



EUROPEAN COMMISSION
Information Society and Media Directorate-General

General Affairs
External Audit
Head of Unit

Brussels, **29 JAN. 2009**
INFO-S5/FD/PYD D(2008) 103075

EDPS - Incoming mail	
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**EDPS – EUROPEAN DATA
PROTECTION SUPERVISOR**
Mr. Joaquín Bayo Delgado,
Assistant Supervisor
Rue Wiertz 60
B – 1047 Brussels

Subject: Complaint of

Your ref.: JBD/HK/ktl/D(2008)1800 C2008-0622

Dear Mr. Bayo Delgado,

I am writing to you in response to your letter dated 4 December 2008 in relation with a complaint of I _____ hereafter: _____, represented by _____ and _____

As indicated in your letter, _____ raised the issue of contacts with _____ in a letter dated 15 October 2008, asking for information about the matter and the actions we intended to take. DG INFO acknowledged receipt of this letter on 24 October 2008 and formally answered on 16 December 2008 (see annexes 3, 4 and 5).

It is our understanding that the complaint to the EDPS has been filed by _____ as a company (in relation to one of its consultant, Mrs. _____) and not by Mrs. _____ herself as a natural person. We would like you to confirm that our understanding is correct.

For the sake of clarity and as proposed in your letter, we would like to provide you first with information regarding the audit programme and the embedded processing of personal data. We will then explain the audit procedures related to _____ and in particular the elements related to the audit contradictory procedure. We would like to point out in that respect that the contradictory procedure is still ongoing and that we are currently preparing the answer to _____ on the comments they made on the draft audit report. Finally we will present you in detail the contacts we had with _____ in the course of this audit, including the oral and written transfer of information, as well as the reasons and the legal basis of the transfer and the Commission's views on the matter.

1. AUDIT PROGRAMME

1.1. Context of the audit programme

The Rules for Participation¹ relating to the Sixth Framework Programme of the European Community for research, technological development and demonstration activities² (FP6) spell out that "the Commission will carry out the research activities in such a way as to ensure the protection of the Community's financial interests by means of effective controls".

In that perspective, Article II.29 of the FP6 model contract³ foresees the possibility for the European Commission to carry out audits in order to ensure the proper execution of the projects and the contracts, up to five years after the final payment of a project.

The contracts under the Research Framework Programmes are signed with a consortium of partners on a project per project basis. In such a consortium, there is always one main partner that takes the role of coordinator, interfacing with the Commission for the negotiation and contract signature as well as for the project reporting and payments for all the partners.

In that context, Article II.29 of the FP6 model contract provides that the contractors (coordinator as well as the other partners) must make available directly to the Commission all the detailed data that may be requested by the Commission with a view to verifying that the contract is being properly managed and performed.

Furthermore, the contractors must ensure that the Commission's departments have on-the-spot access, notably to the contractor's offices, at all reasonable times and to all the information needed to carry out these audits.

1.2. Compliance of the audit programme with Regulation (EC) n° 45/2001 on the protection of individuals with regard to the processing of personal data

1.2.1. *Art. 5 -- Lawfulness of personal data processing*

In this context and in view of the FP6 actuality principle which foresees that the Community's contribution is established on basis of the actual costs incurred, the Commission has no other possibility than processing various data related to the actual costs incurred for the funded research projects. As an important part of these costs is related to personnel costs, this processing of data includes necessarily also the processing of personal data.

<http://eur-lex.europa.eu/JOIndex.do?year=2002&serie=L&textfield2=355&Submit=Search>

http://ec.europa.eu/research/fp6/index_en.cfm &

<http://cordis.europa.eu/fp6/dc/index.cfm?fuseaction=UserSite.FP6HomePage>

http://ec.europa.eu/research/fp6/index_en.cfm?p=0_contracts & <http://cordis.europa.eu/fp6/find-doc.htm>

With a budget of more than 16 billion €, FP6 represents a very significant part of the budget directly managed by the Commission. Appropriate, written and documented audit procedures have thus been established in order to ensure the protection of financial interests of the EC in accordance with professional standards.

In that perspective, it is of the utmost importance to clearly state that, if the audit obligation of the Commission makes the processing of personal data necessary, its purpose is limited to the above mentioned protection of the Community's financial interests.

The processing of personal data executed by the external auditors of the Research DGs therefore fully complies with the requirements of article 5 of the Regulation 45/2001 as it is necessary both for the performance of Commission's tasks carried out in the public interest on basis of European legal instruments and for compliance with the legal obligation to protect the Community's financial interests.

