

## **Draft recommendation to the European Commission in complaint 232/2001/GG**

Recommendation

**Case 232/2001/GG - Opened on 26/02/2001 - Recommendation on 13/02/2002 - Decision on 27/06/2002**

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1) )

### **THE COMPLAINT**

The complainant, a consortium composed of three companies and bodies (Agristudio S.r.l., Vakakis Inr. S.A. and the Chambre d'agriculture de Charente Maritime), had submitted an offer in reply to a call for tenders published by the European Commission for project SCR-E/110582/C/SV/TM (Integrated support for Agriculture and the Food Industry – Turkmenistan) in May 2000 as part of the Tacis Programme. The complainant was put on a shortlist, together with seven other bidders including TDI Natural Resources Division ("TDI NRD") and Landell Mills Limited ("LM").

According to the complaint, the following provisions were relevant for the present case:

- Point 9 of the Contract Notice provides that candidates should submit only one application for the current contract "whatever the form of participation (as an individual candidate, or as leader or partner of a consortium candidate)" and that where a person submitted more than one application, "all applications in which that person has participated will automatically be excluded"
- Article 2 (3) of the SCR (Common Service for External Relations) Manual of Instructions provides that natural or legal persons "are not entitled to participate in competitive tendering or be awarded contracts where (...) they are in one of the situations allowing exclusion referred to in the Ethics Clauses (section 7) in connection with the tender or contract"
- Article 7 (3) of the SCR Manual of Instructions obliges a candidate or tenderer to declare "that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project"

In a letter to the Commission dated 5 December 2000, the complainant took the view that these provisions had been infringed and that TDI and LM should therefore be excluded from the



tender. In support of this allegation, the complainant claimed that TDI NRD was a branch of TDI to which LM belonged and that TDI also owned 50 % of Technical Management Service ("TMS") which, together with two other companies, was responsible for the management of the Tacis Co-ordinating Unit in Turkmenistan. The complainant considered that these facts gave rise to a conflict of interest and to unfair competition.

In its reply of 11 December 2000, the Commission informed the complainant that it had examined the information supplied by the complainant but come to the conclusion that there was no possible conflict of interest or unfair competition that could put into question the inclusion of these two companies in the shortlist.

In a letter to the Commission of 22 December 2000, the complainant reiterated its allegations and produced documentary evidence, namely extracts from the relevant company registers in the UK and in Ireland. These documents showed that 100 % of the shares in LM were owned by an Irish company called Development Consultants International Ltd. ("DCI"). All the shares but one (i.e., 99.9995 %) in TDI Group were also held by DCI. The remaining share in TDI Group was owned by Mr Michael Boyd who was a director in all of these three companies. Mr Boyd was also a director in TMS. In its letter, the complainant also mentioned that it had been informed that Mr Brian Milton who had carried out the fact-finding mission and prepared the terms of reference for the project concerned had been the director of a project implemented by TDI in the Czech Republic for the years 1998 and 1999 and presumably also for 2000.

In the absence of a reply, the complainant sent a further letter to the Commission on 9 January 2001 in which it again set out the facts and conclusions referred to in its previous letter. The complainant also claimed out that there were further links between TDI NRD and LM, given that two other persons (Mr Moran and Mr Meenan) were both directors of TDI Group and DCI. The complainant also asked a number of questions in relation to the roles that the persons and companies involved had played.

In its letter, the complainant further took the view that the primary aim of a tender was to ensure fair competition between all participants, i.e. that each participant had to determine its behaviour independently of all other participants. This was not the case where two companies having the same shareholders and the same directors submitted offers for the same tender. The complainant further submitted that there was also a conflict of interest. According to the complainant, the offers made by TDI and LM had clearly been fully controlled, directed and co-ordinated by a single entity, i.e. DCI, that fully controlled and co-ordinated the behaviour of these two companies through their common management and financial control. Finally, the complainant took the view that tenderers had not been treated equally since one tenderer had been allowed to submit two offers.

On 22 January 2001, the EuropeAid Co-operation Office of the Commission acknowledged receipt of the letters of 22 December 2000 and of 9 January 2001. The Commission claimed that it was investigating the matter anew and would revert to the complainant as soon as this was done.



In a letter of 31 January 2001, the SCR of the Commission informed the complainant that its tender had been unsuccessful and that the contract had been awarded to TDI NRD.

A further letter was sent to the Commission by the complainant on 7 February 2001. In this letter, the complainant claimed that the Commission's attention had already been drawn to the relevant facts by another company in October 2000. The complainant further took the view that the Commission had failed to comply with the time limit of 15 days established in the Commission's Code of Good Administrative Behaviour for its staff. Finally, the complainant expressed the view that in the light of the facts pointed out in its letters to the Commission, awarding the contract to TDI NRD appeared to be an abuse of power on the part of the Commission.

