

**European EEIG Information Centre**  
**Lindenweg 37, D-72414 Rangendingen**

[ewiv@libertas-institut.com](mailto:ewiv@libertas-institut.com)

**phone +49 7471 984996-0**

**Fax +49 7471 984996-19**

[www.ewiv.eu](http://www.ewiv.eu), [www.libertas-institut.eu](http://www.libertas-institut.eu)

**3.5.2011**

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## **Collection of EEIG-related cases**

**from the published reports of the European Ombudsman,  
Strasbourg**

## EU Ombudsman Activities / Compiled on 3.5.2011

### • **Fall : 3693/2005/(ID)PB**

Geöffnet am 27.01.2006 - Entscheidung vom 22.05.2007

- Rechtsgebiet(e) : **Niederlassungsrecht und freier Dienstleistungsverkehr**
- Art der beklagten Missstände – (1) Verletzung von oder (2) Verletzung von Pflichten in Bezug auf : **Verpflichtung zur Begründung von Entscheidungen und Berufungsmöglichkeiten [Artikel 18 und 19 EKGV]**

### ***Summary of decision on complaint 3693/2005/ID (Confidential) against the European Commission***

This complaint concerned the rejection of the complainant's bids on the basis of a provision of a procurement notice, under which "[n]o more than (...) six applications for all the lots can be submitted by a natural or legal person (including legal persons within the same legal group), whatever the form of participation (...)". The complainant, a European Economic Interest Grouping (EEIG) established under Regulation 2137/85<sup>[1]</sup>, alleged that the Commission was wrong to accuse X, a member of this EEIG, of applying for seven lots.

The Ombudsman first noted that it is not his role to assess the admissibility of tenders and to substitute his judgment for that of the Institution concerned as to whether a tender meets the applicable admissibility/eligibility criteria. Accordingly, he examined whether the Commission provided valid and adequate grounds for its challenged decision.

The Ombudsman further remarked that, under the principle of equal treatment of tenderers and the relevant obligation of transparency in the tender procedures, the admissibility and award criteria stated in a tender notice (or similar document) must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. In addition, when tenders are being assessed, the above-mentioned criteria must be applied objectively and uniformly to all tenderers. In this context, information made publicly available by the contracting authority to potential tenderers, with regard to the interpretation and application of the admissibility or award criteria, or of rules of Community law which may reasonably be considered as having a bearing on the application of these criteria, is particularly important. Such information is likely to affect the preparation and formulation of the tenders and is substantially relevant to the significant Community interest of affording potential tenderers the opportunity to compete on an equal footing. Hence, when the contracting authority examines the tenders submitted to it, due regard must be had to the content of such information, at least to the extent that its accuracy or propriety has not been contested by a (potential) tenderer or it is not manifestly violative of the relevant provisions of the tender notice (or similar document) or of Community law.

In the present case, the Ombudsman found that the Commission failed to comply with the above-mentioned requirement. The Ombudsman also found that the Commission failed to give adequate reasons for its challenged decision, taking into account certain passages of its Communication on the participation of EEIGs in public contracts and programmes financed

by public funds, on which the complainant could, at least in principle, justifiably rely when preparing its bids. Taking into account that the relevant contracts had been awarded, signed and were currently being executed and that the challenged decision concerned the selection phase of the tender procedure, the Ombudsman concluded that it would not be justifiable to accept the complainant's claim that the challenged decision should be revoked and the applications should be reinstated. Given that the complainant had not made any other claim, the Ombudsman closed the case with a critical remark.

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[1] Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ 1985 L 199, p. 1.

## **Preceding document (to the short version of the decision above):**

- **Fall : 3693/2005/(ID)PB**

Geöffnet am **27.01.2006** - Entscheidung vom **22.05.2007**

- Betroffene Einrichtung(en) : **Kommission der Europäischen Gemeinschaften**
- Rechtsgebiet(e) : **Niederlassungsrecht und freier Dienstleistungsverkehr**
- Art der beklagten Missstände – (1) Verletzung von oder (2) Verletzung von Pflichten in Bezug auf : **Verpflichtung zur Begründung von Entscheidungen und Berufungsmöglichkeiten [Artikel 18 und 19 EKGV]**

Strasbourg, 22 May 2007

Dear Mr X,

On 25 November 2005, you made a complaint to the European Ombudsman, on behalf of A EEIG. Your complaint was directed against the European Commission and concerned the EuropeAid Co-operation Office's rejection (i) of six applications submitted by the A Consortium, in response to the procurement notice EuropeAid/119860/C/SV/multi, for Lots 01, 02, 06, 07, 08, and 09, and (ii) the application submitted by B eG, in response to the above-mentioned procurement notice, for Lot 13.

