

Decision of the European Ombudsman on complaint 1876/2002/OV against the European Commission

Decision

Case 1876/2002/OV - Opened on 14/11/2002 - Decision on 17/06/2004

Strasbourg, 17 June 2004

Dear Mr S.,

On 30 October 2002, you made a complaint to the European Ombudsman on behalf of S. Consultants concerning your participation in the MEEST project in the framework of the 5th IST Programme managed by DG Information Society of the Commission.

On 14 November 2002, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 26 February 2003. I forwarded it to you with an invitation to make observations, which you sent on 29 April 2003.

On, 30 June 2003, I wrote to the Commission in order to seek a friendly solution to your complaint. The Commission sent its opinion on 4 August 2003. I forwarded it to you with an invitation to make observations, which you sent on 15 September 2003.

On 20 November 2003, I again wrote to the Commission in order to suggest a friendly solution. The Commission sent its opinion on 13 January 2004. I forwarded it to you with an invitation to make observations, which you sent on 4 February 2004.

On 29 March 2004, I again wrote to the Commission asking it to check the accuracy of a statement it had made in its opinion of 13 January 2004. The Commission replied on 21 April 2004.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant, a Dutch company of consultants, was invited to join a consortium in the framework of a project entitled MEEST (Mobile e-Commerce and e-Work Secured Transactions)



under the 5th "Information Society Technologies" (IST) programme of the Commission, which is managed by DG Information Society. The complainant's task was to assess the legal implications of the development and introduction of a Secure Mobile Payment System.

After an initial positive decision of DG Information Society about the complainant's participation in the project, the project was delayed. At the beginning of 2002, the Commission requested from the complainant additional securities, such as a bank guarantee, in order to participate in the project. The complainant fulfilled the Commission's request, but then the Commission stated that the complainant's company was too small and that it could not participate in the consortium. At that time, the Commission had already been in possession of the complainant's financial data for seven and a half months.

The complainant then offered to provide a "parent company guarantee", but on 26 April 2002, the Commission informed the complainant that its participation could not be accepted. This happened one working day before the planned signing of the contract by the Commission. All the members of the consortium, including the complainant, had already signed the contracts which had been sent by courier service. The complainant made several telephone calls and sent e-mails to the Commission, but without success. The complainant then submitted a claim for damages of EUR 96 000 to the Commission in respect of loss of income, a plane ticket to Tel-Aviv for the initial meeting, which was cancelled by the Commission, courier costs and telephone costs, as well as time lost.

In a telephone conversation, an official from DG Information Society stated that he felt very sorry, that the decision had indeed come very late and that the Commission needed to work on its internal procedures.

On 30 October 2002, the complainant lodged the present complaint with the European Ombudsman claiming that the Commission should indemnify him for an amount of EUR 96 000 for damages corresponding to loss of income, a plane ticket for a cancelled meeting in Tel-Aviv, courier costs, telephone costs as well as time spent on the file.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The complaint concerns the negotiations for project proposal ref. IST-2001-32276-MEEST under the IST (Information Society Technologies) Programme, in the context of the 5th Research and Development Framework Programme, 1998-2002) This is a shared cost contract with the Commission, which involved a consortium of five companies, one of which was the complainant. The total proposed Community financial contribution to the project was EUR 2 000 000.

The initial deadline for the completion of negotiations was 14 August 2001. The consortium however requested an extension until 31 August 2001, due to limited availability of resources



during the holiday season in some of the contractor companies. During a negotiation meeting in Brussels on 30 August 2001, the consortium informed the Commission that the project budgets and plan had been prepared on the basis of a funding of EUR 2 500 000 (which was the funding initially requested) and not on the basis of the accepted funding of EUR 2 000 000 mentioned in the invitation letter.

As a result, the consortium needed more time to re-define the scope and work-plan of the project. To accommodate the needs of the consortium, the Commission agreed on a new deadline of 12 September 2001. This deadline could not be met, mainly because of the need to resolve difficult issues concerning the financial viability of two essential contractors. Also, to a lesser extent, it could not be met because it was necessary to make minor modifications to the administrative forms and proposed work-plan, and due to the lack of receipt of all the requested financial information from the complainant.