1.2.2. Art. 25 - Notification of the data processing to the Commission's Data Protection Officer

Furthermore, the legal basis and lawfulness of processing are ensured through the notifications made by the Commission to its Data Protection Officer on the processing of personal data submitted by proposal applicants and reviewers/evaluators/experts in the context of Research Framework Programmes. These processing operations explicitly include the carrying out of projects auditing, to assess whether or not all relevant legal obligations are properly followed.

1.2.3. Art. 4 – Personal data quality

The Commission is therefore of the opinion that the processing of personal data in the context of external auditing complies with the provisions of Article 4 which states that the personal data must be (a) processed fairly and lawfully, (b) collected for specified, explicit and legitimate purposes, (c) adequate, relevant and not excessive in relation to the purpose of their collection and / or processing, (d) accurate and (e) kept in a form which permits identification of the data subjects for no longer than necessary.

1.2.4. Information to the data subjects

Further to the above explained legal basis and lawfulness of the data processing, we would like to point out that the applicant for EC funded research projects is directly informed about the processing of private data through the privacy statement contained in the Electronic Proposal Submission Service – EPSS (<https://www.epss-fp7.org/epss/welcome.jsp>). This Service, including the corresponding privacy statement, is open to the coordinator of a proposal as well as to all participants.

The privacy statement contains the following information :

"2. *What personal information do we collect, for what purpose and through which technical means?*

Identification Data

The personal data collected and further processed concern the contact person for the project and it is necessary for communication purposes. Information is collected by filling the necessary forms, and they are:

- *Last name, First name*
- *Title, Gender*
- *Department/Faculty/Institute/Laboratory name*
- *Phone, Mobile phone*
- *E-mail, Fax*
- *Address, if different from organisation address*

In addition, information will be collected for the legal or natural person asking for funding- cross-covered by notifications DPO-300 (Bank account file) and DPO-372 (Legal entity file) of DG BUDG-:

- *Bank account reference (IBAN and BIC codes)*
- *VAT no (where applicable)*

The purpose of the processing of personal data is, under the legal basis mentioned below to manage the Commission's administration of proposals submitted for funding or funded through the Research Framework Programmes, as well as through other Programmes and Initiatives.

The legal basis for these processing operations on personal data is listed in point 9.

Technical information

The information is provided by the organisation project responsible by filling-up forms on Web Pages available over the Internet by the Electronic Proposal Submission Service (EPSS) run by a service provider under a specific contract with the Commission. The information is collected in files stored in an isolated secure system until the call is closed. Upon call closure, the information is transferred to Commission systems (as described in point 4.) to be processed by Commission personnel, under the responsibility of the controllers mentioned in point 1.

"3. *Who has access to your information and to whom is it disclosed?*

For the purposes detailed above, access to your personal data is given to the following persons, without prejudice to a possible transmission to the bodies in charge of a monitoring or inspection task in accordance with Community law:

- *Internal authorised Commission staff, independent experts and contractors, who are working on behalf of the Commission for the purposes of proposal*

evaluation, and for selected projects under a grant agreement, to manage research projects within the Research Framework Programmes or other Programmes and Initiatives.

· Other structures associated with the Research Framework Programmes, other Programmes and Initiatives, such as Programme Committees, Advisory Groups.

· Public: For projects under a grant agreement, a very limited subset of data (contact name and email address of the main coordinator, total budget of the project) may be published on the CORDIS website in order to allow contacts between interested parties and the research consortium, and may be printed for further dissemination."

This means that the data subjects are duly informed that their identification data together with the technical information can be communicated, inter alia, to the persons in charge of the evaluation of the proposals and projects.

1.2.5. Information handling in EU-funded research projects

Contractors in EU-funded research projects are required to substantiate their personnel costs for the project reporting and cost statements as well as for auditing purposes.

Contractors need to be able to justify on an individual basis for every staff member and consultants their cost, time allocation and contribution to the project by using employment contracts, detailed time sheets, minutes of meetings, working documents, ... in order to properly substantiate the actual costs supporting the contribution claimed from the Commission.

Since [redacted] and [redacted] are performing mainly management tasks in the EC projects, they are all aware of the personal data collection and processing. Indeed, as defined in article II.2(4) of the FP6 model contract, the management tasks include among others "the overall legal, contractual, ethical, financial and administrative management". And this overall management includes in particular, as defined in Article II.7(2)(b), the preparation, coordination and supervision of the "periodic management report [which includes] a justification of the resources deployed by each contractor, linking them to activities implemented and justifying their necessity".

For the above mentioned reasons, it is obvious that [redacted], [redacted] and Mr. [redacted] were all informed of the data processing as they are performing themselves these data processing operations for the project reporting for all partners in the project.