On 27 January 2006, I opened an inquiry into your complaint and forwarded it to the President of the Commission. The Commission sent its opinion on 20 July 2006. I forwarded it to you with an invitation to make observations. I have received no observations from you.

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

**BACKGROUND TO THE COMPLAINT AND SUBJECT-MATTER OF THE OMBUDSMAN'S INQUIRY** △

The complainant, A EEIG, is a European Economic Interest Grouping. The European Economic Interest Grouping was established by Council Regulation 2137/85(1) as a legal instrument designed to facilitate transnational co-operation between firms at the European level. The formation of such a grouping gives rise to a legal entity, the purpose of which "is to facilitate or develop its members' economic activities and to improve or increase the results of those activities. Its activity shall be related to the economic activities of its members and must not be more than ancillary to those activities" (Article 3, paragraph 1, of Regulation 2137/1985).

The complainant received a number of invitations to tender for the European Commission's multiple framework contract to recruit technical assistance for short-term expertise exclusively for third countries benefiting from Commission external aid (procurement notice EuropeAid/119860/C/SV/multi). The tender covered various sectors of Commission expertise and was thus divided into 13 technical domains (Lots 01-13). The terms of the tender included a provision requiring that no more than one application per lot and no more than six applications for all lots be submitted by a single natural or legal person. More specifically, Article 13 of the procurement notice provided as follows:

*"No more than one application per lot and six applications for all the lots can be submitted by a natural or legal person (including legal persons within the same legal group), whatever the form of participation (as an individual legal entity or as a leader or partner of a consortium submitting an application). In the event that a natural or legal person (including legal persons within the same legal group) submits more than one application per lot and/or more than six applications for all the lots, all applications in which that person (and legal persons within the same legal group) has participated will be excluded."*

The A Consortium (hereinafter, "the Consortium") submitted applications for six lots in total (Lots 01, 02, 06, 07, 08, and 09). The complainant participated in the Consortium for all six of these applications. In five of these applications, the complainant was the consortium leader (Lots 01, 06, 07, 08, and 09). In one case ( Lot 02), C led the Consortium, with the complainant participating as a partner. The Consortium successfully pre-qualified for Lots 01, 06 and 08 and at the time of the complaint was in the process of preparing final offers to present to EuropeAid. The applications of the Consortium regarding Lots 02, 07 and 09 were found to be non-compliant with requirements of the procurement notice other than the ones laid down in its Article 13(2). C contested the rejection of the application of the Consortium for Lot 02. Following this challenge, which seems to have been accompanied by the provision of additional information on the composition of the Consortium, the Commission issued the decisions which gave rise to the present dispute.

More specifically, the complaint has arisen from the Commission's position that B eG contravened Article 13 of the procurement notice. B was a member of the complainant. B participated in the five Consortium applications led by the complainant, as a separate partner, that is, independently of the complainant. B also participated independently as a partner in another consortium which submitted an application for Lot 13. This latter consortium was apparently led by an entity called E. On 19 January 2005, C received a letter from the Commission rejecting the Consortium application led by C (for Lot 02). On 20 January 2005, the complainant received a letter from the Commission rejecting the Consortium's applications led by the complainant (for Lots 01, 06, 07, 08, and 09). Both letters were dated 14 January 2005. During the same period, the Commission also rejected the application of the Consortium, led by E, for Lot 13. The reason given was contravention of Article 13 of the

Procurement notice. The Commission considered that B had applied for seven lots (rather than the specified maximum of six), more specifically

- for Lot 2, "*as member of [the complainant]*";
- for Lot 13, "*on its own*"; and
- for Lots 01, 06, 07, 08, and 09, "*individually and with [the complainant]*".

Invoking Article 13 of the procurement notice "*and to ensure the equal treatment of all applicants*", the Commission decided to reject all seven applications "*where [B was] present*".

On 19 January 2005, E contested the rejection of its application for Lot 13. It submitted a statement by B, in which B confirmed that it had not applied for Lot 02. In the same statement, B explained that, since Lot 02 concerned a sector completely unrelated to its know-how and expertise, it was not interested in applying for it. For this reason, B had not concluded any agreement to be involved in any application for Lot 02 as a consortium partner or as a member of the complainant.