In its complaint to the Ombudsman lodged in February 2001, the complainant made, in substance, the following three allegations:

- (1) The Commission wrongly failed to exclude TDI NRD and LM from the tender
- (2) The Commission failed to react to the complainant's letters of 22 December 2000 and 9 January 2001 within an appropriate period
- (3) The award of the contract to TDI NRD constituted an abuse of power

The complainant asked the Ombudsman to recommend that the Commission should suspend the contract immediately and cancel it in time.

The complainant subsequently submitted evidence to show that from September 1998 until September 2000, Mr Brian Milton had been project director of a project implemented by DEVCO - DCI in the Czech Republic and that he had prepared the terms of reference for Tacis projects in Turkmenistan on behalf of the Commission.

## **THE INQUIRY**

### **The Commission's opinion**

In its opinion, the Commission made the following comments:

The complainant had been included in the shortlist of the relevant call for tender. On 5 December 2000, it had complained to the Commission, claiming that TDI NRD and LM should not have been included in the shortlist because of both a conflict of interest and unfair competition. A reply rejecting these allegations was sent on 11 December 2000. The decision not to exclude the two companies was based on information received from TDI in October 2000, following a similar complaint from another competitor.

The tender procedure had in the meantime been carried out, and six offers had been received and accepted for further evaluation. Two had been rejected (consortium GTZ and consortium ACE Agrar, including LM) since they had proposed the same key expert for the same position.



Only one tender, the consortium including TDI, had reached the minimum required technical threshold and had been accepted for financial evaluation. On 19 December 2000, the Commission had awarded the contract to the consortium including TDI.

#### *First allegation*

Regarding the allegation that TDI and LM should have been excluded because of a conflict of interest and unfair competition, TDI had already provided clarifications in October 2000 following a similar complaint from another competitor. According to the information provided, TDI (registered in Ireland), LM (registered in the UK) and TMS (registered in Ireland) were separate legal entities, whose boards of directors, managers and staff were operating totally separate from each other, even though they were subsidiaries of the same investment holding company, DCI. TDI had stressed that DCI was not involved in the day-to-day operations of any of its subsidiaries and that TDI competed aggressively with LM and TMS. The company had further pointed out that it had received no instruction from DCI concerning co-operation or collaboration with other companies and had concluded by proposing to give an "irrevocable and unconditional commitment" in writing to pursue the tender in full independence of the other shortlisted companies and consortia members, as it had done in the past following requests to that effect from the Commission (2) .

Having already received this information, the Commission had been able to reply to the complainant's letter of 5 December 2000 on 11 December 2000, informing the latter that it had been unable to find any proof of a conflict of interest or unfair competition which should lead to an exclusion of TDI and LM from the tender procedure.

#### *Second allegation*

Regarding the time it had taken the Commission to reply to the complainant's letters, the fax from the complainant dated 22 December 2000 had been sent after the Commission's close of business. The Commission had been closed between 23 December 2000 and 2 January 2001. A holding reply had been sent on 22 January 2001. This was in accordance with the Code of Good Administrative Behaviour for Staff in their Relations with the Public (according to which a holding reply was to be sent if a reply could not be sent within 15 working days) and section 8 of the Manual of Instructions (3) (according to which the contracting authority had to reply within 90 days of receipt of the complaint).

#### *Third allegation*

The decision to award the contract to the TDI consortium had been taken before the complaints of 22 December 2000 and 9 January 2001 had been received. Since then, the question had therefore been for the Commission to examine and evaluate the evidence put forward by the complainant in order to find out whether there was any serious evidence that should oblige the Commission to stop the project by cancelling the contract. The examination had taken longer than foreseen since the complainant had added new elements in its letters of 22 December 2000 and 9 January 2001 as well as in its complaint to the Ombudsman, received by the Commission on 7 March 2001.

Subsequent to the information thus provided, the Commission's services had contacted TDI again. In its reply of 11 January 2001, TDI had confirmed that Mr Boyd was a member of the boards of TDI Group, LM and TMS. It had also accepted that through his presence on the boards Mr Boyd might become aware of which tender each company was involved in but



claimed that he did not become involved in the operational aspects of each company's bidding or project management activities. TDI's letter of 11 January 2001 also claimed that the same arguments of operational independence applied to TMS, and that furthermore TMS was only involved in the provision of expertise to the Moscow National Co-ordinating Unit whilst the external assistance in Turkmenistan was provided by a company called 'Proman' under the supervision of a third company called 'Planet', neither of which had any connection whatsoever with TDI.