2. AUDIT PROCEDURES IN RELATION WITH

2.1. Selection of in the audit programme

as a partner in FP6 projects, was selected for audit in that context and on the basis of risk assessment⁴. The risks identified leading to the selection of as auditee were the following:

- seemed to be highly dependent on EU funding;
- charges very high hourly rates (EUR 100-120 per hour + 20% indirect costs) and exorbitant travel expenses;
- During the recent negotiations of a FP7 project), pressure was exercised on DG INFSO by phone and email by ! () to include as a 100% funded partner, even though the FP7 rules do not allow this (see annex 1: emails from Mr to DG INFSO). This pressure was difficult to understand, as does not have any specific technical expertise that would make the company necessary for the project. In addition, was not the coordinator of the project, which made the pressure exerted even more difficult to understand.

was informed of the planned audit by letter dated 30 April 2008. The audit took place from to 2008 in the premises of in

2.2. Interviews during the audit and audit findings

During the audit, various interviews with persons working for were performed. As usual, these interviews aimed at providing a general understanding of the work performed by the contractor in the funded research project.

In March 2007, the Research DGs agreed on a common Ex-Post Audit Strategy of FP6 to for the period 2007-2010. The agreed strategy foresees three different selection mechanisms to identify which contractors/contracts to audit:

- Representative: the use of a representative selection method (e.g. 'Monetary Unit Sampling' or MUS) will allow the extrapolation of the audit results to the whole population with a preset level of confidence and precision;
 - Individually significant contractors: maximise the impact of the audits and the audit coverage, with an extensive use of follow-up and extrapolation procedures;
 - Risk-Based: provide additional audit information supporting assurance to management based on the analysis of the risk profile of both the population as a whole and also for the individual contractors.
- In the high-level risk assessment of DG INFSO (2007-2008), the over-concentration of EU-funding from one or more (fragmented) sources within the DG and/or across DGs, at some (relatively small) participants, which may conflict with their co-funding and research capacities (lack of staff, lack of own capital, EC cash flow is main contribution to cash flow) has been identified as an important risk. The approach which has been taken to mitigate this identified risk is to carry out risk-based audits. Such audits should allow assessing the legality and regularity of the transactions in the population of contracts-contractors considered as a higher risk and if necessary to formulate, under a feedback process, corrective actions to the relevant ex-ante and ex-post control procedures.

Various elements appeared from these interviews that could point to a potential conflict of interest which could damage the financial interests of the Community.

- First it was discovered that total amount paid by [redacted] to Mrs. [redacted] for her work as consultant of [redacted] was of the order of 100 K€ over a period of about 4 years. Furthermore, as explained in section 5.1.4.6 of the audit report, the review of the contractual arrangements between [redacted] and Mrs. [redacted] showed several elements which, in the context of the information gathered, raised questions about the reality of the work done (e.g. no need to work in [redacted] offices, only general supervision of the work done and independent organisation of work, ...).
- Moreover, the contract contains a very uncommon clause which further triggers suspicions about the reality of the work performed by Mrs. [redacted]. The arrangement indeed foresees a financial split of the risks between [redacted] and Mrs. [redacted] should the EC reject all or part of Mrs. [redacted] costs declared to the EU-funded projects, [redacted] is entitled to recover from her 50% of the fees paid to her. In-depth discussion about this clause took place during the audit field work and [redacted] did not provide any reasonable and convincing explanations.
- Furthermore, in one of the EU-funded research projects [redacted], [redacted] is the coordinator of the project and [redacted] is a partner. Mrs. [redacted] has a contract with [redacted] to provide administrative assistance specifically for this project. In this project, [redacted] in its role as coordinator used the services of [redacted] to take care of practical administrative work which normally is done by the coordinator of a project. It is reasonable to expect from the audit perspective that both Mr and Mrs [redacted] cost have been charged to the same project.
- Finally, when Mrs. [redacted] was asked during her interview to explain her curriculum vitae as well as her work and specific tasks, it was fairly difficult to obtain detailed information. This attitude was contrary to the attitude usually adopted by the interviewed persons: when there is nothing to conceal, people are usually keen to present their qualifications as well as personal involvement and achievements in the projects.

2.3. Audit hypotheses

The auditors had therefore reasonable grounds to question the reality of the work performed by Mrs. [redacted] and to assess the hypothesis of a conflict of interest.

One of the audit hypotheses therefore was that Mr [redacted] intervened in the name of [redacted] to maintain the contract flow from the Commission to [redacted] at a 100% funding rate in exchange of payments for a fictitious contract in the name of his wife, thereby prejudicing the financial interests of the Community.