By letters dated 19 January 2005 and 20 January 2005, the Consortium contested the rejection of its six applications, on the basis of Article 13 of the procurement notice. The Consortium argued that, when the declaration of intent to tender for Lot 02 was signed by the complainant, it was understood as a declaration of an "independent legal entity", clearly distinguished from its members, and not as a declaration of the whole grouping. In support of its positions, the Consortium also referred to four passages of the Commission's Communication "Participation of European Economic Interest Groupings (EEIGs) in public contracts and programmes financed by public funds" (hereinafter, "the Communication")<sup>(3)</sup> and pointed out that the Commission's approach would create a considerable obstacle to participation in public procurement, both for members of an EEIG and for the EEIG itself as a legal entity. It concluded that if the complainant itself satisfied the relevant criteria, it was entitled to tender as an independent legal entity, using only its own economic and financial standing or technical capacity. In relation to the Consortium's application for Lot 02, the complainant had presented only its own financial data and technical experience and had not used any consolidated figures of its members. This meant that B had not contributed or participated in any way in the application for Lot 02.

In its replies of 3 February 2005, the Commission confirmed its decisions to reject the Consortium's applications. It noted that the Communication is only interpretative and that the only legal basis is Regulation 2137/85, on the basis of which the Commission had come to the conclusion that the Consortium's applications should be rejected. More specifically, the Commission invoked the rule that the members of an EEIG have "*unlimited joint and several liability for its debts*" and observed that the EEIG "*legally engages its members*" and that "*if the EEIG can offer a reassuring frame for the participation to public contracts, its commitment also commits its members.*" The Commission also made certain references to the Communication, in connection with the Consortium's relevant argumentation.

In a letter dated 4 November 2005, the complainant referred to its disqualification from the tender procedure here concerned and stated the following:

*"1) It is clear for us now that all member companies of [A] EEIG are considered to be participating in a tendering process if [A] EEIG as a group participates. 2) It is not clear for us whether the membership in [A] as an EEIG has even more disadvantages. We have re-examined the documents that usually have to be signed by a bidding firm. As you know, in the*

*standard application form companies have to sign a declaration where they shall indicate whether they [have attached a current list of the enterprises in the same group or network as ourselves] or whether they [are not part of a group or network]. What consequences does it have for an EEIG member firm if it attaches a current list of the EEIG members and it turns out that another member firm (not [A] EEIG as a group) is bidding for the same project? Would that be a ground for exclusion of both firms? Our opinion is that it shouldn't be a ground for exclusion, otherwise the EEIG members would lose their independence to a serious extent."*

On 25 November 2005, the complainant submitted a complaint to the European Ombudsman about this matter. It alleged that the Commission was mistaken to accuse B eG (a member of the complainant) of applying for seven lots, namely, Lots 01, 02, 06, 07, 08, 09 and 13, rather than the maximum of six stipulated by Article 13 of the procurement notice. Therefore, B argued that the Commission had wrongly rejected the Consortium's applications for Lots 01, 02, 06, 07, 08, and 09, and B's application for Lot 13. Moreover, it claimed that the challenged decisions of EuropeAid, expressed in its letters dated 14 January and 3 February 2005, should be revoked without qualification and the six applications of the Consortium, for Lots 01, 02, 06, 07, 08, and 09, should be reinstated immediately. On 27 January 2006, the Ombudsman opened an inquiry into the above allegation and claim made by the complainant.

### **The Commission's opinion on the complaint**

In its opinion, the Commission rejected the complainant's allegation and relevant claim, relying, in essence, on Article 24 of Regulation 2137/85 and on the reasoning contained in its challenged decisions. The Commission also (i) noted that that the Framework contract started on 16 September 2005 and is to remain in force until 15 September 2007; (ii) said that in its above-mentioned letter of 4 November 2005 the complainant acknowledged that it was now clear for it that "*all member companies of [A] EEIG are considered to be participating in a tendering process if [A] EEIG as a group participates*"; and (iii) referred to the judgment of the Court of First Instance in Joined Cases T-376/05 and T-383/05(4). The Commission argued that the Court's reasoning in this decision, regarding Article 13 of the procurement notice here concerned, should also be understood as applying to the rule that the same legal person, including legal persons within the same legal group, may submit no more than six applications for all lots.

The complainant does not appear to have submitted observations on the Commission's opinion.

## **THE DECISION**

### **1 The Ombudsman's approach**

1.1 The complaint concerns the rejection by the European Commission of certain applications under a procurement notice. According to A EEIG ("the complainant"), the Commission was mistaken to accuse B eG of applying for seven lots rather than the maximum of six. The complainant claimed that the challenged decisions should be revoked and the applications should be reinstated.