As for all the other contractors, the necessary documentation required by the Commission from the complainant in the context of the contract negotiations consisted of the balance sheets and the profit and loss accounts for the financial years 1998, 1999 and 2000. On 6 September 2001, the complainant sent to the Commission only the profit and loss accounts for the financial years 1998 and 1999. The complainant did not send balance sheets for any of the three years, nor the profit and loss account for the year 2000.

A new target deadline was set for mid December 2001 because the main dates for the adoption of a Commission Decision, needed for the selection of the proposition, had been missed already. In December 2001, the deadline had to be extended again in order to meet special requirements for one main contractor, which finally agreed with a proposed solution in January 2002.

After 6 September 2001, the complainant failed to provide the Commission with requested supplementary financial information. Instead, the complainant proposed to provide a financial guarantee from a bank for the amount of the advance payment. This solution was not accepted by the Commission, because it did not demonstrate that the complainant would have the necessary resources to carry out the project. Furthermore, the financial guarantee was only a promise on the part of the complainant. The Commission never got confirmation that any bank was willing to provide such a financial guarantee to the complainant.

In the first months of 2002, the Commission's services finally decided to inquire about the complainant's financial viability. Following the inquiry, the Commission's services were able to confirm that for the financial year 2000, as well as for financial years 1998 and 1999, the complainant's total annual turnover was weak, i.e. approximately EUR 35 000. This amount was low compared to the amount of the required annual co-funding for the project, which was EUR 40 500. In addition, the net worth of the company in 2000 was smaller than the amount of the requested annual funding for the project.

Throughout the period of the contract negotiations, the Commission did not receive further information that would enable it to be confident that the co-financing capacity of the complainant



would increase to a sufficiently high level within the near future so as to enable it to comply with the financial rules for participation. The complainant was informed about these issues by e-mail of 24 April 2002, before the Commission's final decision to stop the contract negotiations.

In order to give the complainant one further possibility to provide tangible proof that it was financially capable of participating in the project, the Commission's services asked once again for the outstanding financial information which had never been submitted during the contract negotiations. The complainant sent mere declarations, without the support of any documentary evidence concerning its future commitments and external resources. Because of the failure to submit the requested financial information, the Commission was obliged to discontinue contract negotiations with the complainant.

By e-mail of 26 April 2002, the Commission communicated its final decision to the complainant and to the consortium. It was the consortium's decision to respond to the situation by re-allocating the anticipated role and responsibility of the complainant. By e-mail of 13 May 2002, the consortium informed the Commission of its unanimous decision to reallocate the role and responsibilities of the complainant to Partner Communications, in order to allow the contract procedure to go ahead without additional delay. In the same letter, the co-ordinator, as intermediary for the consortium, confirmed that the complainant had received from him notification that the consortium had decided to cease any further contract negotiations with it. The Commission then notified the complainant by registered letter of 17 June 2002 of its decision to stop the contract negotiations.

The letter sent to potential contractors in order to start contract negotiations following the positive evaluation of a proposal clearly states that the Commission reserves the right to terminate the negotiations and that the letter should not be regarded as a formal commitment by the Commission to give financial support as this depends, in particular, on the satisfactory conclusion of contract negotiations and the completion of the formal selection process. The complainant was therefore fully aware that its participation in the project depended on a positive final decision by the Commission.

Article 8 of Council Decision 1999/65/EC of 22 December 1998, concerning the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the 5th framework programme of the EC (1998-2002) (1) provides that *"any legal entity, international organisation and JRC must:*

- when filing its proposal for an indirect RTD action, have at least the potential resources needed for carrying it out,

- when the contract is signed, demonstrate that it will have all the necessary resources as and when needed for carrying it out.

The resources needed for carrying out the indirect RTD action shall comprise human resources, infrastructure, financial resources and, where appropriate, intangible property" .



The Commission's final decision to stop contract negotiations with the complainant was taken on the basis of the financial information that was finally made available and in compliance with the terms of Article 8 of the above mentioned rules.

As regards the complainant's allegation that the Commission's final decision should have been taken earlier, all major delays were in fact due to extensions granted by the Commission in order to accommodate the consortium's need to provide the required legal documents, including those of the complainant who failed to submit the requested balance sheets.