It should also be pointed out in that respect that, as defined in the International Standards on Auditing (ISA 240), "the auditor is responsible for maintaining

an attitude of professional scepticism throughout the audit, considering the potential for management override of controls and recognizing the fact that audit procedures that are effective for detecting error may not be effective in detecting fraud".

However, the elements gathered during the field work of the audit were not sufficient to assess the reality of the work carried out by Ms [redacted] and the indication of a potential conflict of interest in the name of [redacted].

For reasons of precaution, before taking any further step towards transmitting the file to anti-fraud authorities, the auditors took the option of validating their hypotheses in two parallel ways:

- By prompting [redacted] in the audit contradictory procedure to provide elements which could lift the suspicion of conflict of interest and/or fictitious contract;
- By assessing the potential conflict of interest in the name of [redacted] on a confidential basis with the Internal Audit Department of [redacted].

3. CONTRADICTIONARY PROCEDURE RELATED TO THE AUDIT

As foreseen in the Commission's External Audit Manual, the contradictory procedure started on 14 August 2008. This procedure is not finished yet as DG INFSO had to ask for further supporting documents following the initial answer of [redacted] and is still analysing in detail the answers received. Please note also that, in the meantime, the Court of [redacted] has declared on 30 December 2008 the bankruptcy of [redacted].

During the contradictory phase, [redacted] did not provide any element that allowed assessing the potential conflict of interest, nor the reality of the work performed by Ms [redacted]. [redacted] on the contrary only contested the formal aspects of the audit approach.

4. CONTACTS WITH

4.1. Detailed information about the contacts with

On the basis of the elements which were available at that time, two contacts took place by phone with Mr. [redacted] Head of Internal Audit of [redacted] respectively on 25 June 2008 and 4 November 2008. The purpose of these contacts was to assess whether the reasonable suspicion on a potential conflict of interest was confirmed or not.

The contacts were aimed at obtaining assurance that the decisions and choices made by [redacted] concerning the consortium definition and project management of European projects would not be influenced by a concealed and potentially fraudulent personal gain of one of [redacted]'s staff members.

The main outcome of these calls was the following:

- On basis of the information communicated during the first conference call, Mr. [redacted] confirmed the relevance of the issue discussed with him and fully acknowledged the potential conflict of interest as well as the suspicions raised by the EC. He proposed to start analysing the situation and to come back to the Commission with his assessment of the situation. Mr. [redacted] clearly committed himself to conduct his audit work in a broad manner (not targeted to Mr. [redacted] activity) in order to obtain an overall perspective of the activities of [redacted] in the EU funded research projects as well and assess the specific situation afterwards.
- During the second call, Mr. [redacted] confirmed that [redacted] Internal Audit had looked in the general process of EC projects and investigated both internal and external dealings. During this process, [redacted] was able to confirm that the wife of Mr. [redacted] was indeed working at [redacted] Mr. [redacted] stated that [redacted] Internal Audit did not find evidence of conflict of interest and/or fraud.
- Mr. [redacted] also confirmed that [redacted] shared the understanding of the EC that the contracts between the EC, [redacted] and [redacted] in the same projects create a link between these parties which allows sharing of information in the context of any audit of such projects. Furthermore, Mr. [redacted] communicated that the official position of [redacted] was that even the potentiality of a conflict of interest was not acceptable.

The minutes of the second contact were agreed with Mr. [redacted] whereas the minutes of the first one were only established internally by DG INFSO (see annexes 7 and 8).

For the sake of completeness, we herewith confirm that, since the receipt of your letter, no further contact has occurred with [redacted] and, more generally speaking, the only contacts between DG INFSO's External Audit Unit and [redacted] related to this file are the ones mentioned above.

4.2. Detail of information transferred

First of all we want to point out that the information transmitted to [redacted] was limited to the following elements:

- The minutes of the meeting the auditors had with Mrs. [redacted] during the audit field work;
- The contract between [redacted] and Mrs. [redacted] (both the framework and the two specific annexes related to the projects [redacted] and [redacted]).

The allegation by [redacted] that the Commission would have transferred a draft audit report related to [redacted] to [redacted] is therefore unfounded. Furthermore, in the contacts with [redacted], it was explicitly stated that the purpose of the transfer of information was only for the Internal Audit Service of [redacted] to assess the risk of a potential conflict of interest (Annex 6).