1.2 The European Ombudsman first notes it is not his role to assess the admissibility of tenders and to substitute his judgment for that of the Institution concerned as to whether a tender meets the applicable admissibility/eligibility criteria.

The Ombudsman's approach in the present decision will therefore be to examine whether the Commission has provided valid and adequate grounds for its challenged decision.

1.3 As regards the applicable principles, the Ombudsman recalls the principle of equal treatment of tenderers, which is a general principle of Community law(5). According to this principle, tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority(6). The principle of equal treatment of tenderers also implies an obligation of transparency, in order to enable verification that this principle has been complied with(7). The above requirement means, *inter alia*, that the admissibility and award criteria stated in a tender notice(8), in the context of a restricted tender procedure, must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way(9). It also means that, when tenders are being assessed, the above-mentioned criteria must be applied objectively and uniformly to all tenderers(10). In this context, information made publicly available by the contracting authority to potential tenderers with regard to the interpretation and application of (i) the admissibility or award criteria, and (ii) rules of Community law which may reasonably be considered as having a bearing on the application of these criteria, is particularly important. Such information is likely to affect the preparation and formulation of the tenders(11) and is substantially relevant to the significant Community interest of affording potential tenderers the opportunity to compete on an equal footing. Hence, when the contracting authority examines the tenders submitted to it, due regard must be had to the content of such information (and consistency in the contracting authority's behaviour must be ensured), at least to the extent its accuracy or propriety has not been contested by a (potential) tenderer or it is not manifestly violative of the relevant provisions of the tender notice (or similar document) or of Community law.

## **2 The adequacy of the Commission's reasoning**

2.1 Article 13 of the procurement notice here concerned clearly excludes natural or legal persons from submitting applications for more than six lots under this particular tender. However the clause of the provision which refers to "participation" is not clear. The clause reads as follows:

*"No more than one application per lot and six applications for all the lots can be submitted by a natural or legal person (including legal persons within the same legal group), whatever the form of participation (as an individual legal entity or as a leader or partner of a consortium submitting an application)" (emphasis added).*

The Ombudsman considers that it is not clear whether this prohibition concerns a legal person which has applied for lots, as an individual legal entity or as a leader or partner of a consortium, but is also a formal member of an EEIG which has applied, as leader or partner of a consortium, for lots, without however taking into account the resources and capacities of this legal person.

2.2 In the case at hand, the fact that B is a legal person, within a legal group (EEIG), is not in dispute. Nevertheless, the complainant questions the way the Commission interpreted and applied the above-mentioned clause in the case of B. It argues that B's specialist expertise, project experience, financial data and manpower were not used in the Consortium's application for Lot 02. This fact does not appear to have been disputed by the Commission. Therefore, although B participates in a legal group which was a leader or a partner of a consortium that applied for six lots, including lot 02, it may reasonably be argued, as the

complainant has done, in essence, that B did not participate in the submission of an application for Lot 02, within the meaning of Article 13 of the procurement notice. This argument is based on the fact that B did not apply for that lot, either as an individual legal entity or as a leader or partner of a consortium, and that, as alleged by the complainant and not contested by the Commission, its resources and capacities were not taken into account in the context of the complainant's application for Lot 02.

2.3 In this regard, it is important to note that, in light of the remarks made in point 1.2 above, a normally diligent tenderer could reasonably rely on the Communication, as regards the interpretation of Regulation 2137/85(12), to the extent that it is relevant to the interpretation of Article 13 of the procurement notice. In its letters of 19 and 20 January 2005 contesting the rejection of its applications, the Consortium invoked, *inter alia*, the following passage of the Communication:

*"On the basis of the Procurement Directives, any contractor wishing to take part in a public procurement contract may be requested to prove his identity or his economic and financial standing or his technical capacity (...). If the EEIG does not itself, as an independent legal entity, satisfy these selection criteria, the principle of consolidated assessment requires account to be taken of the capacities of its members."*

This passage is followed by an explanation:

*"This means that:*

*- where all the members of the EEIG are firms satisfying the selection criteria, an EEIG may not be required to satisfy these conditions as well,*

*- on the other hand, if the members of an EEIG do not all satisfy the selection criteria, the members that will in practice perform the contract must satisfy the conditions imposed by the contracting authority(...)" (emphasis added).*

This last sentence, read together with the above passage explicitly invoked by the Consortium, may reasonably be considered as implying that, when an EEIG submits a tender, it is not presumed that all the members of the EEIG undertake to participate in the performance of the contract. If this is the case, then it should not logically further be presumed that all the members of the EEIG participate in the submission of the tender. But the Commission's challenged decisions were based, in essence, on such a presumption.