TDI had further confirmed that Mr Milton had in the past been contracted by DEVCO (which DCI (4) had acquired in 1999) as an independent consultant to carry out short-term assignments and claimed that his work for TDI, through DEVCO, had been to provide specific project-related expertise 'in the field'. TDI had however denied that Mr Milton had ever been an employee of TDI or had had any type of special relationship with TDI. Mr Milton, who had also been asked to explain his connection with TDI, had confirmed that he worked as a self-employed, independent consultant. He had explained that he had provided short-term consultancy to a Phare project in the Czech Republic awarded to DEVCO between 1998 and September 2000 which had been taken over by TDI. However, Mr Milton had denied any links with TDI. In a letter dated 26 January 2001 submitted by the Commission, Mr Milton noted that at the later stages of the implementation of the project on which he had worked for DEVCO, the latter had suffered financial difficulties and the project administration had been taken over by TDI. In a further letter dated 20 March 2001 that had also been submitted by the Commission, Mr Milton claimed that an article (5) on the project in the Czech Republic that had been included in a recent TDI publication had been used without his knowledge or approval and that he had never been an employee of TDI Group or any of its affiliated companies.

The Commission had subsequently decided to re-examine the evaluation report of the tenders and to re-calculate the scores of the evaluators, excluding the scores of Mr Milton, in order to check whether the result would change. As a result, TDI would have received an even higher score.

The file had thereafter been sent to the legal service of EuropeAid for examination. The conclusion had been that the examination had not provided any evidence that would justify a cancellation of the contract. There had been no serious irregularities in the procedure that would have prevented normal competition. No corrupt practices nor any breach of ethical clauses had been discovered. There had been no attempts to enter into unlawful agreements with competitors.

The complainant had been informed accordingly on 11 May 2001.

**Further inquiries** *Request for further information*

Having examined the Commission's opinion, the Ombudsman considered that he needed further information in order to be able to deal with the complaint. He therefore wrote to the Commission in June 2001, asking the latter (1) to provide a copy of the conditions applicable to the tender procedure, namely the Manual of Instructions and the Contract Notice referred to by the complainant, and copies of the sworn statements that TDI and LM had provided; (2) to specify whether it considered, taking account of *all* the complainant's arguments (including the



allegation that Mr Boyd was also a director in TMS and that two other persons - Mr Matt Moran and Mr Nahor Meenan - were both directors of TDI Group and DCI), that TDI appeared to have a "particular link with other tenderers or parties involved in the project"; (3) to explain on what basis it considered that a proposal to make an 'irrevocable and unconditional commitment' to pursue the tender in full independence should be able to dispel doubts concerning the eligibility of a tenderer, both in general and with regard to the case of TDI; and (4) to explain, taking account of the wording of Point 9 of the Contract Notice, why the offer submitted by LM was accepted for further evaluation, although the Commission had noted in its opinion that the offer of a consortium to which LM belonged had been excluded since it had proposed the same expert as another offer.

#### *The Commission's reply*

In its reply, the Commission submitted the documents requested by the Ombudsman. The Commission explained that although the Manual of Instructions had already been adopted when the tender procedure was launched, the standard documents corresponding to the calls for tender had not yet been harmonised and could not therefore be used. According to the Commission, it was for that reason that the sworn statements provided by the companies did not make reference to the Manual of Instructions. The Commission added that dossiers for service contracts now contained a declaration to the effect that bidders had to confirm that they had no specific link with any of the other bidders.

The declaration of LM dated 10 May 2000 contains a clause certifying that LM was not "guilty of serious misrepresentation with regard to information required for participation in an invitation to tender". Neither this declaration nor TDI's declaration which is dated 4 September 2000 includes any clause referring to the issue of a potential conflict of interest or to the question of a particular link with other companies or persons involved in the tender.

The Commission made the following comments:

#### *Second question*

The regulatory framework applicable to this call for tenders consisted of Annex III to Council Regulation no. 1279/96 of 25 June 1996, the General Regulations for tenders and the award of service contracts financed from Tacis funds, and the General Conditions for service contracts financed from Tacis/Phare funds.

The complainant's first argument was based on the link between TDI NRD, LM and TMS. LM was wholly owned by DCI which also owned 99.995 % of TDI Group to which TDI NRD belonged. Furthermore, TDI Group, DCI and TMS had a common director, Mr Boyd.

Section 7 of the Manual of Instructions required each candidate or tenderer to declare that it did not have any special relationships with other tenderers. Section 9.2 of the call for tenders also stated that the competition was open to all natural and legal persons and that each candidate could only submit one application.

On comparing the facts at their disposal with the rules in force, the Commission departments had noted first of all that, although there was an established financial link between TDI NRD and LM, *they did not have a parent-subsidiary relationship, but were both members of the same*



*investment group, DCI*. Although financially dependent on their parent company, they were legally separate from it. These two companies could therefore justifiably claim to be separate legal entities with commercial and management autonomy. Consequently, there were no grounds for automatically suspecting TDI NRD and LM of contravening the rules of the competition by responding separately to a call for tenders. The fact that they belonged to the same investment group did not prevent them from complying with the rules of competition between themselves.