The Commission rejects the complainant's claim that it is liable for the financial loss incurred. The Commission acted within the limits set by the rules for participation of companies in the 5th Framework programme. The agreement of the Commission's Financial Control represents the final and obligatory stage of the Commission's internal procedure. Without this agreement, it is not possible for the Commission's services to conclude a contract. Such control is necessary to protect the financial interest of the Communities.

The complainant's observations

The complainant observed that when the Commission cancelled the negotiations on formal grounds just three days before the planned signing of the contract, the complainant's financial data had already been in the Commission's possession for months. The complainant reacted promptly to the Commission's requests and offered various guarantees to the Commission, including bank guarantees and personal guarantees, but the Commission ignored these.

The Commission should have informed the complainant from the very beginning that it did not fulfil the formal criteria to participate in the project. This would have prevented the complainant from having financial problems later. The Commission should act more carefully when it deals with one-man firms like the complainant, which have limited financial resources.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinion and observations, the Ombudsman considered that there could be an instance of maladministration by the Commission. In accordance with Article 3(5) of the Statute (2) , he therefore wrote to the President of the Commission on 30 June 2003 to propose a friendly solution on the basis of the following analysis of the issue in dispute between the complainant and the Commission:

1.1 The complaint relates to a project proposed by a consortium for Community funding under the 5th Framework programme. According to the complainant, the Commission took an initial positive decision on the complainant's participation in the consortium, but finally decided to cancel the negotiations one working day before the planned signing of the contract, when all the consortium members, including the complainant, had already signed the contract which had been sent by courier service. The complainant claims that the Commission should indemnify him for an amount of EUR 96 000 for damages corresponding to loss of income, a plane ticket for a cancelled meeting in Tel-Aviv, courier costs, telephone costs, as well as time spent on the



file.

1.2 According to the Commission, all major delays in the negotiations were in fact due to extensions granted by the Commission in order to accommodate the consortium's need to provide the required legal documents, including those of the complainant. The complainant sent only the profit and loss accounts for the financial years 1998 and 1999, whereas the necessary documentation required from the contractors were the balance sheets and the profit and loss accounts for the financial years 1998, 1999 and 2000. The complainant also failed to provide the Commission, after 6 September 2001, with requested supplementary financial information showing that it could comply with the financial rules for participation in the 5th Framework programme. Instead, the complainant proposed to provide a bank guarantee for the amount of the advance payment. This solution was not accepted by the Commission, because it did not demonstrate that the complainant would have the necessary resources to carry out the project. Before the final decision to stop the contract negotiations, the Commission gave the complainant one further possibility to provide tangible proof that it was financially capable to participate in the project. However, the complainant sent mere declarations, without the support of any documentary evidence concerning its future commitments and external resources.

1.3 On the basis of a thorough examination of the documents produced during the inquiry, the Ombudsman made the following findings of fact with regard to the issues in dispute between the complainant and the Commission:

1.4 By letter of 12 July 2001, DG Information Society informed the potential co-ordinator that the Commission services wished to proceed to contract negotiations and that contract preparation forms had to be completed by the co-ordinator, as well as by the other participants in the project, whose forms had first to be checked by the co-ordinator before being forwarded to the Commission. The letter invited the co-ordinator to inform the other participants in the project of this situation. Enclosed with the Commission's letter were the evaluation summary report and the framework for negotiation. The letter also indicated that the following documents were available on CORDIS (<http://www.cordis.lu/ist/cont-prep.htm> [Link]): a) contract preparation forms, b) guidelines for contract preparation, c) guidelines on major financial provisions, and d) model contract.

1.5 On 6 September 2001, the complainant sent profit and loss accounts for the financial years 1998 and 1999 to the Commission. By e-mail of 24 April 2002, the responsible Commission official informed the complainant that the internal financial control had concerns regarding the complainant's financial capacity and that, in the absence of convincing evidence that the complainant could support its financial share of the proposed contract, the Commission would be forced to request the complainant's withdrawal as a contractor. This e-mail invited the complainant to describe which financial sources would cover its share in the costs. The complainant replied by e-mail of 25 April 2002 stating that it had made arrangements to secure capital from external sources and that it could provide the Commission with a bank guarantee. By e-mail of 26 April 2002, the Commission informed the complainant, as well as the consortium's co-ordinator, that it could not accept the complainant's participation in the project. At that time, the complainant had already signed the contract, which was sent by courier service



to the Commission.