4.3. Basis for transfer of information and views on the matter

It is worth repeating at this stage that [redacted] and [redacted] were both contractors in several EU-funded research projects (see annex 2: list of projects in which [redacted] is currently participating together with an indication, where appropriate, of [redacted] involvement) and that the conflict of interest which was suspected would have been one within the contractual boundaries of a single contract with the Commission (every project is bound by one single contract with several contractors). [redacted] is therefore not, as indicated by [redacted] an external third party.

On the contrary, [redacted] is a partner in several audited research projects funded by the Commission where the contractual agreement links the Commission and both [redacted] and [redacted]. As such, there is no breach of confidentiality in the meaning of article II.29 of Annex II to the contract as information was gathered in the context of the audit of the projects on the basis of these contracts. Furthermore, the verification of the costs may obviously imply in certain cases, as for [redacted], to obtain confirmation from the other contractors involved.

4.3.1. *Art. 8 – Transfer of personal data to non-EC recipients*

First of all, it is important to state that, as the work performed by Mrs. [redacted] relates to management activities and since these management activities are contractually placed under the direct leadership, coordination, supervision and responsibility of the coordinator, we legitimately consider that, as coordinator of the project [redacted] was already informed about the activities of Mrs. [redacted] as well as the details of her activity and contractual conditions.

In this perspective, the information communicated to [redacted] was not new or protected, for the company as a project coordinator. However, it was necessary to provide [redacted] Internal Audit Service with the relevant information for performing the most appropriate auditing diligence and thereby assessing the hypothesis of a potential conflict of interest with financial impact on the Community budget.

In addition and as far as this article applies, Article 8 of the Regulation 45/2001 on personal data protection permits the transfer of personal data by EC Institutions to a recipient subject to Directive 95/46 if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

The Commission is of the opinion that these two conditions were definitely met in this case.

In our judgment, the transfer of the information was necessary in order for the Internal Audit Service of [redacted] to fully and properly understand why the Commission was assessing the hypothesis of a potential conflict of interest with financial impact on the Community budget. In addition, the recipient [redacted] Internal Audit Service) requested this information in order to be able to perform the necessary checks.

In that context, we would like to add the following:

- In the auditor's judgment, it was necessary to invoke the help of the Internal Audit Service of [redacted] to assess the situation in view of the impossibility to obtain this assurance during the audit fieldwork. This judgment was later on confirmed by the reaction of [redacted] in the contradictory procedure, where no information on substance was provided to provide reassurance.

As mentioned above, Mr. [redacted] acting as representative of [redacted] /, strongly and repeatedly supported [redacted]'s participation in the negotiation of a new project ([redacted]) although [redacted] was not the coordinator and several tasks proposed for [redacted] were in contradiction with the contractual provisions. This naturally raised questions. In view of the elements discovered during the audit, it was not excluded that [redacted] by the actions of its representative, Mr. [redacted] would increase the cost charged by [redacted] to the Commission for the project.

Also, there was no reason for the external auditors to assume that the data subject's legitimate interests might be prejudiced:

- In their two contacts with [redacted], the Commission services explicitly required confidentiality and stated that there was no proof of a conflict of interest or fraud but that the initiative by the Commission services aimed at assessing and clarifying the situation with respect to the protection of the Community's financial interest and removing any doubt (see annex 3, 4, 5).
- In view of all these precautions taken (contact made with a professional audit capacity, request for confidentiality, no accusations formulated, protection of the financial interest of the Community as only purpose of the request), the contact was proportionate in the auditors' judgment.
- It is also worth pointing out here that only a very limited set of data was transferred to [redacted], i.e. the minutes of the meeting and the specific paragraphs in the contract related to Mrs. [redacted], to [redacted] to let them perform their process review.
- Further to the explanations given in our answer to [redacted] on 16 December 2008, we would like to add that, in our opinion, the consultancy agreement in place between [redacted] and Mrs. [redacted] is not of the nature of an employment contract but of the nature of a commercial service contract (subcontract). [redacted] contradicts this qualification as it implies the ineligibility of the related costs. However, the general terms and several specific clauses of the contract between [redacted] and Mrs. [redacted] as well as the actual factual execution of the contract clearly demonstrate in the auditor's opinion that the contractual relationship relates to a subcontracting agreement. For this reason, the communication of the contract and minutes of interviews does not fundamentally relate to personal or employment data but rather to commercial data.

- If there would have been a situation of conflict of interest with damage to the financial interests of the Community as a result, this certainly cannot be considered as a legitimate interest of the subject.

4.3.2. Confidentiality between auditors

Further to the above mentioned reasons, it should be pointed out that we have not contacted an unqualified party but specifically the Internal Audit Service of [redacted].

