Afgørelse i sag 3784/2006/FOR - Manglende betaling

Afgørelse
Sag 3784/2006/FOR - **Indledt den** 10/01/2007 - **Afgørelse af** 05/12/2008

Sammendrag af afgørelse om klage 3784/2006/FOR over Europa-Kommissionen (fortroligt)

Instituttet for kemiteknik ved X Universitet ("instituttet") indgik forsknings- og udviklingsaftaler med Europa-Kommissionen i 1994 og 1996. Kommissionen sendte instituttet et formelt brev den 10. november 2003 og anmodede om "manglende udgiftsopgørelser" i forbindelse med en af disse kontrakter. Kommissionen præciserede, at hvis instituttet ikke fremsendte de udgiftsopgørelser, der var anmodet om, inden for en måned, ville den ikke foretage yderligere betalinger og afslutte kontrakten. Instituttet svarede ikke, hvorefter Kommissionen afsluttede kontakten.

Efter at klageren i over to år forgæves havde forsøgt at få Kommissionen til at ændre holdning, henvendte denne sig til Ombudsmanden i december 2006. Efter at have gennemført en undersøgelse i løbet af 2007 fandt Ombudsmanden under de givne omstændigheder, at den af Kommissionen pålagte sanktion var åbenbart uforholdsmæssig, navnlig størrelsen af indtægtstabet som følge af Kommissionens afvisning af at foretage yderligere betalinger (96 832,32 EUR), sammenlignet med instituttets samlede udgifter (127 404 EUR). Han fremsatte derfor et forslag til en mindelig løsning i april 2008, hvori han bad Kommissionen om at tage sin holdning op til fornyet overvejelse.

Kommissionen svarede, at den havde taget sin holdning op til fornyet overvejelse og var villig til at betale et yderligere beløb på 53 705,32 EUR for at afgøre sagen. Instituttet accepterede Kommissionens forslag. Klagerne takkede Ombudsmanden for at have støttet instituttet og foreslået en mindelig løsning.

THE BACKGROUND TO THE COMPLAINT
1. The Institute of Chemical Engineering of University X (the "Institute") entered into two research and development contracts with the European Commission in 1994 and 1996.

2. The first research contract was signed on 2 November 1996. The term of the contract commenced on 1 December 1996 and ended on 31 May 2000. The total contribution from Community funds allocated pursuant to the contract amounted to EUR 150 000. An advance payment of EUR 60 000 was made to the Institute within two months.

3. The first phase of the project covered the period from 1 December 1996 to 30 November 1997. The scientific and financial reports in relation to that period were submitted by the

Institute on 18 July 1999. These reports were approved by the Commission on 13 July 2004. The total accepted costs for that period amounted to EUR 4 704.58 (which was deducted from the advance payment of EUR 60 000).

4. The second phase of the project covered the period from 1 December 1997 to 30 November 1998. The scientific and financial reports relating to that period were submitted by the Institute on 18 July 1999 and were approved by the Commission on 13 July 2004. The total accepted costs for that period amounted to EUR 25 868.10 (which was also deducted from the advance payment).

5. The third phase covered the period from 1 December 1998 to 30 November 1999, and the final phase covered the period from 1 December 1999 to 31 May 2000. The complainants stated that the scientific and financial reports in relation to those periods were submitted by the Institute on 30 October 2001. The costs claimed amounted to EUR 57 363 (for the third period) and EUR 37 512 (for the final period). However, the costs in relation to the third and fourth periods were not reimbursed by the Commission.

6. The Commission sent the Institute a formal letter on 10 November 2003 requesting "missing cost statements". In its letter, the Commission informed the Institute that, failing the submission of the requested cost statements within the given delay (which was one month from the receipt of the letter), the Commission would decide to make no further reimbursement and close the contract. The Commission stated that the Institute received the letter on 17 November 2003. According to one of the complainants (the coordinator of the project), this letter was "mislaid" (he stated that he has not seen the letter and was not aware of its whereabouts).

7. In July 2004, the Commission requested the Institute to return EUR 29 428.32 from the initial advance payment of EUR 60 000. Given that the Institute was also the beneficiary of funding under a second research contract, the Commission deducted this amount from payments due to the Institute in relation to that contract.

8. On 27 July 2004, the Institute informed the Commission that it did not agree with the position the Commission had taken on the matter. The Institute again provided it with copies of all the relevant costs statements.

9. On 21 August 2004, the coordinator of the project sent a fax to the Commission explaining in detail the Institute's position. He requested the Commission to reassess the situation. He attached copies of all cost statements for the first research contract. The Commission did not answer this fax.

