

Draft recommendation to the European Commission in complaint 1878/2002/GG

Recommendation

Case 1878/2002/GG - Opened on 12/11/2002 - Recommendation on 18/06/2003 - Decision on 02/02/2004

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

THE COMPLAINT

The complainant, a small company from the UK, was the co-ordinator of a project for the elaboration of a safety device designed to prevent trucks from rolling over and thus to save lives. This project was the subject-matter of an Exploratory Award contract (G3ST-CT-2001-00329) with the European Commission aimed at preparing a CRAFT proposal within the framework of the specific research and technological development programme “Competitive and Sustainable Growth”.

Under cover of a letter dated 3 October 2001, the Commission sent two copies of the draft contract to the complainant. These copies were to be signed by the complainant and its partner company and to be returned to the Commission. In its letter, the Commission asked the complainant to note that

“- the Commission itself cannot sign the contract before the completion of the commitment procedures;

- the submission of this contract does not imply any legal commitment by the Commission, as the conclusion of a contract is subject to the outcome of these procedures.”

Article 3 (“Duration”) of the draft contract provided that the duration of the project was to be seven months from 26 September 2001. (2)

The complainant and its partner company signed the draft contracts and returned them to the Commission.

The contract was signed by the Commission on 16 January 2002 and sent to the complainant under cover of a letter dated 1 February 2002. According to the complainant, this letter was received by it on 4 February 2002.



The CRAFT proposal had to be submitted by 28 February 2002 in order to be eligible. However, in order to benefit of an “EU Preliminary Check”, the proposal had to be submitted to the Commission already by 7 February 2002. The complainant’s proposal was submitted on 12 February 2002 for this pre-eligibility checking. According to the complainant, this was due to the fact that it had relied on the (erroneous) advice of Beta Technology Ltd (the national contact point for such proposals in the UK) that the relevant deadline was 13 February 2002.

The complainant’s proposal was ultimately rejected by the Commission on the grounds that it was not eligible since the total EC contribution requested exceeded 50 % of the project costs.

According to the complainant, its proposal had been checked using the CRAFT calculator (3) and by Beta Technology Ltd before it was submitted to the Commission. In its view, the use of gross figures rather than net figures, i.e. a simple misunderstanding, had resulted in a request for 54 % contribution from the EC.

The complainant took the view that what it considered to be a “ridiculously short timetable” had created conditions in which errors could be made. According to the complainant, it had only a few days, certainly less than a week, to prepare its proposal. The complainant submitted that it had done all in its power to prepare for the contract, when it finally arrived, at its own risk and expense in time and money. According to the complainant, its proposal failed on one criterion that had not been properly explained to it by Beta Technology Ltd.

The complaint was first submitted to the Ombudsman by Dr. Caroline Jackson MEP on 31 July 2002 (complaint 1436/2002/GG). On 30 August 2002, the Ombudsman informed the complainant and Dr. Jackson that the complaint was inadmissible since the appropriate prior approaches had not yet been made.

On 11 September 2002, the complainant thereupon wrote to the European Commission’s Directorate-General Research. In its reply of 9 October 2002, the Commission expressed the view that the Commission’s services had set up a number of tools and/or services to avoid applications being ineligible:

- a self-eligibility checklist provided in the CRAFT information brochure;
- a self-eligibility check on the cost breakdown using the CRAFT calculator, available on the internet;
- a network of SME (small and medium-sized enterprises) National Contact Points, to assist in the preparation of proposals;
- a pre-eligibility check by the Commission’s services for proposals that were introduced at least three weeks before the deadline of 28 February 2002 (i.e., up to and including 7 February 2002)

In the Commission’s view, there had therefore been sufficient time to perform an eligibility check using these tools and/or services.

In the present complaint that was lodged with the Ombudsman in late October 2002, the complainant renewed its previous complaint. It further claimed that the Commission should



reimburse its expenses with regard to the Exploratory Award (29 920 €).

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The complainant's Exploratory Award contract had been selected following a Commission decision on 26 September 2001. As a general rule, the contractors could start working and the resulting eligible costs were accepted as of that moment. This fact was clearly mentioned in the Exploratory Award model contract available on the relevant website as well as on the SME Techweb pages. Furthermore, on 3 October 2001, the complainant was informed of the selection of its Exploratory Award contract.