1.6 The Ombudsman notes that, on the basis of the available documentary evidence, it appears that the Commission did not react - by writing directly to the complainant or to the co-ordinator who was the Commission's contact person for the project - to the financial information contained in the complainant's letter of 6 September 2001 until 24 April 2002, i.e. some working days before the planned signing of the contract by the Commission. Moreover, the Ombudsman has found nothing to indicate that the complainant was informed before 24 April 2002 that the profit and loss accounts it had sent for the financial years 1998 and 1999 were insufficient as a condition for its participation in the project.

1.7 The Ombudsman's provisional conclusion, therefore, is that the fact that the Commission invited the complainant to supply further financial information only on 24 April 2002, although the Commission had been aware since September 2001, i.e. for seven and a half months, of exactly what financial information the complainant had supplied, constitutes an unreasonable delay and is therefore an instance of maladministration.

The proposal for a friendly solution

On the basis of the above considerations and in accordance with Article 3 (5) of the Statute of the Ombudsman, the Ombudsman proposed a friendly solution between the complainant and the Commission which would consist in the Commission paying an appropriate amount by way of compensation for the unreasonable delay in informing the complainant about its exclusion from the project.

The Commission's response

In response to the Ombudsman's proposal for a friendly solution, the Commission stated that, until the end of the negotiations in April 2002, the official contact with the Commission for the contract negotiations was the co-ordinator and not the complainant. It recognised that there is limited documentary evidence available about the specific communication between the Commission and the co-ordinator with regard to the complainant's case. This communication was conducted by e-mail and telephone conversations, but the most relevant e-mails are not available, because, due to the standards applied at the time, the formal registration of such e-mail correspondence was not systematic and there was a strict limit on the quantity of e-mails that could be archived on the Commission's computer system.

The Commission recognised that the communication could have been better and more formal, both on the side of the Commission and probably also between the co-ordinator and the complainant. However, the fact that the complainant first promised a bank guarantee and later proposed an arrangement to secure additional capital, also provides evidence that there must have been an ongoing communication between the Commission and the consortium co-ordinator, which must have reached the complainant. More recently, the consortium co-ordinator has also provided an e-mail statement indicating that it had kept the complainant informed of the procedure and delays. The Commission enclosed a copy of this e-mail, which was dated 10 July 2003.

In the circumstances of the case, the Community is not liable in damages. The Commission followed standard procedures and acted within the limits of Council Decision 1999/65/EC. The



Commission recalled the content of the letter inviting the contractors to start contract negotiations which stated that *"this letter should not be regarded under any circumstances as a formal commitment by the Commission to give financial support as it depends, in particular, on the satisfactory conclusion of contract negotiations and completion of the formal selection process"*. The Commission can thus not see how the proposed compensation could be considered.

In an effort to avoid further misunderstandings with the complainant, the Commission suggested to invite the complainant to a meeting, which could be held at the costs of the Commission and could serve to review and clarify the issues that have affected the negotiation process.

The complainant's second observations

The complainant observed that, again, the Commission passed by the essential point of the complaint, which is that it was already in possession of the complainant's financial data for months, and that it was only some days before the planned signing of the contract that, on the basis of that information, it decided that the complainant could not be admitted. The complainant should have been informed of this from the beginning when the Commission obtained its financial data.

The complainant was informed at a very late stage by the co-ordinator of the project that the Commission had requested additional guarantees. The co-ordinator himself had only been informed of the situation a few days previously.

The complainant rejected the invitation for a meeting, unless the agenda would be to specify the amount of an indemnity. The complainant asked the Ombudsman to try again to obtain a friendly solution and, if the Commission maintains its view, to make a Special Report to the European Parliament.

The Ombudsman's further efforts to achieve a friendly solution

The Ombudsman did not consider that the Commission had responded adequately to the Ombudsman's proposal for a friendly solution. The Ombudsman therefore again wrote to the President of the Commission, observing the following:

In its opinion of 4 August 2003, the Commission recognised that there is little documentary evidence available about the specific communication between the Commission and the co-ordinator with regard to the complainant's case. The communication was conducted by e-mail and telephone conversations, but the most relevant e-mails are no longer available, as they were not registered. The Commission recognised that the communication could have been better and more formal, both on the side of the Commission and probably also between the co-ordinator and the complainant.