The Commission departments felt that the financial link between TDI NRD and LM was not a special relationship within the meaning of the rules applicable. Going beyond the definition in its stricter sense, the Commission understood a special relationship to be a situation where two tenderers who had submitted bids entered into an agreement in an attempt to foil the competition. No proof of any such agreement had been produced. On the contrary, both LM and TDI NRD had submitted applications of high quality. This objective aspect had convinced the Commission that both companies had acted in pursuit of their own commercial interests, without any agreement, and in compliance with the rules of competition.

Furthermore, the fact, in such circumstances, of having a common director did not constitute a decisive aspect. On this point, the Commission subscribed to the logical point of view of the TDI management that Mr Boyd could not participate in the daily operation of both companies.

Regarding the link between TDI Group, LM and TMS, these three companies were owned by the same investment company, DCI, and had a common director, Mr Boyd. The exclusion clause (6) contained in the service contract between TMS and the Commission and Section 7.3 of the Manual of Instructions were based on Annex III of Regulation no. 1279/96, paragraph 5, which stated that "Natural and legal persons who have co-operated to prepare the terms of reference of a tendered project, or have otherwise contributed to define activities to be implemented under the Contract, may not participate in the tender either as tenderers or as a consortium or as sub-contractors or as members of the Tenderer's staff".

In the opinion of the departments responsible for organising calls for tender, section 7.3 of the Manual of Instructions, the article quoted above and the exclusion clause should be strictly interpreted as prohibiting a contractor and/or that contractor's *own subsidiaries* and/or a company belonging to the consortium that is awarded the contract from participating in a call for tenders concerning the same project. If interpreted more broadly, so as to exclude all companies with financial links with companies which have helped to prepare the project, the exclusion clause would jeopardise the realisation of the projects concerned, given the limited number of companies which can meet the criteria for carrying out Tacis projects.

In order to allow extensive participation, the Commission departments' principle was to apply paragraph 5 of the Regulation to each individual case, by carrying out an objective analysis of the role of the co-contractor in project preparation in order to assess whether it should be allowed to participate in project implementation. According to TDI's declarations, the role of TMS in preparing the terms of the call for tenders had been limited to "the provision of expertise to the Moscow National Co-ordinating Unit." As the link between TMS and TDI was not a special





relationship within the meaning of the relevant rules and, even if it were, the role of TMS in project preparation would not have allowed the Commission to exclude TDI from participating in project implementation, the Commission had rejected the allegation of a conflict of interest.

Regarding the presence of Mr Milton on the evaluation committee, the Commission had considered that the relatively large number of members of Tacis evaluation committees (five) made it very difficult for a single member to influence an evaluation unduly. Following the complaint, the Commission had re-examined the record of the evaluation and concluded that Mr Milton's vote had had no influence on the final choice.

#### Third question

The declarations made by the companies had both a moral and a legal value. The moral value lay in the company's undertaking, through such a declaration, to comply with the criteria of the clause, without needing to submit documentary evidence. The legal value lay in the Commission's possibility, in the event of any contravention, to invoke them to annul a procedure or cancel a contract.

#### Fourth question

The procedure for a restricted invitation for tender consisted of several stages. First of all, the contracting authority published a call for expressions of interest. Companies responding thereto and fulfilling certain criteria were put on a shortlist. No list of experts was required at this stage. The companies ACE and GTZ had satisfied the relevant criteria and had thus been included in the shortlist. It was only when the bids submitted thereafter were examined that the selection committee had realised that the same expert had been proposed by both companies. As a result, the bids of both companies had been rejected.

#### **The complainant's observations**

On 21 December 2001, the complainant submitted detailed (7) observations on the position adopted by the Commission in which it maintained its complaint.

Of the numerous comments made by the complainant, the following appear to be the most important:

When evaluating the bids, the weight attributed to the technical proposal (80 %) was extremely high. This represented a high barrier for all those competitors who, unlike TDI NRD, had not received unofficial clarifications and specific information through their strong links with persons involved in the project from the very beginning (TMS directly or through its director, Mr Boyd, who was also a director of TDI, and Mr Milton). It was remarkable that with the exception of the consortium including TDI NRD, none of the six consortia whose offers were evaluated had been able to overcome this technical barrier.

Mr Boyd, who was a director of DCI, TDI NRD, LM and TMS and a shareholder of TDI, had acted on behalf of DCI as the main orchestrator of the business strategy in the tender. He had intervened in the elaboration by TDI NRD and LM of their offers by transmitting to them, directly or indirectly, special, secret internal information acquired by TMS through its participation in the management of the Tacis Co-ordinating Unit in Turkmenistan. There was full, reciprocal collaboration and exchange of information between DCI, the Group leader, and its three affiliates as far as strategy was concerned. The fact that DCI did not carry out trade activities did





not alter the fact that it controlled its affiliated undertakings.