Moreover, the Commission disposed too easily of the Consortium's reasonable reliance on the above passage of the Communication. In this regard, the Commission, in its letter of 3 February 2005, argued that the Communication is merely interpretative and that the only legal basis is Regulation 2137/85, on which basis it had come to the conclusion that the Consortium's applications should be rejected(13). This argument is ill-founded for two reasons. First, "*the only legal basis*" was not actually Regulation 2137/85, but rather Article 13 of the procurement notice. Second, due regard must be had to the content of the Communication, when interpreting Article 13 of the procurement notice, at least insofar as the statements made and clarifications given in the Communication had not been contested by a tenderer, through a properly formulated reservation, or potential tenderer, and were not manifestly contrary to the provisions of Regulation 2137/85.

2.4 The Commission's application of Article 13 of the procurement notice in the present case has been based on Regulation 2137/85, more specifically on its Article 24(1), which provides as follows:

*"The members of [an EEIG] shall have unlimited joint and several liability for its debts and other liabilities of whatever nature. National law shall determine the consequences of such liability."*(14)

The Commission has drawn from this paragraph (invoked, in its opinion, cumulatively with Articles 1(2) and 3(1) of Regulation 2137/85(15)) the conclusion that *"a commitment from an EEIG commits its members: if an EEIG submits an application for a tender procedure, its members are applying jointly."* However, this interpretation is far from unobjectionable. First, it is not clear from the various linguistic versions of the first sentence of this paragraph, whether it refers only to financial obligations or to obligations in general(16). Second, even assuming that this sentence actually covers all kinds of obligations, it refers to the member's "liability", apparently in case of non-fulfilment (or incomplete fulfilment) of the EEIG's obligations. This "liability" seems to refer to financial responsibility rather than responsibility for (proper) *in natura* fulfilment of the EEIG's relevant obligations (such as the ones that would result from the conclusion of the Framework contracts here concerned). The contrary interpretation would not lead to satisfactory, reasonable results, at least where actual fulfilment of obligations by a member of the EEIG presupposes the performance of economic activities not conducted by the specific member. Third, the second sentence of the above paragraph refers to the national law with regard to the determination of *"the consequences of such liability"*. The Commission has in no way referred to the relevant national law. The Commission appears to have considered that "liability", in the sense of Article 24(1) of Regulation 2137/85, covers the submission of *"an application for a tender procedure"*, without having addressed the issues discussed above, which reasonably and clearly call into question the correctness of its interpretation. In any event, the clarifications made in the part of the Communication cannot be considered as manifestly incompatible with the provisions of Article 24(1) of Regulation 2137/85(17). The relevant part of the Communication, set out in point 2.3 above, states that, if an EEIG does not itself, as an independent legal entity, satisfy the qualitative selection criteria, it will be examined whether its members that will in practice perform the contract satisfy these criteria. The Ombudsman notes that the accuracy of the information contained in the Commission's clarifications does not appear to have been contested by a (potential) tenderer in the context of the tender procedure at issue.

2.5 In its opinion, the Commission also observed that even the complainant acknowledged in its letter of 4 November 2005 that it was now clear for the complainant that *"all member companies of [A] EEIG are considered to be participating in a tendering process if [A] EEIG as a group participates"*. This observation, to the extent it implies that the complainant has accepted the Commission's approach, does not seem to be correct. The above statement made by the complainant simply referred to its understanding of the considerations of other parties about the matter and was followed by an analysis and a query clearly challenging the propriety of these considerations. Nor is the Commission's argument drawn from the Court of First Instance's decision in Joined Cases T-376/05 and T-383/05 convincing. This decision dealt with Article 13 of the procurement notice here concerned, but not with its portion which is relevant to the case at hand. More specifically, this decision dealt with the application of the provision under which *"[n]o more than one application per lot (...) can be submitted by a natural or legal person(...)"*. The reasoning of the judgment does not appear to provide a solution to the issues raised by the present complaint.

2.6 In light of the above, the Ombudsman considers that, when the Commission applied article 13 of the procurement notice, it should have adequately addressed the issue raised by the complainant about the information contained in the Communication. However, it failed to do so. The Ombudsman, therefore, concludes that the contested decisions, expressed in EuropeAid's letters dated 14 January and 3 February 2005, concerning the rejection, on the basis of Article 13 of the procurement notice, of the Consortium's applications for Lots 01, 02, 06, 07, 08, and 09, and B's application for Lot 13, were not adequately reasoned. This was an instance of maladministration.