The Commission observed, however, that the circumstances of the case do not give rise to liability in damages of the Community and that it has followed standard procedures and acted within the limits of Council Decision 1999/65/EC.

The Ombudsman has re-examined the file in the light of the Commission's reply. It appears that the Commission did not provide any new documentary evidence that between 6 September



2001 and 24 April 2002 it contacted either the co-ordinator or the complainant with regard to the financial information which was lacking in the complainant's file. The e-mails to which the Commission refers have not been registered and are no longer available.

The Ombudsman therefore maintained his provisional conclusion that there was unreasonable delay by the Commission in informing the complainant only in April 2002, some days before the planned signing of the contract by the Commission, about its exclusion from the project, on the basis of information it already possessed since September 2001.

On the basis of the above, the Ombudsman reiterated his proposal for a friendly solution between the Commission and the complainant, which could consist in the Commission paying an appropriate amount by way of compensation for the maladministration which has occurred. The Ombudsman pointed out that the Commission's reference to the Community's liability in damages is not appropriate in this context, as the issue at stake is not a question of legal liability. Indeed, the Ombudsman is not a judicial body and has no power to determine liability or to award damages.

What the Ombudsman intends with his proposal for a friendly solution is that the Commission should take steps to put right an instance of maladministration, for example by offering the complainant a reasonable amount as compensation for the maladministration which has occurred. It is in this context that the Ombudsman would like the Commission to look again at the proposal for a friendly solution.

The Commission's response

In its opinion of 13 January 2004, the Commission first observed that the Ombudsman's conclusions were based on the finding that "the Commission did not provide any new documentary evidence that between 6 September 2001 and 23 April 2002 it contacted either the co-ordinator of the complainant with regards to the financial information that was lacking in the complainant's file".

According to the Commission, it provided three additional documents in response to the first request for a friendly solution from the Ombudsman: 1) an e-mail from the Commission to the consortium Co-ordinator of 24 October 2001, 2) an e-mail from the Commission to the consortium Co-ordinator of 16 November 2001, and 3) an e-mail statement by the consortium co-ordinator of 10 July 2003. The Commission expressed regret that those e-mails could not be considered by the Ombudsman as new documentary evidence. The Commission enclosed copies of the three e-mails mentioned.

These additional documents and, in particular, the statement of 10 July 2003, must be considered in the light of the rule applicable to communications during the negotiation of research projects. In conformity with this rule, which is well known to the complainant, all communication during the negotiation is conducted solely between the Commission and the Co-ordinator.

The Commission reiterates its opinion that the delay in relation to the complainant was due to exceptional efforts on the part of the Commission to accommodate the consortium's difficulties



in providing all necessary documents, including - but not exclusively - the missing financial information from the complainant. As several official negotiation deadlines were missed by the proposers, the Commission would have been entitled to terminate the contract negotiations at an earlier stage, but this would have been detrimental, not only for the complainant, but for the whole consortium.

The fact that, in its opinion of 4 August 2003, the Commission recognised that "the communication could have been better and more formal" was not meant to admit that there had been de facto "maladministration", but was rather a genuine and constructive attitude to recognise that the current system, although satisfactory and compatible with reasonable standards, still provided room for improvement. The Commission has in the meantime introduced a systematic e-mail archival system (EAS).

In reaction to the complainant's observations, the Commission stated that it is untrue that the very core of the complaint lies in the fact that the requested financial information had been available to the Commission for months before the end of negotiations. Only partial (insufficient) information had been supplied. This information was not sufficient to grant a contract without putting public money at risk, nor sufficient to decline a contract to the proposer from the outset.

Some standard accounting documents were never submitted (balance sheet and profit and loss accounts for some of the three most recent years of operation), and other more specific financial documents were never provided.

The complainant's allegation that the Commission withdrew its offer at the latest moment is unfounded, because, in May 2002, it was precisely the complainant's inability to fulfil the financial requirement that prevented the contract negotiations with the whole consortium to be finalised.

