technical issues the differences between the co-ordinator and the complainant cannot be overcome; d. The substantial disagreement between the co-ordinator (acting on behalf of the INDRIS consortium) and the complainant prevents any future inclusion of the complainant in the INDRIS project; e. The co-ordinator acknowledges the fact that the complainant has provided work and repeats his offer of a sub-contract to the complainant according to Article 3 of the general conditions to the INDRIS project. In conclusion, the Commission stated that it could not accept the allegation that it failed to provide a contract to the complainant as a full contractor in the INDRIS project without giving any reasons. It is obvious that the Commission, for objective reasons, could not sign a contract with the complainant in December 1997. It is not contested by the complainant that the Commission tried to solve the question of financial credibility even during the first months of 1998. As regards the allegation concerning the protection of the technical know-how and reimbursement for the work provided to the INDRIS project, the Commission stated that DG VII could not accept any responsibility, as these points had to be concluded between the co-ordinator and the complainant. **The complainant's observations** Before the opinion of the Commission was received, the complainant had already informed the Ombudsman by letter of 5 July 1999 that the project co-ordinator has paid the complainant for work carried out for the INDRIS project the sum which it had demanded, a total of 92.606,72 EURO. In observations on the Commission's opinion, the complainant made, in summary, the following additional points: In view of its first allegation, it confirmed that as the company was recently re-founded, a balance sheet of the last years could therefore not be produced. As regards the promise to be made partner it claimed that this was agreed in writing by the project co-ordinator under the condition that the complainant's creditworthiness was confirmed. The complainant further stated that it was requested at short notice by the project co-ordinator to provide information on its financial situation and on the necessary bank guarantees which it duly provided. The complainant claimed that until April 1999 it was given the impression that it was fully included in the project. The complainant sent a copy of the minutes of the meeting that was held together with the Commission and the project co-ordinator on 22 April 1999. In these minutes, to which the complainant principally agreed in its letter of 11 June 1999 to the Commission, the reasons for



the rejection of the complainant as full partner to the INDRIS project were laid down. The complainant now claims damages for lost profit and for resulting damages of 7.555.900,- ECU. As regards the third allegation, the alleged failure to protect the complainant's know-how, the latter states that the project co-ordinator never replied to its proposal of an agreement on the subject. Furthermore, the complainant commented that the project co-ordinator admitted to it that it harmonised its policy with that of DG VII of the Commission so that the Commission's statement that it could not take any responsibility on the questions of the know-how and the reimbursement did not appear to be correct.

THE DECISION

1 Failure to establish the complainant as a contractual partner to the project and failure to give reasons for it

1.1 The complainant alleged that it should have been made a partner of the INDRIS project and that it was not given any reasons for the failure to do so. **1.2** The Commission stated that as the complainant was unable to provide the necessary documents as regards its financial situation it could not be accepted as a full partner of the project. This reason was made clear to the complainant as the Commission was in contact with the complainant in order to obtain more information. In observations, the complainant confirmed that it had received the reasons for its rejection as a full partner in the minutes of a meeting held with the Commission and the project co-ordinator on 22 April 1999. **1.3** The evidence available to the Ombudsman is therefore that the complainant was not accepted as a full partner in the project because the other partners were not satisfied with its technical contribution and that the complainant was informed of this reason. The Ombudsman's inquiry has therefore revealed no evidence of maladministration in relation to this aspect of the complaint. **1.4** As regards the further claims for lost profit and damages the Ombudsman notes that this claim has not been made in the original complaint. The Ombudsman did not pursue this claim in view of the findings of no maladministration. The complainant has nonetheless the possibility to pursue this claim in legal proceedings. **2 Payment for work carried out** **2.1** The complainant alleged that it was not paid for the preparatory work it carried out. **2.2** The Commission stated that for the complainant's costs, the co-ordinator - taking into account Article 3 of the general conditions to the INDRIS contract - proposed a reimbursement of approximately 100.000 ECU based on a sub-contract. **2.3** In its letter to the Ombudsman of 5 July 1999, the complainant confirmed that it was paid the due sum of 92.606,72 EURO. The Ombudsman therefore finds that this matter was settled by the Commission. **3 Protection of the complainant's know-how** **3.1** The complainant alleges that the Commission failed to protect the complainant's know-how and that its proposals which it sent to the project co-ordinator remained unanswered. **3.2** The Commission stated that it did not have any responsibility as regards this aspect of the complaint, and that it was up to the project co-ordinator, the Dutch Ministry for Transport to settle this point. The complainant pointed out that the project co-ordinator harmonised its policy on protection of know-how with that of the Commission. **3.3** The evidence available to the Ombudsman is that the role of the Commission is limited to advice on policy for the protection of know-how and that the project co-ordinator is responsible for specific decisions. Since the complaint relates to a specific decision, it falls within the responsibility of the project co-ordinator, which is not a Community body. The Ombudsman has therefore not investigated further into this aspect of the complaint since there appears to be no evidence of any maladministration by the Commission. **4 Conclusion** On the basis of the European



Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission as regards the first and third allegations. In view of the second allegation the Commission has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes the case. The President of the Commission will also be informed of this decision. Yours sincerely, Jacob SÖDERMAN