Tacis tenders required difficult, technical knowledge of local environments. Any additional structural or contractual links with legal or natural persons closely involved with a project and possessing privileged, secret information and being prepared to disclose the technical, inner characteristics of a project and the special conditions and features of the local situation gave the tenderer concerned an insurmountable advantage.

The sworn statements of TDI NRD and LM had absolutely nothing to do with the Ethics clause (Article 7 of the SCR Manual of Instructions) since they concerned compliance with Article 4.4 of the General Regulations for Tenderers (professional situation of candidates).

The Commission had not questioned the information provided to it by TDI NRD and had failed to ask the latter to provide any documentary evidence. The Commission had also failed to address the fact that Mr Boyd was also a director of DCI and that Mr Moran and Mr Meenan were also directors in both DCI and TDI.

The complainant had argued that Mr Milton had been employed or at least associated with TDI Group. It did therefore not understand why both the Commission and TDI argued that Mr Milton had not been an "employee" of TDI. In this context, it was important to note that in its e-mail to the Commission of 13 October 2000, TDI NRD had noted: "RDI and EDC, together with DEVCO (taken over by TDI in 1999), form TDI Natural Resources Division." The fact that Mr Milton collaborated with TDI NRD was further proved by the TDI publication to which Mr Milton's fax of 20 March 2001 referred. It was significant that in spite of the information provided in the e-mail of 13 October 2000, the Commission felt the need to ask TDI again about DEVCO, and that TDI had subsequently provided information that differed from the one it had given previously. The link between TDI NRD (through DEVCO) and Mr Milton corresponded to a "particular link".

The expression "special relationship" used by the Commission did not correspond at all to that of "particular link" in Article 7 (3) of the SCR Manual of Instructions.

The link between TDI and LM was not merely financial, but also managerial. A written agreement was not the only case where such a "particular link" existed.

The Commission's argument that a 'broader' interpretation of the relevant provisions would, in view of the limited number of companies that meet the criteria for Tacis projects, jeopardise the realisation of the projects concerned, was astonishing. Five other bids apart from the one in which TDI was involved had been evaluated by the Commission.

All the evidence necessary to reject TDI NRD and LM had already been known to the Commission before the complainant's letter of 5 December 2000.

In its observations, the complainant further alleged that various other rules relating to the call for tenders had been violated in the present case. In the complainant's view, the Ombudsman should therefore recommend that the Commission immediately terminate its contracts with TDI



NRD and with TMS, take measures to ensure that such unfair practices are stopped and that the SCR no longer award contracts to such competitors acting unfairly.

## THE DECISION

### 1 Preliminary remarks

1.1 The complainant, a consortium composed of three companies and bodies, had submitted an offer in reply to a call for tenders published by the European Commission for project SCR-E/110582/C/SV/TM (Integrated support for Agriculture and the Food Industry – Turkmenistan) in May 2000 as part of the Tacis Programme. It was put on a shortlist, together with seven other bidders including TDI Natural Resources Division ("TDI NRD") and Landell Mills Limited ("LM"). The complainant asked the Commission to reject the applications of TDI NRD and LM on the basis of Point 9 of the Contract Notice and Article 2 (3) of the SCR (Common Service for External Relations) Manual of Instructions, read in conjunction with Article 7 (3) thereof. The Commission rejected this application and awarded the contract to the consortium to which TDI NRD belonged. In its complaint to the Ombudsman, the complainant argued (1) that the Commission had wrongly failed to exclude TDI NRD and LM from the tender, (2) that the Commission had failed to react to two letters the complainant had addressed to it and (3) that the award of the contract to TDI NRD had constituted an abuse of power. These allegations were based on an alleged infringement of the above-mentioned rules.

1.2 In December 2001, the complainant submitted its observations on the Commission's opinion and the Commission's answer to a request for further information. In these observations, the complainant alleged that various other rules relating to the call for tenders had also been violated in the present case. In the complainant's view, the Ombudsman should therefore recommend that the Commission should immediately terminate its contracts with TDI NRD and with Technical Management Services ("TMS"), take measures to ensure that such unfair practices were stopped and that the SCR should no longer award contracts to such competitors acting unfairly.

1.3 The Ombudsman considers that in the light of his appraisal of the issues raised by the original complaint set out below, it appears neither necessary nor appropriate to consider these additional allegations and claims (on which the Commission has in any event not yet had the chance to comment) at this stage of his present inquiry.