### **3 Claim that the challenged decisions of the EuropeAid should be revoked and the six applications of the Consortium should be reinstated**

3.1 As regards the complainant's claim, the Commission noted, in particular, the following:

- i. Contracts regarding the foregoing lots had been awarded and signed and were currently being executed. The Framework contract started on 16 September 2005 and is to remain in force until 15 September 2007.
- ii. The challenged decisions concerned the selection phase of the tender procedure. Afterwards the tenderers selected submitted their offers, which were evaluated by the relevant committee. Even assuming that the complainant had been unlawfully excluded and could have submitted offers for the lots concerned, these offers would still have had to be evaluated and there could have been no certainty about the outcome of the procedure.
- iii. The exclusion of the Consortium's applications for Lots 07 and 09 was also based on another ground, namely, the Consortium's lack of technical capacity.

The Ombudsman notes that, the complainant has not challenged the Commission's above analysis of the current situation.

3.2 In the circumstances referred to by the Commission, the Ombudsman considers that it would not be justifiable to accept the complainant's claim that the challenged decisions should be revoked and the applications should be reinstated. Given that the complainant has not made any other claim, the Ombudsman will close the case with a critical remark.

## **4 Conclusion**

On the basis of his inquiry into the present complaint, the Ombudsman makes the following critical remark:

The contested decisions, expressed in EuropeAid's letters dated 14 January and 3 February 2005, concerning the rejection, on the basis of Article 13 of the procurement notice, of the Consortium's applications for Lots 01, 02, 06, 07, 08, and 09, and B's application for Lot 13, were not adequately reasoned.

For the reasons explained in point 3 above, the Ombudsman considers that no further inquiries are justified into the complainant's claim. The Ombudsman therefore closes the case.

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

## **Further remark**

In its letter of 3 February 2005 to the complainant and in reply to an argument put forward by the complainant, the Commission stated that its Communication "Participation of European Economic Interest Groupings (EEIGs) in public contracts and programmes financed by public funds" is only interpretative. The Commission argued that the only legal relevant basis is Regulation 2137/85. The points made in this letter and in the Commission's opinion on the complaint could be interpreted as suggesting that that the above Communication contains statements which might not be compatible with the pertinent provisions of Regulation 2137/85 or give misleading information about the true meaning of these provisions. The Commission could, thus, consider examining this matter more closely.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

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[\(1\)](#) Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ 1985 L 199, p. 1.

[\(2\)](#) See Commission letter of 14 December 2004, concerning Lots 07 and 09, and Commission letter of 17 December 2004, concerning Lot 02.

[\(3\)](#) OJ 1997 C 285, p. 17. These passages read as follows:

*"(...) the EEIG can have different functions: it can be used simply as a framework for coordinating and organizing its members' activities or it can conclude in its own name and execute contracts awarded by the public authorities or under programmes financed by public funds.( ...)*

*Structural aspects of of the EEIG: stability and flexibility*

*The Regulation guarantees a grouping's ability to adapt to economic conditions through the considerable freedom its members have in their contractual relations and the internal organization of the grouping.( ...)*

*The ancillary nature of the activity of an EEIG should not be an obstacle to its participation in public procurement. (...)*

*On the basis of the Procurement Directives, any contractor wishing to take part in a public procurement contract may be requested to prove his identity or his economic and financial standing or his technical capacity (...). If the EEIG does not itself, as an independent legal entity, satisfy these selection criteria, the principle of consolidated assessment requires account to be taken of the capacities of its members."*

[\(4\)](#) Joined Cases T-376/05 and T-383/05 *TEA-CEGOS* [2006] ECR II-205.

[\(5\)](#) See Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091, paragraph 69.

[\(6\)](#) See, for example, Case C-448/01 *Evn and Wienstrom* [2003] ECR I-14558, paragraph 47.

[\(7\)](#) Case C-448/01 *Evn and Wienstrom*, cited above, paragraph 49.

[\(8\)](#) Or similar document, such as an invitation to specific persons for submission of bids.

[\(9\)](#) See Case C-19/00 *SIAC Construction* [2001] ECR I-7725 paragraph 42 (referring to award criteria).

[\(10\)](#) See Case C-448/01 *Evn and Wienstrom*, cited above, paragraph 48 (referring to award criteria).

[\(11\)](#) Cf. Case C-331/04 *ATI EAC* [2005] ECR I-10109, paragraphs 24, 28, and 29.