The fact that the final withdrawal of an offer for a contract to the complainant occurred close to the end of the negotiations with the consortium is rather a sign of the willingness of the Commission to give a chance to the complainant to comply with financial requirements until the very end of the process. It was not the result of a precipitate decision.

Over several months, the complainant repeatedly expressed (orally) its readiness to fulfil the Commission's requirements but failed to deliver in practice. In the end, it became necessary to put an end to the unfruitful and lengthy process to obtain the missing documents in order not to further delay other contractors, who were eager to launch the project. The fact that the Commission finalised the contracts with the other proposers shortly after it withdrew the offer to the complainant, is therefore normal since there was a causal link between both actions.

The complainant's allegation that he was not aware of any difficulties from 9 September 2001 until 23 April 2002 is not credible. The complainant had direct telephone conversations with the Commission several times during this period. The complainant also indicated that he had intense contacts with the co-ordinator Orange, i.e. Partner Communications. The latter has indicated that it was available to the services of the Ombudsman to clarify the actual sequence



of events, which had led to the withdrawal of the offer for a contract. Regrettably, the Commission must raise the fact that this allegation does not seem to have been made in good faith.

The Commission is surprised by the magnitude of the complainant's claim for damages (EUR 96 000, i.e. more than twice the company's annual turnover in the year 2000, and disproportionately high given the comparison with the total project funding of EUR 80 971).

The Commission concluded that there are no legal grounds in support of the claim that the Commission should bear the costs incurred by the complainant. The Commission can therefore not agree with the proposed friendly solution.

The Commission however wished to reiterate its offer to both the complainant and Partner Communications to hold a meeting with the Commission's services, at the cost of the Commission, in order to review the issues which have affected the negotiation process and clarify the possible misunderstandings. As mentioned in the Commission's earlier response, this meeting could also be used to explore possibilities for the complainant to take part in future activities of the ongoing 6th Framework Programme.

The complainant's third observations

The complainant maintained his position and did not accept the Commission's argument that he had not acted in good faith. The complainant sent all the necessary financial information on 6 September 2001 and reacted immediately to all requests for additional information. It is not correct that because of the missing documents (additional financial guarantees), the negotiations with the Consortium could not be finished in May 2002.

The complainant further pointed out that the disproportionately (as claimed by the Commission) high amount of the claimed damage was based on a proposal from a European telecom operator to provide interim management for a period of 6 months for EUR 100/hour without VAT. A calculation confirms the amount claimed by the complainant. The complainant had to reject the proposal based on the prospect of starting with the Commission.

The complainant was still open to a friendly solution. He is however only ready for a discussion with the Commission if the compensation issue is discussed. If the complainant's and Ombudsman's common efforts would not lead to a satisfactory solution, the complainant would have recourse to publicity.

Further inquiries

The Ombudsman carefully studied the Commission's opinion on the second proposal for a friendly solution and the complainant's observations thereon.

The Ombudsman noted that the Commission stated that it had annexed to its opinion on the first proposal for a friendly solution three e-mails, dated 24 October 2001, 16 November 2001 and 10 July 2003. The Ombudsman's records showed that only the third e-mail, dated 10 July 2003, had in fact been mentioned in and annexed to the Commission's opinion on the first proposal for a friendly solution. Since the e-mails dated 24 October 2001 and 16 November 2001 appeared to constitute important evidence in support of the Commission's arguments, the



Ombudsman considered it important to clarify the issue of when this evidence had first been presented by the Commission and why there appeared to have been delay in doing so. The Ombudsman therefore wrote to the Commission on 29 March 2004 asking it to check the accuracy of its statement in the opinion of 13 January 2004 that the e-mails in question were already sent to the Ombudsman as part of the Commission's reply to the Ombudsman's first proposal for a friendly solution. The Commission replied on 21 April 2004 that only the e-mail of 10 July 2003 had been sent with the Commission's response to the first proposal for a friendly solution, and that the e-mails of 24 October and 16 November 2001 were only enclosed with the Commission's response to the second proposal for a friendly solution. According to the Commission, these documents had been found only after a long search. The Commission, however, asked the Ombudsman to take those e-mails into account as proof of communication between the Commission and the co-ordinator concerning the financial viability of the complainant.