Following a publication in the Official Journal of 1 December 2001, the indicative deadlines for submitting CRAFT proposals in 2002 had been changed. The deadlines foreseen on 16 January and 17 April 2002 were replaced by the deadline of 28 February 2002. This modification had immediately been extensively publicised. At the moment of the selection of the complainant's Exploratory Award proposal, the information concerning this change of deadline had not yet been available. The above-mentioned letter of 3 October 2001 had however pointed out that proposals had to arrive before the final deadline of the programme and invited the complainant regularly to check the update of the deadline on the internet. All contractors concerned by the change (more than 300) had been informed personally. The complainant had been informed by fax on 11 January 2002.

Along with the complainant's proposal, 14 other Exploratory Award proposals had been selected on 26 September 2001. All of them had been informed that they could start working as of that date. 12 of them had managed to submit an eligible Step 2 (CRAFT) proposal by 28 February 2002, leading to the payment of their Exploratory Award. One of them submitted an eligible Step 2 proposal that was not a CRAFT proposal, and the last one let the Commission know that he wanted to withdraw from the contract.

From the above, it was clear that the complainant's contract had started on 26 September 2001 (and not on 1 February 2002 when it received the contract signed by the Commission), and that thus sufficient time had been allowed to prepare a good Step 2 proposal to be submitted before 28 February 2002.

The complainant's proposal had been considered not eligible because the total EC contribution exceeded 50 % of the project costs. It had to be noted that when discrepancies were noticed in the application forms, as in this case (between the A forms and table B4), the figures in the signed forms prevailed for the purposes of the eligibility check.

The complainant's observations

In its observations on the Commission's opinion, the complainant maintained its complaint and made the following further comments:



The letter of 3 October 2001 had clearly stated that the draft contract did not imply any legal commitment by the Commission. Information on the new deadline was received on 11 January 2002. This had reduced the available time for submission of, at least, four months as quoted in the draft contract, down to one and a half months. The actual contract was received on 4 February 2002. The 'pre-screening' check would easily have shown up the small error that had been made.

The problems concerning Beta Technology Ltd had been taken up with the UK Government and might be taken further.

FURTHER INQUIRIES

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

Request for further information

The Ombudsman therefore asked the Commission to explain (1) why the complainant could be expected to start working on its project and to spend money on the same although the Commission had explained, in its letter of 3 October 2001, that the submission of the draft contract to the complainant did not imply any legal commitment by the Commission and (2) why notwithstanding the fact that the deadline had been brought forward to 28 February 2002, the contract that appeared to have been signed by the Commission on 16 January 2002 was only sent to the complainant on 1 February 2002.

The Commission's reply

In its reply, the Commission made the following comments:

The model contract for Exploratory Awards adopted by the Commission in September 1999 provided the option to take the date of the Commission decision selecting the proposal (meaning a date prior to the signature of the contract) as the date for starting the project (article 3 (1) of the contract). This implied that the costs could be incurred from that starting date. The reason for this provision was that the Exploratory Award scheme concerned preparatory measures which had to lead to the submission of a proposal for a CRAFT or other RTD project (called "Step 2 proposal"). Therefore a quick start of the exploratory phase was of particular importance because the Step 2 proposals had to be submitted against call deadlines.

On 3 October 2001, a draft contract was sent to fifteen Exploratory Award co-ordinators (including the complainant) only one week after the Commission decision selecting their proposals in order to accelerate the process. By doing so, the Commission was making sure that the co-ordinators were informed as soon as possible of the decision taken and had the necessary time to check their personal data as well as their partners' and the content of their contract which provided that the starting date would be 26 September 2001. While the co-ordinators verified and amended their contracts, the Commission could finalise internally the administrative procedures. This way, the SMEs could start working at their own risk, without being delayed by the administrative procedures of the Commission.



The complainant returned the signed contract back to the Commission. Before doing so, it did not request any modification or any complementary information on the conditions. By signing, the complainant acknowledged the content and accepted these conditions. At a later stage, the complainant submitted a Payment Request Form dated 10 February 2002 by which it requested the payment of its award (22 440 €), for reimbursement of its costs incurred “for the period from 26/09/2001 to 10/02/2002”.