10. On 30 September 2004, the Institute sent a formal request for payment to the Commission. The Commission refused the formal request for payment on 20 October 2004.

11. On 25 November 2004, the coordinator of the project informed the Commission that he did not agree with the Commission's position. He stated that he had submitted the "missing" cost statements and requested that the outstanding payment be made. He also requested

information on all possible appeal procedures. The Commission wrote to the Institute on 29 November 2004 informing it that it would not "reopen" the first research contract. It did not provide any information on possible appeal procedures.

12. The Institute wrote to the Secretariat General of the Commission on 1 December 2005 informing it of the issue. The Secretariat General replied on 21 December 2005 stating that it was not the appropriate service to deal with the issue and forwarded the correspondence to the competent service. The competent service (which was the same service that had responded to the Institute on 29 November 2004) again refused the request for payment unless the Institute submitted proof that the cost statements had indeed been sent to the Commission on 18 July 1999 or on 30 October 2001. On 10 March 2006, the complainant again provided the cost statements to the Commission.

13. On 25 May 2006, the Commission informed the complainant that he had not been able to prove that he had sent the reports on November 2001 and confirmed its position that the contract remained closed.

THE SUBJECT-MATTER OF THE INQUIRY

14. The Ombudsman understood the complainants to allege, in summary, that the European Commission:

- wrongly refused to approve cost statements submitted by the Institute, and, subsequently, wrongly refused to make payments which the complainants claim were due pursuant to the provisions of the first research contract;
- failed to give adequate reasons for its decisions to delay and deny payments due pursuant to the first research contract;
- failed to provide the Institute with information in relation to possible appeal procedures;
- failed to respond promptly to the complainant’s enquiries.

15. The Ombudsman understood the complainants to claim, in summary, that the Commission should:

- fulfil its commitments regarding the first research contract by paying the Institute EUR 67 404;
- withdraw its recovery decision concerning the second research contract and return the recovered sum of EUR 29 428.32 to the Institute.

THE INQUIRY

16. The Ombudsman received the complaint (which was dated 21 November 2006) on 18 December 2006. On 10 January 2007 the Ombudsman opened an inquiry into the complaint and requested the Commission to submit an opinion by 30 April 2007. On 7 May 2007, the Commission sent its opinion, which was forwarded to the complainants on 9 May 2007 with a request to submit observations by 30 June 2007. The complainants' observations were received by the Ombudsman on 10 October 2007. On 25 April 2008, the Ombudsman made a proposal for a friendly solution and requested the Commission to respond to it by 30 June 2008. On 17 July 2008 the Commission responded to the proposal for a friendly solution. On 22 July 2008 the Ombudsman forwarded the response to the complainants with a request to submit observations by 30 September 2008. On 8 October 2008 the Ombudsman granted the complainants' request for an extension of the deadline until 15 November 2008. On 3 November 2008 the complainants submitted observations in relation to the Commission's

response to the proposal for a friendly solution.
THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS
Preliminary remarks

17. The first and second allegations, and the two claims, are closely related. For the sake of clarity, therefore, the Ombudsman considers it necessary to deal with the complainants' first and second allegations, and the related claims, together.

A. Allegations that the Commission wrongly refused to approve cost statements and failed to give adequate reasons for its decisions to delay and deny payments, and the related claims *Arguments presented to the Ombudsman*

18. The complainants stated that the Institute had, by October 2001, provided all the relevant scientific and financial reports required under the contract.

19. The Institute had repeated contacts, by email and telephone, with the Commission after 10 November 2003 (the date when the Commission sent the formal letter requesting the "missing cost statements"). However, according to the complainants, the Commission did not, despite repeated communications with the Institute, inform the latter that any further information was missing. The Institute was, therefore, unaware that cost statements, which it understood had already been submitted in 2001, were in fact missing.

20. The complainants stated that, notwithstanding the failure to reply to the Commission's formal notice of 10 November 2003 regarding the missing cost statements, the Institute made many attempts to determine what information was missing. The complainants were of the opinion that, while a delay in the provision of cost statements may justify a delay in the payment of funds (until the costs statements are provided), such a delay should not justify withholding payments altogether.

21. The complainants stated that, notwithstanding the fact that the denial of payment is contrary to contract law, it is also contrary to the Commission's own Code of Good Administrative Behaviour, which states that the application of the Code should never lead to the imposition of administrative or budgetary burdens that are out of proportion to the benefit expected. In addition, the complainants argued that such a position is contrary to Article 6(1) of the European Code of Good Administrative Behaviour, which states that, when taking decisions, officials shall ensure that the measures taken are proportionate to the aim pursued.

