

Decision of the European Ombudsman on complaint 326/2004/IP against the European Commission

Decision

Case 326/2004/IP - Opened on 23/02/2004 - Decision on 05/10/2004

Strasbourg, 5 October 2004

Dear Mr B.,

On 30 January 2004, you made a complaint, in your capacity as Managing Director of the Italian company SIM-GICO Branch. On 16 February 2004, you sent to me further documents in relation to your complaint. It concerned the Commission's handling of the selection procedure in the framework of the call for expression of interest EuropeAid/114626/C/SV/MN.

On 23 February 2004, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 17 May 2004 and I forwarded it to you with an invitation to make observations, if you so wished, by 30 June 2004. No observations appear to have been received from you.

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

THE COMPLAINT

The Italian company SIM-GICO Branch is the leader of the consortium composed of SIM-GICO Branch, the German company Integration GmbH and ECO 3 srl (hereinafter "the Consortium"). The Consortium participated in the call for expression of interest Europeaid/114626/C/SV/MN which the European Commission launched on 21 October 2003 for the project "Establishment of a collection and distribution network in Mongolia".

By letter of 12 December 2003, the Commission informed the complainant, who is the Managing Director of SIM-GICO Branch, that the Consortium had not been short-listed for the project in question because it had failed to provide all the relevant documents as requested in point 2.3.3 of the Practical Guide to Contractual Procedures financed from the EC general budget in the context of external actions (hereinafter "the Practical Guide").

On 9 January 2004, the complainant wrote to the Commission and contested this decision. The complainant stated that the Commission had failed to consider the full content of point 2.3.3. of



the Practical Guide, which provides that "*Candidates must supply the proof usual under the law of the country in which they are established that they do not fall into the categories listed above*". The complainant pointed out that, on this basis, he had provided the Commission's competent service, AIDCO A6, with all documentation needed in Italy and Germany to comply with the requirements of point 2.3.3 of the Practical Guide, SIM-GICO Branch and Integration GmbH being established in Italy and Germany respectively.

In his complaint to the Ombudsman, the complainant alleged that (*i*) the Commission wrongly failed to include the Consortium in the short-list of applicants for project Europeaid/114626/C/SV/MN on the grounds that point 2.3.3 of the Practical Guide had not been complied with and that (*b*) the Commission failed to reply to his letter of 9 January 2004. The complainant claimed that the Commission (*i*) should reconsider its decision not to put the Consortium on the short list of applicants and (*ii*) clarify clause 2.3.3 of the Practical Guide, in order to avoid any interpretation problems in the future.

THE INQUIRY

The European Commission's opinion

In its opinion, the Commission referred to the background of the case as follows:

The Consortium presented one of the thirteen projects following the call for expression of interest Europeaid/114626/C/SV/MN launched by the Commission on 21 October 2003. On 10 December 2003, the Evaluation Committee asked the Consortium to provide the Commission with official documents confirming their compliance with Section 2.3.3 of the Practical Guide. Following this request, the complainant sent the following documents to the Committee:

- The extract of the judicial record of a member of the Consortium, ECO, dated 27 November 2003, confirming the compliance of ECO with letters b) and e) of Section 2.3.3 of the Practical Guide;
- Two statements of eligibility (sworn statements) for the other two members of the Consortium (SIM-GICO Branch and Integration GmbH);
- Copies of the Italian and German legislation concerning the sworn statements;
- A list of projects presented by the complainant which had not been rejected because of the non-acceptance of the sworn statements.

On 19 December 2003, the Authorising Officer had approved the short-list, in which four candidates out of the thirteen had been included. The Consortium was not among the four candidates short-listed as "its application did not provide all proof documents relevant to paragraph 2.3.3 of the Practical Guide to Contract Procedure financed from the EC general budget in the context of external actions". All the candidates that had not been short-listed were informed of the relevant decision on 23 December 2003.



As regards the non-inclusion of the Consortium in the short-list, the Commission stated that the new guide in force from 1 June 2003 took into account the changes introduced by the new Financial Regulation applicable to the General Budget of the European Community and its implementing Rules, which entered into force on 1 January 2003.

The grounds for exclusion from participation in a procurement procedure were laid down in Article 93 of the Financial Regulation, in Article 134 of its implementing rules and in section 2.3.3 of the Practical Guide (1). According to this section, the certificates requested are of the same type as those requested by the national administration of the EU Member States for the same purposes. For letters a), b) or e), it is foreseen that applicants should provide a recent extract from the judicial record or a document issued by a judicial administrative authority. As regards the certificate requested to prove that the candidate or tenderer is not in the situation described in point d), it is normally issued by the fiscal administrator. However, "where no such certificate is issued in the country concerned, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in its country of origin or provenance". Furthermore, section 2.3.3 foresees that "candidates must supply the proof usual under the law of the country in which they are established (...)", meaning that candidates must supply the type of document issued by the competent authorities for the specific purpose of each letter of this section.

The Commission considered that the complainant could have been confused by the fact that the same section of the old Practical Guide, which had been in force until 31 May 2003, had required the candidates in the first stage of a restricted tender procedure to supply a sworn statement that they did not fall into the categories of the section concerned. However, the Commission underlined that the reference to the new Practical Guide was clearly made in point 15 of the Service Procurement Notice of the call for tender in question. Moreover, in its request of 10 December 2003, the Commission expressly asked the complainant to provide it with the certificates mentioned in section 2.3.3. The complainant sent the requested certificates regarding only one of the three members of the Consortium.