### 2 Failure to exclude TDI NRD and LM from the tender

2.1 The complainant claims that the offers submitted by TDI NRD and LM ought to have been excluded from the tender on the basis of two main considerations. First, the complainant points out that Point 9 of the Contract Notice provided that candidates should submit only one application for the current contract "whatever the form of participation (as an individual candidate, or as leader or partner of a consortium candidate)" and that where a person submits more than one application, "all applications in which that person has participated will automatically be excluded". In the complainant's view, the applications of TDI NRD and of LM should be regarded as two applications submitted by the same person. Second, the complainant relies on Article 2 (3) of the SCR Manual of Instructions which provides that natural or legal persons "are not entitled to participate in competitive tendering or be awarded contracts



where (...) they are in one of the situations allowing exclusion referred to in the Ethics Clauses (section 7) in connection with the tender or contract. Article 7 (3) of the SCR Manual of Instructions obliges a candidate or tenderer to declare "that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project".

2.2 Before examining the detailed allegations made by the complainant in this context, the Ombudsman considers it useful to consider the facts on which the complaint is based. The Ombudsman notes that some of these facts have been confirmed, expressly or implicitly, by the Commission. These are the following: LM is a company registered in the United Kingdom. At the relevant time, 100 % of its shares were owned by an Irish company called Development Consultants International Ltd. ("DCI"). TDI NRD is part of TDI Group, a company registered in Ireland. All the shares but one (i.e., 99.9995 %) in TDI Group were also held by DCI. The remaining share in TDI Group was owned by Mr Michael Boyd who was a director in both TDI and LM. TMS, a company registered in Ireland, was part of the consortium managing the Tacis Co-ordinating Unit in Turkmenistan. TMS is also a subsidiary of DCI (8) . Mr Boyd is a director of TMS as well. TMS played a certain role in preparing the call for tenders. Mr Milton was one of the five evaluators who had examined the bids lodged in reply to the call for tenders. Mr Milton had worked for a company called DEVCO (an Irish company) as an independent consultant between 1998 and September 2000. DEVCO had been taken over by DCI in 1999.

2.3 Turning to the complainant's detailed allegations, the complainant claims that the bids submitted by TDI NRD and LM should be regarded as two applications submitted by the same person, within the meaning of Point 9 of the Contract Notice. The Commission rejects this view. The Ombudsman notes that the relevant bids were submitted by two companies (9) that, although owned by the same parent company, nevertheless constitute two separate entities. The complainant suggests, in its observations on the Commission's opinion, that DCI fully controlled its subsidiaries TDI and LM and that the submission of bids by these companies was orchestrated by DCI. The Ombudsman considers, however, that this allegation is not supported by sufficient evidence. The mere fact that TDI and LM are both subsidiaries of DCI is not sufficient to establish that bids submitted by TDI and LM respectively ought to be considered as bids made by DCI. In these circumstances, the Ombudsman considers that the Commission's conclusion that Point 9 of the Contract Notice had not been infringed in the present case appears to be reasonable.

2.4 The complainant's main argument is based on the assumption that there existed a "particular link" between TDI and LM on the one hand and between TDI and "other tenderers or parties involved in the project" on the other hand. In this context, the complainant relies on the facts set out above and makes the following further submissions: In addition to the financial links between DCI, TDI, LM and TMS (the latter all being subsidiaries of DCI), there were also links relating to the management, given that Mr Boyd was a director in all four companies and that two further persons, Mr Moran and Mr Meenan were also directors in both DCI and TDI. Mr Milton, one of the persons evaluating the bids, had at least been associated with TDI Group.

2.5 The Commission takes the view that there was no "special relationship" between TDI, LM



and TMS. In its view, the relevant exclusion clause and similar exclusion clauses have to be interpreted strictly so as not to jeopardise the realisation of projects, given the limited number of companies that can meet the criteria for carrying out Tacis projects. The Commission claims that although there was an established financial relationship between TDI and LM, there was no parent-subsidary relationship. In the Commission's view, these companies were legally separate from their parent company and could therefore justifiably claim to be separate legal entities with commercial and management autonomy. The Commission submits that a "special relationship" could also exist where there is an agreement between companies to restrict competition but takes the view that there is nothing to suggest that such an agreement existed. It further claims that the fact of having a common director does not constitute a decisive factor in the circumstances of the case. On this point, the Commission agrees with the view expressed by TDI according to which Mr Boyd cannot participate in the daily operation of both companies. Even if there was a "special relationship" between TDI and TMS, the role of TMS in preparing the call for tenders was limited to "the provision of expertise to the Moscow Co-ordinating Unit" and would thus not allow the Commission to exclude TDI from participating in project implementation. Regarding Mr Milton, the relatively large number of members on Tacis evaluation committees (five) made it very difficult for a single member to influence an evaluation unduly. According to the Commission, it was also verified that Mr Milton's vote had had no influence on the choice of contractor made.