THE DECISION

1 The claim for damages due to the late cancellation of the complainant's participation

1.1 The complaint relates to a project proposed by a consortium for Community funding under the 5th Framework programme. According to the complainant, the Commission took an initial positive decision on the complainant's participation in the consortium, but finally decided to cancel the negotiations one working day before the planned signing of the contract, when all the consortium members, including the complainant, had already signed the contract which had been sent by courier service. The complainant claims that the Commission should indemnify him for an amount of EUR 96 000 for damages corresponding to lack of income, a plane ticket for a cancelled meeting in Tel-Aviv, courier costs, telephone costs as well as time spent on the file.

1.2 According to the Commission, all major delays in the negotiations were in fact due to extensions granted by the Commission in order to accommodate the consortium's needs to provide the required legal documents, including those of the complainant. The complainant sent only the profit and loss accounts for the financial years 1998 and 1999, whereas the necessary documentation required from the contractors were the balance sheets and the profit and loss accounts for the financial years 1998, 1999 and 2000. The complainant also failed to provide the Commission, after 6 September 2001, with requested supplementary financial information showing that it could comply with the financial rules for participation in the 5th Framework programme. Instead, the complainant proposed to provide a financial bank guarantee for the amount of the advance payment. This solution was not accepted by the Commission, because it did not demonstrate that the complainant would have the necessary resources to carry out the project. Before the final decision to stop the contract negotiations, the Commission gave the complainant one further possibility to provide tangible proof that it was financially capable to participate in the project. However, the complainant sent mere declarations, without the support of any documentary evidence concerning its future commitments and external resources.

1.3 On 30 June and 20 November 2003, the Ombudsman wrote to the Commission in order to propose a friendly solution to the complaint which would have consisted in the Commission



paying an appropriate amount by way of compensation for the unreasonable delay in informing the complainant about its exclusion from the project. The proposal for a friendly solution was based on the finding that, on the basis of available documentary evidence, it appeared that the Commission had not reacted - by writing directly to the complainant or to the co-ordinator who was the Commission's contact person for the project - to the financial information contained in the complainant's letter of 6 September 2001 until 24 April 2002, i.e. a few working days before the planned signing of the contract by the Commission. The second proposal for a friendly solution was based on the finding that the Commission had not provided any new documentary evidence that between 6 September 2001 and 24 April 2002 it had contacted either the co-ordinator or the complainant with regard to the financial information which was lacking in the complainant's file.

1.4 The Commission twice rejected the proposal for a friendly solution. In its opinion on the first proposal for a friendly solution, the Commission stated that the circumstances of the case did not justify any liability for damages on its behalf. The Commission also observed that the most relevant e-mails with the co-ordinator were no longer available, as they had not been registered. The Commission sent a copy, however, of a non-contemporaneous e-mail of 10 July 2003 from the co-ordinator of the project to the Commission.

1.5 In its opinion on the second proposal for a friendly solution, the Commission stated that it had also sent e-mails dated 24 October and 16 November 2001 with its previous opinion. The Commission regretted that those e-mails could not be considered by the Ombudsman as new documentary evidence.

1.6 As a preliminary point, the Ombudsman notes that the Commission's opinion of 4 August 2003 on the Ombudsman's first proposal for a friendly solution only mentioned and contained as an enclosure the third of the three e-mails which the Commission claimed in its opinion of 13 January 2004 to have enclosed with its earlier opinion. The two other e-mails, namely those of 24 October and 16 November 2001 were neither mentioned in nor enclosed with the Commission's opinion of 4 August 2003, and the Ombudsman took knowledge of them only when he received the Commission's opinion on the second proposal for a friendly solution, i.e. on 15 January 2004.