22. The Commission stated in its opinion that its position was in full agreement with Article 21(4) of the General Conditions to the contract which reads as follows:

" *The Commission may determine not to take account of any further costs or not to make any further reimbursement after giving one month's notice in writing of non-receipt of the final cost statements* ".

23. The Commission concluded that it had not, therefore, wrongly refused to approve cost

statements and had not wrongly refused to make the ensuing payment. The Commission explained that it had applied the contract which had been signed by the Institute and the Commission. In doing so, the Commission stated that it had not infringed the Code of Good Administrative Behaviour.

24. As regards whether the Commission had infringed the European Code of Good Administrative Behaviour, which states that measures taken by officials should be proportionate to the aim pursued, the Commission stated that it had applied the contract between the Institute and the Commission. The Commission concluded that in so doing it had not infringed the Code of Good Administrative Behaviour.

25. As regards the allegation that the Commission failed to give adequate reasons for its decisions to delay and deny payments due pursuant to the first research contract, the Commission explained that the payments had been denied because the Institute had not submitted the cost statements within the deadlines set out in the contract. The Commission stated that this had been clearly spelled out in its correspondence attached to the opinion.

26. In response to the arguments made by the Commission in its opinion, the complainants pointed out that, in its opinion, the Commission had not addressed their arguments as regards the disproportionate nature of the penalty applied. In this respect, the complainants pointed out that all the technical goals of the project had been attained - indeed they had been exceeded. All scientific reports had been submitted correctly. The complainants also pointed out that all cost statements had been submitted before or after the deadline (depending on one's point of view). They noted that the misdemeanour alleged by the Commission related to the lack of proof that the allegedly "missing" cost statements were submitted on time. The complainants also noted that the Institute fulfilled all its obligations in spite of the extremely difficult hurdles created by the Commission, such as, for example, when it ignored correspondence, or delayed in responding and in making payments.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

27. The Commission imposed a total sanction of EUR 96 873 on the Institute as a result of the complainant's failure to provide the missing cost statements within the deadline set out in the Commission's letter of 10 November 2003 (1) .

28. It was not contested that the complainant submitted the " *missing* " cost statements by, at the latest, August 2004. The substantive sufficiency of these cost statements has not been called into question by the Commission. It was not contested that all the technical goals of the project had been attained. In sum, the sole reason the Commission puts forward for rejecting the cost statements submitted in August 2004 was the fact that they were received by the Commission after the deadline set out in the letter to the Institute dated 10 November 2003.

29. In its opinion to the Ombudsman, the Commission stated that its decision to issue the recovery order and to refuse all further payments was consistent with Article 21(4) of the General Conditions. The Ombudsman noted that Article 21(4) of the General Conditions to

the contract reads as follows:

" *The Commission* may *determine not to take account of any further costs or not to make any further reimbursement after giving one month's notice in writing of non-receipt of the final cost statements* " (emphasis added by the Ombudsman).

Article 21(4) grants the Commission a contractual right not to take account of any further costs statements or not to make any further reimbursement after giving one month's notice in writing of non-receipt of the final cost statements. However, the Ombudsman noted, the existence of a contractual right does not imply an obligation to exercise that right. In effect, Article 21(4) does not *require* the Commission not to take account of any further costs or not to make any further reimbursement after having given in writing one month's notice concerning the non-receipt of the final cost statements. Rather, it falls within the discretion of the Commission whether or not it actually exercises that contractual right.

30. The extent of the Commission's margin of discretion under Article 21(4) of the General Conditions will be determined by the applicable legal rules, including the rules set out in the Financial Regulation (2) and its Implementing Rules (3) . In addition, the Commission should, when exercising its discretion, also take into consideration the principles of good administration and the general principles of European law.

31. The proportionality principle is a long established general principle of European law (4) . According to the established case law of the Community courts, the proportionality principle requires that measures adopted by a Community institution should not exceed the limits of what is appropriate and necessary in order to attain its legitimate objectives and that, where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (5) .

32. The Financial Regulation and its Implementing Rules also require a Community institution to respect the principle of proportionality in the imposition of administrative and financial penalties. The Ombudsman recalls that in the context of grants, for instance, Article 103 of the Financial Regulation states that:

" *Where the award procedure or performance of the contract is vitiated by substantial errors or irregularities or by fraud, the institutions shall suspend performance of the contract.*

Where such errors, irregularities or fraud are attributable to the contractor, the institutions may in addition refuse to make payments or may recover amounts already paid, in proportion to the seriousness *of the errors, irregularities or fraud* " (emphasis added).