2.6 The exclusion clauses contained in the relevant contracts and provisions serve the purpose of ensuring that the competition between bidders that a call for tenders is not jeopardised by a conflict of interest or by the existence of "particular" links between the participants in such a tender. The Commission argues that these clauses and rules do not need to be interpreted more widely than this purpose requires. This approach appears to be reasonable. It would also appear to be correct to assume, as the Commission argues, that such a "particular link" (10) exists where there is a parent-subsidary relationship between the companies concerned or where these companies have entered into an anti-competitive agreement with the aim of restricting competition. On the basis of the available evidence, neither of these conditions is fulfilled in the present case. TDI, LM and TMS are subsidiaries of the same parent company but none of them is a parent or subsidiary of one of the other companies. Nor has the existence of any anti-competitive agreement between these companies (or some of them) been established.

2.7 The Ombudsman considers, however, that the question as to whether a "particular link" within the above-mentioned meaning exists has to be assessed on the basis of all the facts of a given case. In the present case, there are several aspects that need to be underlined. *First*, on the basis of the evidence that has been submitted it appears that Mr Boyd is the managing director of TDI and also a director in LM, DCI and TMS. The presence of the managing partner of TDI on the board of LM and TMS is difficult to reconcile with TDI's claim that it competes vigorously with these companies. Even assuming that Mr Boyd is not involved in the operational aspects of the activities of LM and TDS, it cannot be excluded that in his capacity as director of these other companies he may obtain information that could be used for the benefit of TDI. The Commission accepts that through his presence on the boards, Mr Boyd might become aware of which tender each company was involved in. The Ombudsman considers that the complainant's allegation that Mr Boyd has indeed obtained such information and used it in the said way or that



he has even 'orchestrated' the activities of all these companies in relation to the call for tenders have not been established. In his view, however, the risk of such an exchange of information ought to have been considered by the Commission. *Second*, the complainant has submitted evidence to show that apart from Mr Boyd, two further persons were directors of both TDI and DCI. This reinforces the complainant's claim that the links between these two companies (and indirectly between TDI on the one hand and LM and TMS on the other) were more than just financial. The Commission has not made any comment regarding this additional link, despite being asked to do so by the Ombudsman. *Third*, it cannot be excluded that 'an irrevocable and unconditional commitment' to pursue the tender in full independence could be taken into account by the Commission in this context. According to the information that has been submitted, however, TDI has *proposed* to make such a commitment. The Commission has not claimed or shown that this proposal was indeed accepted by it and implemented by TDI. *Fourth*, the Commission accepts that Mr Milton who was one of the evaluators carried out some work for Devco, a company that was subsequently taken over by DCI's group of companies. Whilst it is true that it has not been established that Mr Milton was an employee of TDI, the Commission does not seem to have examined in detail the allegation that there was a "particular link" between this person and TDI. In this context, the discrepancy between the e-mail of TDI dated 13 October 2000 and the letter from TDI of 20 March 2001 (which were written by the same person) should be noted. Whilst the e-mail explains that Devco had been taken over by TDI, the letter notes that Devco was acquired by DCI. The relationship between Devco, DCI and TDI is further obscured by a letter from Mr Milton of 26 January 2001 according to which the administration of the project run by Devco "was taken over by TDI". Finally it should be taken into account that TDI's e-mail of 13 October 2000 notes that Devco and two other companies "form the TDI Natural Resources Division". This would appear to be confirmed by the letterhead of a fax sent by TDI on 15 January 2001. The Ombudsman considers that in these circumstances, the relationship between Mr Milton and TDI ought to have been examined more closely by the Commission. This applies *a fortiori* to the complainant's claim that Mr Milton prepared the terms of reference for the relevant call for tenders on which the Commission has not commented. *Fifth*, in so far as TMS is concerned the Commission has limited itself to endorsing TDI's argument according to which TMS only played a minor role in preparing the call for tenders. It is hard to understand why the Commission – which had concluded an agreement with TMS regarding the work to be carried out – failed to provide its own analysis as to whether this claim was correct.

2.8 On the basis of the evidence that has been submitted, there are serious grounds that would seem to support the complainant's claim that there were "particular links" between TDI and other companies or persons involved in the tender and that TDI and LM consequently ought to have been excluded from the tender. As noted above, Mr Boyd, the managing director of TDI, is also on the board of LM, DCI and LMS. The Commission accepts that through his presence on the boards, Mr Boyd may obtain information regarding the commercial activities of all these companies. There is thus a clear risk that such information on the activities of LM and LMS in particular could be used to the benefit of TDI. Furthermore, Mr Milton, one of the persons entrusted with the task of evaluating the bids, worked for TDI or a related company shortly beforehand. The complainant alleged that he also prepared the terms of reference for the relevant call of tenders, and the Commission has not commented on this claim. Finally, a further



company closely linked to TDI and LM, that is to say LMS, appears to have played a certain role in the call for tenders.