[\(12\)](#) As noted in its introduction, "[t]his communication describes the EEIG and clarifies some of its characteristics and the way in which it operates so as to ensure that it can tender for public contracts and participate in programmes financed by public funds on an equal footing with other firms."

[\(13\)](#) It is not clear from this letter or from the Commission's opinion whether the Commission considers that the Communication contains statements which may not be correct, in view of the pertinent provisions of Regulation 2137/85, or give misleading information about the true meaning of these provisions. The Ombudsman will make a relevant further remark, at the end of the present decision.

[\(14\)](#) The French version reads as follows: "*Les membres du groupement répondent indéfiniment et solidairement des dettes de toute nature de celui-ci. La loi nationale détermine les conséquences de cette responsabilité.*"

[\(15\)](#) Article 1(2) provides that an EEIG "*shall from the date of its registration as provided for in Article 6, have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued.*"

Article 3(1) provides that: "*The purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself. Its activity shall be related to the economic activities of its members and must not be more than ancillary to those activities.*"

[\(16\)](#) For example, the term "dettes" or "χρέη" used in the French and Greek versions respectively seems to refer only to financial obligations.

[\(17\)](#) The same is true with regard to Articles 1(2), 3(1), 5 and 7 of Regulation 2137/85 referred to in the Commission's opinion, without any specific explanations about their bearing on the Commission's positions. Relatedly, it should also be noted that the references in the opinion of the Commission to Articles 6 and 12 of the complainant formation contract or to the prohibition of changes in the identity or composition of tenderers do not adequately explain and support its positions.

## • **Fall : 310/99/ADB**

Geöffnet am **09.06.1999** - Entscheidung vom **31.08.2000**

- Betroffene Einrichtung(en) : **Kommission der Europäischen Gemeinschaften**
- Rechtsgebiet(e) : **Auswärtige Beziehungen**
- Art der beklagten Missstände – (1) Verletzung von oder (2) Verletzung von Pflichten in Bezug auf : **Informationsbegehren [Artikel 22 EKGV], Rechtmäßigkeit (inkorrekte Anwendung von materiellen und/oder verfahrensrechtlichen Vorgaben) [Artikel 4 EKGV]**

Strasbourg, 31 August 2000

Dear Mr B.,

On 18 March 1999, you lodged a complaint with the European Ombudsman on behalf of International United Surveyors (I.U.S.). You claimed that the European Commission failed to reply to letters in which you sought clarifications about tender procedures for food aid projects.

On 9 June 1999, I forwarded the complaint to the President of the European Commission. The European Commission sent its opinion on 13 October 1999 and I forwarded it to you with an invitation to make observations, if you so wished. I received observations from a law firm, Dorsey & Whitney LLP, on 1 December 1999. On 25 June 2000 you informed my services that you had indeed entrusted the case to the aforementioned law firm but that in the meantime the collaboration had been discontinued.

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

### **THE COMPLAINT** △

International United Surveyors [EEIG\(1\)](#) (hereinafter I.U.S.) and one of its members German Control participated in tender procedures concerning the monitoring of food aid projects organised by the European Commission. Allegedly, the Commission twice failed to reply to letters addressed to it.

1. On 4 February 1999, I.U.S. sent a letter to the Commission to obtain information about the outcome of tender procedure N° 84-052533. The delays in the processing and rumours as to the possible cancellation of the procedure made I.U.S. suspect irregularities.

2. On the same date, German Control, a member of the I.U.S., sent a letter to the Commission relating to call for expression of interest N° IA:AUS/31/RU/SCR.E1 - JOCE S 251-171772. Due to an extremely short deadline for the submission of applications, I.U.S. had participated in this procedure through one of its members, i.e. German Control. In fact, all the members of the I.U.S. consortium should have carried out the project once awarded to German Control. Given that this appeared to raise procedural difficulties, German Control decided to withdraw its application. It therefore contacted the Commission and sought clarifications about the Commission's position.

On 18 March 1999, I.U.S. lodged a complaint with the Ombudsman. It alleged that despite its request, the Commission had never replied to its letters. The Ombudsman's services made

numerous informal contacts with the responsible department within the Commission but could not obtain the settlement of the matter. The Ombudsman therefore asked the Commission for an opinion.