Article 114(3) of the Financial Regulation states that:

" *Administrative and financial penalties of an* effective, proportionate and dissuasive *nature may be imposed by the authorising officer, as provided in Articles 93 to 96 and in the implementing rules relating to those articles, on applicants who are excluded under paragraph 2* "

(emphasis added).

33. The Ombudsman agreed that, in the interest of sound administration, the Commission is entitled to impose time-limits for the submission of cost statements in the context of research programmes funded by the Community. The Ombudsman also agreed that the Commission may be entitled to impose certain penalties for the late submission of such documents.

34. However, while the Commission may be entitled to impose certain penalties for the late submission of documents, such penalties must at least be compatible with the proportionality principle. The proportionality principle requires that measures adopted by a Community institution *should not exceed the limits* of what is appropriate and necessary in order to attain its legitimate objectives. Where there is a choice between several appropriate measures, recourse must be had to *the least onerous measure* .

35. The Ombudsman drew the Commission's attention to the relevant case law, in particular, *The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP)* , where the Court of Justice held that:

" *(...) the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered* too drastic *a penalty in relation to the export licence's function of ensuring the sound management of the market in question* " (emphasis added) (6) .

36. In light of the above outlined circumstances, in particular the size of the penalty (EUR 96 873), in comparison to the total expenditure (EUR 127 404), the Ombudsman considered the penalty imposed by the Commission to be manifestly disproportionate.

37. In order to evaluate the appropriate level for any such penalty, the Ombudsman was of the view that it was necessary to take into account the specific characteristics of the contract, in particular the size of the contract, and whether the other party fulfilled all its other obligations under the contract.

38. As regards the question whether the Institute fulfilled its other obligations under the contract, the Ombudsman noted that the Commission did not question the quality of the research produced or the substantive sufficiency of the cost statements submitted in August 2004. It appeared, in fact, that the sole reason the Commission put forward for refusing to make any further payments and for issuing the recovery order was the fact that the cost statements were received by its services after the deadline set out in the letter to the Institute dated 10 November 2003.

39. The Ombudsman finally noted that Article 87(1) of the Implementing Rules of the Financial Regulation states that:

" *The authorising officer responsible may waive recovery of all or part of an established amount receivable (...)* where recovery is inconsistent with the principle of proportionality " (emphasis

added).

40. In light of the conclusions set out above, the Ombudsman's provisional conclusion was that there may have been an instance of maladministration by the Commission. Article 3(5) of the Statute European Ombudsman states that " *[a]s far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.* " The Ombudsman therefore made the following Proposal for a Friendly Solution.

"The Commission should consider cancelling or waiving the recovery order in relation to the second research contract. The Commission should also consider making a payment to the Institute for the outstanding amounts requested in the financial reports for the third and fourth periods, after having carried out a substantive review of the submitted costs statements."

The arguments presented to the Ombudsman after his friendly solution proposal

41. In its response the Commission stated that it did not agree that the exercise of its contractual rights vis-à-vis the Institute constituted a "penalty". It noted that, according to the Financial Regulation and the Implementing Rules, a "penalty" is a sanction which stems from regulatory provisions or contractual provisions (liquidated damages). As a "penalty" is not foreseen in the contract for the late submission of documents, the Commission is not entitled to impose a contractual penalty for the late submission of documents. The Commission therefore argues that it cannot agree with the position of the Ombudsman that the size of the penalty was manifestly disproportionate simply because, in its view, there was no penalty imposed.

42. Nevertheless, in view of the fact that Article 20(5) of the General Condition specifically only refers to "final cost statements", the Commission is ready to accept partially the Proposal for a Friendly Solution. In sum, the Commission is ready to examine the cost statements of the third reporting year submitted under the first research contract. The Commission however maintains its view as regards the cost statements for the fourth (and final) reporting period and will not take them into account.

43. The cost statements which will be taken into account are therefore:

Reporting period 1 (first submitted in 1999) - 4 703 EUR

Reporting period 2 (first submitted in 1999) - 25 929 EUR

Reporting period 3 (submitted in 2004) - 57 363 EUR

44. The total amount to be paid, namely 87 995 EUR, will be reduced by 3 781 EUR to take account of Article 14(3) of the General Conditions, which limits transfers between cost categories to 20% of the original allocation. This implies that the Commission is willing to pay an additional amount of 53 705.32 EUR, which, according to the Commission, brings the total

that will be paid under the first research contract to 84 277 EUR (7) .

45. The Commission also noted that when, in 2003, the complainants resubmitted the costs statements for periods 1 and 2, the amounts declared were higher than the costs submitted in 1999. The difference amounted to 1 896 EUR. This amount is not included in the amounts cited in paragraph 43 above.