As regards the reference made by the complainant to the German and Italian law, the Commission put forward that the German Law "*Gesetz betreffend die Gesellschaften mit beschränkter Haftung vom 20. April 2002 (BGBl S. 477)*" referred to by the complainant seemed not to be relevant since it appeared that no provision related to self-declaration was quoted in the law. As regards the Italian legislation, the Commission was aware that Italian Presidential Decree n° 445/2000 allows legal and natural persons to supply sworn statements. However, they are not prevented from obtaining standard certificates issued by the relevant national authorities as, according to the Commission, other German and Italian applicants have done.

As regards the complainant's allegation that the Commission had failed to reply to his letter of 9 January 2004, it acknowledged that a delay had occurred in dealing with the complainant's letter and apologised for it. The Commission also pointed out that in the meanwhile, a reply had been sent to the complainant on 8 March 2004.

The complainant's observations

No observations appear to have been received from the complainant.



THE DECISION

1 The Commission's handling of the selection procedure

1.1 The complainant, who is the Managing Director of the Italian company SIM-GICO Branch, leader of the consortium composed of SIM-GICO Branch, the German company Integration GmbH and ECO 3 srl ("the Consortium") that participated in the call for expression of interest Europeaid/114626/C/SV/MN, alleged that the Commission had wrongly failed to include the Consortium in the short-list of applicants for project Europeaid/114626/C/SV/MN on the grounds that point 2.3.3 of the Practical Guide had not been complied with.

1.2 The Ombudsman notes that, in its opinion, the Commission described the selection procedure followed by the Evaluation Committee. The Evaluation Committee had to check the compliance of all the proposals received with the relevant rules. The Consortium had not been included in the short list because on the basis of the examination of its proposal by the Evaluation Committee, it emerged that *"its application did not provide all proof documents relevant to paragraph 2.3.3 of the Practical Guide to Contract Procedure financed from the EC general budget in the context of external actions"*.

The Commission explained that the consortium had not been included in the short-list because the complainant had failed to provide the institution with official documents confirming compliance with Section 2.3.3 of the Practical Guide to Contractual Procedures financed from EC general budget in the context of external actions for two of the three members of the Consortium, SIM-GICO Branch and Integration GmbH.

1.3 On the basis of the information obtained in the course of the inquiry, it did not appear that the complainant had provided the Commission with all the documents required in compliance with Section 2.3.3 of the Practical Guide. The Ombudsman therefore takes the view that the Commission has given reasonable explanation as to why it had decided not to include the Consortium in the short list.

1.4 The Ombudsman therefore finds no maladministration in relation to this aspect of the case.

2 The alleged failure to reply

2.1 The complainant alleged that the Commission failed to reply to his letter of 9 January 2004.

2.2 In its opinion, the Commission acknowledged that a delay had occurred in dealing with the complainant's letter and apologised for it.

2.3 In accordance with the Commission's Code of Good Administrative Behaviour (2), a reply to a letter addressed to the Commission shall be sent within fifteen working days from the date of receipt of the letter from the responsible Commission department. In the present case, the Commission failed to act in accordance with its own rules. The Ombudsman notes, however, that the institution has in the meanwhile replied to the complainant's letter and apologised for the delay which had occurred.



2.4 In these circumstances, the Ombudsman does not consider it necessary to inquire further into this aspect of the case.

3 The complainant's claims

3.1 The complainant claimed that the Commission (*i*) should reconsider its decision not to put the Consortium on the short-list of applicants and (*ii*) that the institution should clarify clause 2.3.3 of the Practical Guide, in order to avoid any interpretation problem in the future.

3.2 As regards the complainant's first claim, the Ombudsman considers that, in view of the conclusions in point 1.4 of the present decision, it no longer appears necessary to deal with this point.

3.3 As regards the complainant's second claim, the Ombudsman notes that, in its opinion, the Commission referred to the relevant rules laid down in Section 2.3.3 of the Practical Guide to Contractual Procedures Financed from the EC general budget in the context of external actions, which applied in the complainant's case. Having checked the content of Section 2.3.3 of the Practical Guide in force from 1 June 2003, which applies in the present case, the Ombudsman considers that its content does not appear to be unclear. Furthermore, he takes the view that the Commission has given a reasonable explanation of its interpretation of these rules. The Ombudsman considers that it therefore no longer appears necessary to deal with this point.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, no further inquiries appear to be necessary in so far as the alleged failure to reply by the European Commission is concerned. As regards the other aspects of this case, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) "Section 2.3.3 Grounds for exclusion

Candidates or tenderers will be excluded from participation in a procurement procedure if:

(a) they are bankrupt or being wound up, are having their affairs administrated by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;

(b) they have been convicted of an offence concerning their professional conduct by a judgement which has the force of *res judicata*;



- (c) they have been guilty of grave professional misconduct proven by any means which the Contracting Authority can justify;
- (d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the Contracting Authority or those of the country where the contract is to be performed.;
- (e) they have been the subject of a judgement which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;
- (f) following another procurement procedure or grant awarded procedure financed by the Community budget, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations.

The Contracting Authority will accept, as satisfactory evidence that the candidate or tenderer is not in one of the situations described in (a), (b) or (e), production of a recent extract from the judicial record or, failing that, a recent equivalent document issued by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied. The Contracting Authority will accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in (d), a recent certificate issued by the competent authority of the Member State concerned.

(...)"

(2) OJ L 308 of 8 December 2000, pp. 26-34.