After the Director from the relevant Thematic Programme had signed the contract, the Commission had to complete a number of administrative steps before the contract could be sent. These steps always took several days.

The complainant's observations

In its observations, the complainant made the following comments:

The Commission had failed to answer the Ombudsman's questions. Until 11 January 2002, the complainant had been working towards a deadline of 17 April 2002. A proportionate amount of work had been done given the speculative nature of the contract and the foreseen 14 weeks of time still available to complete the work detailed within the Exploratory Award contract (it was estimated that only 10 % of the work had been carried out by then). It suddenly became clear that only 6 weeks were left to complete the work whereas still no notification had been received that there was a legal contract by which the complainant would be paid. The complainant was therefore compelled to work much faster and therefore less effectively and accurately.

Upon receiving the signed contract on 4 February 2002, the complainant further increased the pace of work, and since it was a company of effectively only two people, they were working day and night to fulfil the terms of the contract.

Of course the complainant had claimed payment for work carried out between 26 September 2001 and 10 February 2002. However, the Commission seemed to imply that the complainant had worked evenly throughout this period. This was not the case.

The ‘administrative steps’ that the Commission carried out took 16 days from the date of signing the contract to the date when it was sent out on 1 February 2002. This represented almost half of the time that was available until the deadline for submitting proposals, thus putting even greater pressure on the complainant.

THE DECISION

1 Introductory remarks

1.1 According to Article 195 of the EC Treaty, the European Ombudsman has the power to receive and examine complaints about maladministration in the activities of the Community institutions and bodies. No action by any other authority or person may therefore be the subject of a complaint to the Ombudsman.

1.2 The Ombudsman's inquiry into the present complaint thus deals exclusively with possible maladministration on the part of the European Commission.



2 Failure to grant sufficient time for preparing a CRAFT proposal

2.1 The complainant, a small company from the UK, entered into an Exploratory Award contract (G3ST-CT-2001-00329) aimed at preparing a CRAFT proposal within the framework of the specific research and technological development programme “Competitive and Sustainable Growth”. The draft contract was sent to the complainant on 3 October 2001, signed by the latter and its partner company and returned to the Commission. The draft contract provided for a duration of the contract of seven months from 26 September 2001. By fax of 11 January 2002, the Commission informed the complainant that this deadline had been brought forward to 28 February 2002. On 1 February 2002, the Commission sent the complainant the contract signed by it. According to the complainant, it received this contract on 4 February 2002. A pre-screening check as to the eligibility of proposals was available for proposals that were received by the Commission by 7 February 2002. The complainant’s proposal was submitted on 12 February 2002. According to the complainant, Beta Technology Ltd, the national contact point for such proposals in the UK, had advised it that the deadline for submitting proposals for the pre-screening test was 13 February 2002. The complainant’s proposal was ultimately rejected by the Commission as being ineligible. In its complaint to the Ombudsman, the complainant alleged that what it considered to be a “ridiculously short timetable” had created conditions in which errors could be made.

2.2 The Commission took the view that the complainant’s contract had started on 26 September 2001 and that thus sufficient time had been allowed to prepare a good proposal to be submitted before 28 February 2002.

2.3 The Ombudsman notes that the complainant’s allegation that the Commission did not give it sufficient time within the framework of the relevant contract in effect covers two different aspects, namely (1) the deadline of 28 February 2002 for submitting proposals and (2) the deadline of 7 February 2002 for submitting proposals for a pre-screening test to be carried out by the Commission’s services.

2.4 In so far as the final deadline for submitting proposals is concerned, the Ombudsman notes that the complainant takes the view that its proposal failed on account of a small error that could easily have been discovered. The Ombudsman further notes that the complainant submitted its proposal to the Commission on 12 February 2002. It is true that the time left for the complainant was substantially reduced compared to the time-scale (seven months) foreseen in the contract, regardless of whether one considers that the relevant date in this context should be the date when the complainant was informed of the new deadline (11 January 2002) or the date when it received the contract signed by the Commission (4 February 2002). However, regard should be had to the fact that it took the complainant little more than a week after having received the signed contract to submit its proposal. Furthermore, when the complainant submitted its proposal to the Commission, more than two weeks were still left before the expiry of the final deadline of 28 February 2002. In these circumstances, the Ombudsman considers that it has not been established that the deadline of 28 February 2002 was such as to prevent the complainant from submitting an eligible proposal.