In our judgement the Internal Audit Service of [redacted] was suited to help the Commission in assessing its audit hypothesis, as it offered the assurance of a professional and independent audit capacity internal to [redacted].

It is also common professional practice for auditors to exchange information between them on a reciprocal, confidential and "need-to-know" basis in order to ensure a proper execution of their audit responsibilities.

5. CONCLUSION

In that context and for the reasons mentioned above, we do not consider that the audit confidentiality or the data protection rules have been infringed but we believe on the contrary that:

- in the specific case of [redacted], the transfer of personal data was necessary and proportionate in order to execute our obligation and mission properly and thus to protect the financial interests of the European Community and, more generally, the public interest and
- in the specific case of [redacted], the Commission's external auditors properly and legitimately assumed that no data subject's legitimate interests might be prejudiced: the transfer of information did not focus on the personal data or behaviour of the persons but only aimed at assessing the potential conflict of interest and thereby protecting the financial interest of the Community.

6. CONFIDENTIALITY

Finally, you propose in your letter that we communicate you which information we would like you to treat as confidential. We ask you to treat all the annexes to this letter as well as all information not contained in our answer to [redacted] (annex 5) as confidential since it is part of our audit process (which is still in progress) and may serve as a basis for our audit conclusions and possible judicial follow-up.

Should you wish to use in your answer any additional information provided in the core text of this letter, we kindly ask you to contact us and obtain our prior explicit agreement in order to avoid any unfavourable impact on the audit and / or judicial procedures.

Yours sincerely,

/1

Cc: Data Protection Officer of the Commission

DG INFSO/S

DG INFSO

Enclosures:

- Annex 1: Emails from Mr to DG INFSO related to the project
- Annex 2: List of projects in which is currently participating together with an indication, where appropriate, of involvement
- Annex 3: Letter sent by to DG INFSO on 15 October 2008
- Annex 4: Acknowledgment letter by DG INFSO to of 24 October 2008
- Annex 5: Answer letter by DG INFSO sent to on 16 December 2008
- Annex 6: Transfer email of information to ' on 25 June 2008
- Annex 7: Minutes of phone call with on 25 June 08
- Annex 8: Minutes of phone call with on 12 November 08

Annex 2: List of projects in which
indication, where appropriate, of

s currently participating together with an
involvement

Project	FP	Participation I	Role of
	FP6	N/A	N/A
	FP6		Partner
	FP6		Partner
	FP6	N/A	N/A
	FP6		Partner
	FP6		Coordinator
	FP7	N/A	N/A
	FP7	N/A	N/A
	FP7		Partner
	FP7		Partner
	FP7		Partner

as proposed as a partner in the project but eventually did not enter the consortium as further explained in the core part of our letter.



EUROPEAN COMMISSION
Information Society and Media Directorate-General

General Affairs
External Audit
Head of Unit

Brussels, 24 OCT. 2008
INFSO-S5/FD/AC/Isc D (2008) 943628

REGISTERED A.R.

Subject: Beanstandung der Weitergabe von Informationen durch die Europäische Kommission; Ihr Brief vom 15. Oktober 2008 mit der Referenz 21491/2008 CB

Sehr geehrter Herr

hiermit möchten wir den Erhalt Ihres Briefes vom 15. Oktober 2008 bestätigen. Der dort von Ihnen vorgebrachte Sachverhalt wird von uns genauestens untersucht. Dies kann allerdings einige Zeit in Anspruch nehmen. Wir bemühen uns aber, so schnell wie möglich in dieser Angelegenheit auf Sie zurückzukommen. Wir bitten um Ihr Verständnis.

Mit freundlichen Grüßen

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone:
0 2 29 99 96 96

E-mail:



EUROPEAN COMMISSION
Information Society and Media Directorate-General

General Affairs
External Audit
Head of Unit

Brussels, 16 DEC. 2008
INFSO-S5/FD/PYD D(2008) 950106

REGISTERED A.R.

Subject: Your letter dated 15/10/2008 with subject: "Beanstandung der Weitergabe von Informationen durch die Europäische Kommission"

Your ref.: File No: 21491/2008 CB

Dear
Dear ,

In your letter mentioned in reference, you complained that Commission services had transmitted information related to your client, (hereafter: , to an external third party) and you requested to comment on this situation.

As announced in our letter dated 24/10/2008 with reference D(2008)943628, we have thoroughly analysed the case and would like to provide you with the following comments:

The communication of information to was based on the following elements:

- Article II.29 (1) of the audited FP6 contracts explicitly states that the audit scope covers any aspects "relating to the proper execution of the project and the contract". In that perspective, even if your client was the specifically audited entity in the case of audit 08-INFS-003, it should be considered that it is the whole execution of the projects and contracts in which your client participates that was being audited. Information was not transmitted to an "external third party" as pointed out in your letter, but to another contractor in the same projects.