46. The complainants in their observations stated that the Institute accepts the Commission's proposal to settle the matter by paying the Institute 53 705.32 EUR. The Institute appreciates the fact that the Commission has reopened the file and has agreed, at least partially, to accept the Ombudsman's Proposal for a Friendly Solution. The complainants thanked the Ombudsman for supporting the Institute and for having made the Proposal for a Friendly Solution.

The Ombudsman's assessment after his friendly solution proposal

47. The Ombudsman notes that the Commission has partially agreed to the Ombudsman's Proposal for a Friendly Solution. The complainants have accepted the offer of the Commission. As such, the Ombudsman considers that no further inquiries are justified in relation to the first and second allegations and the related claims.

B. Allegation that the Commission failed to provide the Institute with information in relation to possible appeals procedures *Arguments presented to the Ombudsman*

48. On 25 November 2004, the complainants, in their correspondence with the Commission requested information on all possible appeal procedures. The Commission did not provide the requested information in its reply of 29 November 2004.

49. In its opinion to the Ombudsman, the Commission recognised that it did not provide information on the possible appeal procedures and apologised for this oversight.

The Ombudsman's assessment

50. The Ombudsman considers that it is important to inform interested parties of the appeal procedures open to them, especially in response to specific requests for information in relation to such appeal procedures. However, the Commission has recognised its error in the present case and apologised for it. The Ombudsman presumes, on this basis, that the Commission will seek to avoid such errors in future. The Ombudsman therefore considers that no further inquires are justified in relation to this allegation.

C. Allegation that the Commission failed to respond promptly to the complainant's enquiries *Arguments presented to the Ombudsman*

51. In its opinion to the Ombudsman, the Commission recognised that delays had occurred when responding to a letter of 12 November 1999 and a fax dated 21 August 2004. It apologised for these delays. It also pointed out that in all other instances it had responded

promptly.

The Ombudsman's assessment

52. The Ombudsman considers that it is important to respond promptly to correspondence. However, the Commission has recognised its error in the present case and apologised for it. The Ombudsman presumes, on this basis, that the Commission will seek to avoid such errors in future. The Ombudsman therefore considers that no further inquires are justified in relation to this allegation.

D. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman notes that the Commission has partially agreed to the Ombudsman's Proposal for a Friendly Solution. The complainants have accepted the offer of the Commission. As such, the Ombudsman considers that no further inquiries are justified in relation to the first and second allegations, and the related claims. No further inquires are justified in relation to the third and fourth allegations. The Ombudsman therefore closes the case.

The complainants and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 5 December 2008

(1) Allegedly, the total unpaid costs amounted to EUR 96 873 (that is, EUR 57 363 for the third period, EUR 37 512 for the final period, and an additional EUR 1 998 for the first and second period).

(2) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, p. 1–48.

(3) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357, 31.12.2002, p. 1–71.

(4) Case 11/70, *Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125. See also Article 5 of the Treaty on the European Union.

(5) See, for instance, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25; Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144; Case T-216/96 *Conserve Italia Soc. Coop. arl, v Commission* , [1999] ECR II-3139, paragraph 101; Case T-186/00

Conserve *Italia Soc. Coop. rl, v Commission* , [2003] ECR II-719, paragraph 83; Case T-306/00 *Conserve Italia Soc. Coop. rl v Commission* , [2003] ECR II-5705, paragraph 127. See also Article 6(1) of the European Code of Good Administrative Behaviour.

(6) Case 181/84, *The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP)* [1985] ECR, 2889, paragraph 29-30. See also Case C-161/96, *Südzucker Mannheim/Ochsenfurt AG and Hauptzollamt Mannheim* , [1998] ECR I-281, paragraphs 25, 30 and 31; Case T-340/99, *Arne Mathisen AS, established in Værøy (Norway) v. Council* , [2002] ECR II-2905, paragraphs 106 and 126; Case T-199/99, *Sgaravatti Mediterranea Srl, v Commission* , [2002] ECR II-3731, paragraph § 120; Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99, *Vela Srl, v Commission* , [2002] ECR II-4547, paragraph 395; Case T-33/02, *Britannia Alloys & Chemicals Ltd v Commission* , [2005] ECR II-4973, paragraph 26; and Case 21/85 *Maas v Bundesanstalt für Landwirtschaftliche Marktordnung* [1986] ECR 3537, paragraph 23.

(7) The Ombudsman does note that the complainant actually received EUR 4 704.58 and EUR 25 868.10 for the first and second reporting periods respectively. As the Commission is willing to pay an additional amount of 53 705.32 EUR, the total amount paid to the Institute will be 84 278 EUR.