2.5 The Ombudsman notes that the Commission offered a pre-eligibility check for proposals that



were introduced at least three weeks before the deadline of 28 February 2002 (i.e., up to and including 7 February 2002). Given that the relevant programme appears to have been addressed to small and medium-sized enterprises that will usually have only limited experience in carrying out such projects for the EU, the possibility thus offered was of certain importance and usefulness to the companies concerned. The Ombudsman considers that it is good administrative practice to ensure, when offering such a possibility, that all companies concerned are able to benefit thereof. This means in particular that companies should have disposed of a sufficient period of time for preparing their proposals before the expiry of the deadline for the pre-eligibility check on 7 February 2002.

2.6 According to the Commission, the date of 26 September 2001 mentioned as the starting date in the contract should be taken into account in this context. The Ombudsman notes, however, that the Commission itself, in its letter of 3 October 2001 accompanying the draft contract, expressly warned the complainant that the Commission did not accept any legal commitment before it had signed the contract. No prudent contractor could thus be expected to carry out its obligations under the draft contract before the Commission had signed the latter. This does not exclude, as the complainant has convincingly explained, that such a contractor nevertheless carried out a proportionate amount of work, on the basis of the expectation that the Commission would in the end sign the contract. The Ombudsman further considers that the fact that the complainant signed the draft contract which provided for a starting date of 26 September 2001 without asking for a modification is, contrary to what the Commission claimed, of limited relevance in the present context. When the complainant signed the draft contract, it could not know that instead of the seven months foreseen therein it would ultimately only have five months to prepare its proposal. Nor could the complainant reasonably foresee that more than three months were to lapse before the Commission itself finally signed the contract and that it would receive the signed contract less than one month before the final deadline for submitting proposals. Incidentally, the Commission's reliance on the terms of the contract should be contrasted with the Commission's submission that the period for submitting proposals ended on 28 February 2002 whereas the contract expressly provided for a period of seven months starting on 26 September 2001. It does not appear that the Commission considered it necessary to modify the contract in this respect.

2.7 The Ombudsman cannot exclude that the complainant would have disposed of a sufficient period of time in order to prepare its proposal and submit it for a pre-eligibility check to the Commission if the latter had immediately informed the complainant after it had finally signed the contract on 16 January 2002. Given that the Commission had shortly before individually informed each of the companies concerned about the new deadline, there is nothing to suggest that the Commission could not have informed the complainant on or shortly after 16 January 2002 that the contract had been signed. The complainant correctly observed that it took the Commission 16 days from the date of signing the contract before it sent the latter to the complainant and that this represented almost half of the time that was available until the deadline for submitting proposals on 28 February 2002. What is more important in the present context, given that the complainant according to its account (which the Commission has not challenged) received the signed contract on 4 February 2002, it only disposed of 3 or 4 days to prepare or finalise its proposal in order to submit it to the Commission for the pre-eligibility



check offered by the latter. The Ombudsman considers that such a short period of time was clearly insufficient.

2.8 The Ombudsman's conclusion, therefore, is that by failing to grant the complainant a reasonable amount of time in order to submit its proposal for the pre-eligibility check it had offered to carry out, the Commission committed maladministration.

3 The complainant's claims

3.1 The complainant claimed that the Commission should reimburse its expenses with regard to the Exploratory Award (29 920 €).

3.2 The Commission did not comment on this claim.

3.3 In the light of his finding that the Commission has committed maladministration in the present case, the Ombudsman considers that it would be appropriate for the Commission to consider compensating the complainant, to the extent that it has suffered loss as a result of the maladministration identified in paragraph 2.8 above.

4 Conclusion

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

The draft recommendation

The Commission should consider compensating the complainant, to the extent that it has suffered loss as a result of the maladministration identified in paragraph 2.8 above.

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 30 September 2003. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 18 June 2003

P. Nikiforos DIAMANDOUROS

(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) The deadline for submission of the CRAFT proposal was subsequently shortened to 28 February 2002 (see the Commission's opinion).

(3) See below.