In this context, it should be stressed that information from other contractors was indeed relevant for the audit of [redacted] as the role of [redacted] in all the audited projects is to carry out management tasks for the other partners of the consortium. Therefore, in such circumstances, the verification whether the costs claimed by the audited contractor were indeed "actual, economic and necessary for the implementation of the project" (cf. Art. II.19.1.a) of the audited contracts) may imply to obtain confirmation from the other contractors involved. Indeed, some of the particular findings of the audit 08-INFS-003 with regard to the costs claimed for tasks carried out by Mrs [redacted] raised questions which needed to be further addressed with other consortium partners.

- Furthermore, the Commission has observed that during the negotiation of the project [redacted] which took place before the audit of [redacted], Mr. [redacted] representing [redacted] in the negotiations has strongly and repeatedly insisted on [redacted] participation although several tasks proposed for [redacted] were obviously in contradiction with the contractual provisions regarding the management tasks reserved to the coordinator. This was even more surprising as [redacted] was not the coordinator of that project.
- The specific audit 08-INFS-003 revealed indeed that the relationship between Mr [redacted] and Mrs [redacted] could lead to conflicts of interests when distributing the tasks between contractors and could therefore potentially impact the financial interests of the European Community. You will therefore understand that the information collected during the audit and communicated afterwards to [redacted] was not only related to [redacted] but extended also to [redacted]. It should be pointed out in that respect that [redacted] (incl. subsidiaries and affiliates) not only participates to several ongoing (audited as well as non-audited) projects but also acts as a coordinator in some of these, which reinforces the potential cause of conflicts of interest.
- Finally, it should be pointed out that, when communicating the information to [redacted], Commission services have explicitly required the confidentiality about the information as well as explicitly stated that there was no evidence at this stage of actual conflict of interest and that the initiative taken by Commission services aimed at clarifying the situation.

In view of the above, we are of the opinion that the audit has been carried out properly and in compliance with the provisions of article II.29 of the FP6 contract, in particular as regards to confidentiality.

Yours sincerely,

EUROPEAN COMMISSION
Information Society and Media Directorate-General

General Affairs
External Audit

Brussels, 25 June 2008
External Audit/GVC D(2008)

Note to the File

Concerns: Minutes of conference call with Mr. [redacted] head of Internal Audit at [redacted]

1. INTRODUCTION

The External Audit Unit of DG INFSO has carried out an external audit of [redacted]

One of the audit findings was related to the fact that [redacted] and [redacted] are often project partners and that one of the researchers (Mrs. [redacted]) claimed for funding to the EC by [redacted] is the wife of one of the representatives of [redacted] in the project.

[redacted] organized a call with the head of the internal audit of [redacted] in order to bring this unusual practice to his attention.

This call took place as of June 25, 2008.

2. MINUTES

Attendance:

(INFSO / S5) - [redacted]

Find hereafter the key elements discussed during the phone call.

[redacted] presented the role of the external audit unit of the DG INFSO.

[redacted] brought some elements to the attention of Mr. [redacted]

- (1) [redacted] is partner in about 18 indirect research actions co-funded by the EC
- (2) The external audit unit has recently performed an audit of a beneficiary, [redacted] which is often a project partner of [redacted] in the indirect research actions. [redacted] is a consulting company located in Germany which often plays a role of co-ordination / management. [redacted] participates in the design of the projects, the proposal phase and the project management.

- (3) Besides the audit, [redacted] and [redacted] were both involved in the negotiation of a FP7 project called [redacted]. During the negotiations, the Project Officer ("PO") raised some doubts about the budgeted costs claimed by [redacted]. They were deemed to be excessive and the PO asked to decrease them. As a result thereof, [redacted] decided to quit the indirect research action as a project partner. After those discussions, the PO and the Head of Unit were contacted by a staff of [redacted], namely Mr. [redacted], who raised criticisms about the way the EC had treated [redacted]. Mr. [redacted] wanted [redacted] to re-integrate the consortium and told the EC that the behaviour of the EC could lead to troubles for [redacted].
- (4) As referred to in point (2), DG INFSO has audited some FP6 projects where [redacted] participated. One of the issues raised by the auditors relates to the fact that one of the staff claimed for funding to the EC by [redacted] is Mrs. [redacted] the wife of [redacted] representative referred to in point (3). The external auditors looked at the underlying employment contract which included a special clause. This clause foresaw that in case the EC would reject the funding of her salary, the risk would be supported at 50% by [redacted] and at 50% by herself.