2.9 In such circumstances, principles of good administration would have required the Commission to carry out a comprehensive examination. The Commission has failed to do so in the present case. As discussed above, several facts that appear to be relevant do not seem to have been considered at all by the Commission. With regard to others, the Commission appears simply to have relied on statements made by the incriminated company without using the means at its disposal to verify the correctness of these statements. He considers, In this context, regard should be had to the fact that the Commission itself points out that it already received a similar complaint regarding the participation of TDI in the call for tender, well before the one submitted by the complainant in the present case (11) . The Commission would thus appear to have had sufficient time to clarify the situation by obtaining all the necessary information.

2.10 In these circumstances, the Ombudsman concludes that the Commission's failure to carry out a comprehensive examination of the issues raised constituted an instance of maladministration.

### **3 Failure to reply to letters within an appropriate period**

3.1 The complainant claims that the Commission has failed to reply to its letters of 22 December 2000 and of 9 January 2001 within an appropriate period.

3.2 The Commission points out that the first of these letters was sent after the Commission's close of business in 2000 and that a holding reply was sent on 22 January 2001. Regarding the second letter, the Commission appears to claim that it had to reply to the complaint within 90 days.

3.3 The Ombudsman considers that in the light of the detailed comments submitted by the Commission in its opinion and in its reply to the request for further information, there are no grounds to continue his inquiry into this aspect of the complaint.

### **4 Abuse of power**

4.1 The complainant claims that in the circumstances of the case, the award of the contract to NRD constituted an abuse of power.

4.2 The Commission has not made any specific comments on this allegation.

4.3 Given the fact that this allegation is closely linked to the first allegation, the Ombudsman considers that there is not need for him to deal with it at the present stage of his inquiry.

### **5 Conclusion**

The Ombudsman therefore considers that the Commission's approach in the present case gave rise to an instance of maladministration in so far as it failed to carry out a comprehensive examination of the issues raised by the complainant. The Ombudsman notes that the complainant claims that the Commission should suspend and cancel the contract with TDI. It appears from the Contract Notice provided by the Commission that this contract was to be concluded for a period of 30 months.





The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

**The draft recommendation**

The European Commission should carry out a comprehensive examination of all the relevant issues in the present case. This examination should also cover the additional allegations and claims made by the complainant in its observations. The Commission should further reconsider its decision not to exclude TDI and LM from the tender and its subsequent decision not to cancel the contract with TDI in the light of the results of this examination.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 31 May 2002. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 13 February 2002

Jacob Söderman

- (1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, page 15.
- (2) Together with its opinion, the Commission submitted a copy of an e-mail sent by TDI to the Commission on 13 October 2000 and in which TDI replied to an e-mail from the Commission of 26 July 2000 enquiring as to the 'status/relation' of TDI with LM and TMS.
- (3) 'Manual of instructions: Contracts for works, supplies and services concluded for the purposes of Community co-operation with third countries', SEC (1999) 1801, adopted by the Commission on 10 November 1999.
- (4) TDI's letter of 11 January 2001 refers to an acquisition of DEVCO by TDI. The Commission referred to a further letter from TDI dated 20 March 2001 for "clarifications" concerning the relations between DEVCO, TDI and DCI. According to this letter, DEVCO had been acquired by DCI and was a wholly-owned subsidiary of the latter.
- (5) This article from the Newsletter of TDI Group 2000/2001 had been submitted by the complainant. It names Mr Milton as its author and refers to work carried out by "TDI Natural Resources, and formerly Devco".
- (6) "38. The Contractor and all affiliated companies and any members of a consortium led by the Contractor to supply services under this contract shall be excluded from all restricted and open tenders launched by the Contracting Authority within the framework of implementation of





the provision of EU assistance to the Partner States in Eastern Europe and Central Asia during the validity of the contract and, beyond this period, from the execution of projects in whose preparation the Contractor was involved."

(7) These observations comprise 35 pages plus annexes.

(8) No details regarding the relationship between DCI and TMS are given. However, given that TDI, LM and TMS are all referred to as subsidiaries of DCI it is likely that DCI holds all (or nearly all) shares in TMS, as it does with regard to LM and TDI.

(9) This expression has been used for the sake of convenience. It is however not fully accurate in two respects. First, and as mentioned above, one of the bids was submitted by TDI NRD which is not itself a company but part of TDI. However, since this distinction is irrelevant for present purposes, TDI NRD and TDI will be referred to as one and the same entity in the text. Second, it should be remembered that the relevant bids were submitted not by the companies referred to above but by the consortia to which they belonged.

(10) The Ombudsman assumes that the fact that the Commission refers to the term "special relationship" in this context is due to an error committed by the translator of the Commission's opinions (which were originally submitted in French).

(11) See the Commission's e-mail to TDI of 26 July 2000 in which the recipient is asked, due to "a possible exclusion case", to provide "all information" regarding TDI's relationship with LM and TMS.