## **THE INQUIRY**

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

The opinion of the European Commission on the twofold complaint was in summary the following:

1. The Commission's anti fraud unit initiated investigations about companies monitoring food aid. Thus, tender procedure N° 84-052533 was cancelled in November 1998. All the applicants, including the complainant, had been officially informed through a telephone call. The Commission therefore rejected the complainant's allegation.
2. German Control had been shortlisted by the Commission further to the call for expression of interests. German Control which is part of the European Economic Interest Grouping I.U.S. asked the Commission to substitute I.U.S. for German Control among the shortlisted applicants. The Commission refused. The whole situation had been discussed at length with the complainant and the Commission therefore considered that no further explanations were needed. Nevertheless, on 23 June 1999, further to the Ombudsman's inquiry, the Commission sent a letter to the complainant and once again explained its position.

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

The European Ombudsman forwarded the European Commission's opinion to the complainant with an invitation to make observations. A law firm acting on the complainant's behalf made in summary the following observations:

Regarding the call for tender N° 84-052533, the Commission had made attempts to address I.U.S.'s concern further to the Ombudsman's intervention. However a response by telephone could not be considered as an appropriate mean to inform applicants of the cancellation of a tender procedure.

In its observations, the complainant also put forward that the tender process should not have been stopped. The contract should have been awarded as soon as possible to an applicant which was not involved in the investigations into suspected fraud. The complainant requested that the European Ombudsman obtain clarifications on this issue.

In this regard, it is necessary to state that these allegations were not part of the original complaint which concerned the failure to reply to letters. Deciding upon the complainant's new claims would go beyond the present investigation and require new proceedings. These allegations could however form part of a new complaint.

Finally, the Ombudsman was informed that I.U.S. had addressed a letter to the Commission on 26 October 1999. In the event that the Commission would not respond, I.U.S. would request its lawyers to initiate a procedure before the Court of First Instance of the European Communities.

## **FURTHER INQUIRIES**

On 25 June 2000, the Ombudsman's services contacted the complainant. The complainant informed the Ombudsman that the collaboration with the aforementioned law firm had ceased. I.U.S. had no intention to pursue proceedings against the European Commission on this

matter.

## **THE DECISION**

### **1 Failure to reply to the complainant's letter about tender N° 84-052533**

1.1 The complainant alleged that the Commission failed to answer a letter in which it queried about the outcome of a lengthy tender procedure.

1.2 The Commission considered that all the applicants had already been informed by telephone of the cancellation of the procedure.

1.3 Principles of good administration require that Institutions act in accordance with the rules and procedures laid down in Community legislation. Article 9(6) of Regulation 2519/97<sup>(2)</sup> foresees that tenderers should be informed in writing of the Commission's decision not to award a contract. In the present case, the Commission failed to do so. It also failed to correct its behaviour when it was given the opportunity to do so (i.e. further to the complainant's letter and the Ombudsman's informal approaches). The Ombudsman therefore considers that the Commission's acting constitutes an instance of maladministration.

### **2 Failure to reply to the complainant's letter relating to a call for expression of interests**

2.1 The complainant alleged that the European Commission had failed to reply to a letter in which it sought clarifications as to the Commission's position.

2.2 The Commission acknowledged that it had not replied to the complainant's letter. It considered that the issue had been exhaustively discussed and that the complainant needed no further explanations.

2.3 The Ombudsman notes that in the course of the present inquiry the Commission sent a reply which appears to answer the points raised by German Control in its letter of 4 February 1999. The Ombudsman has found no ongoing instance of maladministration as regards this aspect of the case and therefore considers that the European Commission has taken steps to settle this aspect of the case.

### **3 Conclusion**

On the basis of the European Ombudsman's inquiries in this case, it appears necessary to make the following critical remark:

Principles of good administration require that Institutions act in accordance with the rules and procedures laid down in Community legislation. Article 9(6) of Regulation 2519/97 foresees that tenderers should be informed in writing of the Commission's decision not to award a contract. In the present case the Commission failed to do so. It also failed to correct its behaviour when it was given the opportunity to do so (i.e. further to the complainant's letter and the Ombudsman's informal approaches). The Ombudsman therefore considers that the Commission's acting constitutes an instance of maladministration.

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

Yours sincerely  
Jacob Söderman

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<sup>(1)</sup> EEIG : European Economic Interest Grouping.

<sup>(2)</sup> Commission Regulation (EC) No 2519/97 of 16 December 1997 laying down general rules for the mobilisation of products to be supplied under Council Regulation (EC) No 1292/96 as Community food aid Official Journal L 346 , 17/12/1997 p. 0023 - 0040 Article

9(6) : (...) *Tenderers shall be informed of the decision not to award the contract by written telecommunication (...).*