FD pinpointed the 2 main concerns of DG INFSO regarding this situation.

- (1) DG INFSO has some doubts about the actual contribution of Mrs. [redacted] to the audited project. The risk exists that the EC has paid [redacted] for services which were not delivered. The total amount paid by [redacted] to Mrs. [redacted] over the 3/4 past years amount to about 100 K€. As a result, the EC will ask to [redacted] to reimburse the amounts co-funded by the EC.
- (2) DG INFSO believes that there might be a gentleman's agreement to integrate [redacted] as a project partner to the extent that [redacted] supports the wage of Mrs. [redacted]. DG INFSO believes that it is necessary to bring the potential conflict of interest to the attention of the internal audit of [redacted].

[redacted] asked [redacted] to communicate him the list of audited contracts concerned by this issue.

[redacted] agreed to send him this information, together with the underlying employment contracts to the extent that it remains confidential.

[redacted] asked to [redacted] whether this issue is relevant to him as an internal auditor of [redacted].

[redacted] agreed on the relevance of the issues discussed and fully acknowledged the potential issue of conflict of interest. And the doubts raised by the EC. He agreed to have a look at the information that will be provided by [redacted] and to come back to [redacted] subsequently.

Contact:



EUROPEAN COMMISSION
Information Society and Media Directorate-General
General Affairs
External Audit
Head of Unit

Brussels, 12 November 2008
INFSO-S5/FD/PYD/mvh D(2008) 946941

NOTE FOR THE FILE

Subject: Minutes of phone call EC- on 04/11/2008
Potential conflict of interests of an employee of in EU funded
research projects

1. INTRODUCTION

During the audit of the Contractor (hereafter), the External Audit Unit of DG INFSO observed that a researcher / contractor of is the wife of one of the representatives of in EC projects in which ! participates.

The EC (represented by head of unit External Audit at DG INFSO) organised a first phone conversation with (represented by ! Head of Internal Audit at) on 25/06/2008 in order for the EC to bring this unexpected finding to the attention of and to assess the potential conflict of interest.

A second phone call has taken place on 04 November 2008 at 14.00 in order to discuss with ! the outcome of their review of the situation.

2. ATTENDANTS

- European Commission – Head of External Audit
-
-

3. MINUTES OF PHONE CALL

- Start of phone call at 14.07

- started the phone call by providing with the following information:
 - The loudspeaker is on and is attending the call. is the auditor who performed the audit fieldwork at and discovered the potential conflict of interests;
 - Since the first phone call, the EC has prepared a draft audit report and submitted it to for comments;
 - The lawyers of have sent a letter regarding a potential breach of the confidentiality of the audit procedure by the EC. has been informed that the EC auditors have communicated information about the contracts of Mrs. to , Head of Internal Audit of ;
 - The purpose of this second phone call is to ask about the current status of their analysis of the points raised during the first phone call;
- gave the following information:
 - Internal Audit has looked in the general process of EC projects and investigated both internal and external dealings;
 - During this review of the process and projects, Internal Audit was informed that the wife of Mr. it is indeed working at This information was used as a starting point to discuss the situation with the employee;
 - A discussion with Mr. took place but the employee explained that there was no conflict of interest;
 - A discussion was then organised with the director of Mr. and the director had then a conversation with Mr. without participation of Internal Audit;
 - The audit performed by Internal Audit couldn't find evidence of fraud but the situation is in contradiction with s internal guidelines regarding conflicts of interests which aims to avoid actual conflicts of interests and potential / perceived conflict of interests;
 - As wants to resolve this situation, the employee has been asked to find a solution, i.e. to end the link between his wife and
 - The documentation provided by the EC to has not been provided to the employee; only his director had access to these documents. The employee and have probably deducted from the discussions that a contact has taken place between the EC and
- explained that the EC will answer the letter of the lawyers of and give an explanation about the communication of information to . He indicated that, in the opinion of the EC, the contracts between the EC, and in the same projects creates a link between these 3 parties which allows sharing of information in the context of an audit of such projects.

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-- confirmed that this is also the understanding of / and that the situation detected was not acceptable in the view of . I added that, in the view of ' and with regards to its internal guidelines, the point is not whether there is a fraud or not, but that the potential of a conflict of interest was not acceptable.

- reminded that the EC has never said that there was actual fraud or actual conflict of interest but the evidence found had to be assessed;

- agrees and confirms that this was also his understanding;

- asked whether he had anything else to add

- confirmed that he had nothing else to add

- End of phone call at 14.25

Cc: Mr. , Head of Internal Audit