1.7 In its opinion on the first proposal for a friendly solution, the Commission explained that many e-mails were no longer available, because of the absence of a systematic registration of e-mails at the time. In its reply to the Ombudsman's further inquiries following the Commission's reply to the second proposal for a friendly solution, the Commission stated that the e-mails enclosed with its reply to the second proposal had only been found after a long search. This Ombudsman considers that, taking these elements together, the Commission has provided a reasonable explanation why it did not present the e-mails of 24 October and 16 November 2001 as evidence at an earlier stage of the inquiry. Moreover, the complainant's interests do not appear to have been adversely affected by the delay in producing the evidence. In these circumstances, although the Commission has neither explained, nor apologised for, its incorrect statement in its reply to the second proposal for a friendly solution that the e-mails in question had already been presented as evidence, the Ombudsman accepts the said e-mails as new



evidence. The Ombudsman hopes that, in the future, the Commission will transmit supporting documents with its original opinion on the complaint, in order to demonstrate the reliability of its administrative procedures and to assist the Ombudsman in dealing with citizens' complaints in as timely and effective a way as possible.

1.8 On the basis of a thorough examination of the documents contained in the file - including the e-mails of 24 October and 16 November 2001, the Ombudsman makes the following findings of fact:

(i) On 12 July 2001 DG Information Society informed the co-ordinator of the project that the Commission services wished to proceed to contract negotiations. On 6 September 2001, in response to a request made by the co-ordinator, the complainant sent financial information to the Commission consisting of profit and loss accounts for the financial years 1998 and 1999.

(ii) On 24 October 2001, the responsible official within DG Information Society wrote an e-mail to the co-ordinator with the following subject field: *"MEEST - Additional information required to finalise a contract - IMPORTANT"*. In the body of the message, he stated that *"during the pre-processing of your contract, we have identified the following issues to be addressed: (...) 3. [name of the complainant]: We propose to avoid an advance payment to solve the risk issue regarding the financial solidity of the company (not sufficient net worth). Please inform the contractor accordingly and provide me with their response"*.

(iii) On 16 November 2001, the same official wrote another e-mail to the co-ordinator asking *"Should I consider that (...) and [name of the complainant] have agreed with the bank (or parent's) guarantee approach ? Thank you for clarifying that for me"*.

(iv) By e-mail of 24 April 2002, the same official informed the complainant that the Commission's internal financial control had concerns regarding the complainant's financial capacity and that, in the absence of convincing evidence that the complainant could support its financial share of the proposed contract, the Commission would be forced to request the complainant's withdrawal as a contractor. This e-mail invited the complainant to describe which financial sources would cover its share in the costs and to ascertain whether or not, in the interim, the co-ordinator contacted the complainant. The complainant replied by e-mail of 25 April 2002 stating that it had made arrangements to secure capital from external sources and that it could provide the Commission with a bank guarantee. By e-mail of 26 April 2002, the same official informed the complainant, as well as the consortium's co-ordinator, that it could not accept the complainant's participation in the project. At that time, the complainant had already signed the contract, which was sent by courier service to the Commission.

(v) There is no written document in the file (such as an e-mail reply) containing a response from the co-ordinator to the Commission's e-mails of 24 October and 16 November 2001, or showing that the co-ordinator contacted the complainant in this regard.

1.9 The new evidence provided by the Commission thus shows that the Commission did in fact react to the financial information contained in the complainant's letter of 6 September 2001 by



writing to the co-ordinator who was the Commission's contact person for the project in the two and a half months following the transmission of the complainant's financial information. The Ombudsman points out that his inquiry only concerns the activities of the Commission and that he has no power to inquire into the activities of the co-ordinator and to ascertain whether or not in the interim, the coordinator contacted the complainant. Given this new evidence, the Ombudsman considers that his earlier provisional finding of maladministration by the Commission can no longer be sustained and that the case should be closed with a finding of no maladministration. There is no basis, therefore, for the Ombudsman to examine the complainant's claim.

1.10 The Ombudsman notes, however, that in both its opinions on the proposal for a friendly solution, the Commission offered the complainant a meeting with the Commission's services and the co-ordinator, at the cost of the Commission, in order to review the issues which have affected the negotiation process, clarify the possible misunderstandings and explore possibilities for the complainant to take part in future activities of the ongoing 6th Framework Programme. The Ombudsman points out that the complainant still has the possibility to accept this offer.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

FURTHER REMARK

The Ombudsman hopes that, in the future, the Commission will transmit supporting documents with its original opinion on the complaint, in order to demonstrate the reliability of its administrative procedures and to assist the Ombudsman in dealing with citizens' complaints in as timely and effective a way as possible.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ L 26/46 1.2.1999.

(2) "As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint".