

Entscheidung in der Sache 3490/2005/(ID)PB - Meinungsverschiedenheit über die zum Ende eines Vertrag zu leistenden Zahlungen

Entscheidung

Fall 3490/2005/(ID)PB - Geöffnet am 31/01/2006 - Entscheidung vom 15/12/2008

Im Jahr 2001 schloss der Beschwerdeführer, ein italienisches Unternehmen, einen Vertrag mit der Europäischen Kommission im Rahmen des Europäischen Entwicklungsfonds. Der Vertrag betraf ein Projekt zur Schaffung einer angemessenen Wasserversorgung für Rücksiedler und Vertriebene in Liberia. Zum Ende der Vertragslaufzeit kam es zu Unstimmigkeiten zwischen dem Beschwerdeführer und der Kommission über die für den Abschluss des Projekts zu leistenden Zahlungen.

Der Beschwerdeführer wandte sich Ende 2005 an den Bürgerbeauftragten und erhob eine Reihe von Vorwürfen und Forderungen.

Im Juli 2007 schlug der Bürgerbeauftragte eine einvernehmliche Lösung vor. Er wies die Vorwürfe und die meisten Forderungen des Beschwerdeführers zurück, kam jedoch zu dem Schluss, dass eine Forderung, die die Verwaltungsgebühren eines im Rahmen des Projekts eingerichteten Kontos betraf, gerechtfertigt zu sein schien.

Die Kommission antwortete, dass sie den Vorschlag des Bürgerbeauftragten annehme. Überdies ermittelte die Kommission auf eigene Initiative eine zusätzliche Zahlung an den Beschwerdeführer, die ihr im Rahmen einer gütlichen Einigung angemessen erschien. Die Kommission stellte jedoch fest, dass sie diese Zahlungen erst dann leisten würde, wenn der Beschwerdeführer eine ernsthafte Behauptung zurücknehmen würde, die er in Bezug auf eine mögliche Fälschung eines Schreibens durch Kommissionsdienststellen gemacht hatte.

Der Beschwerdeführer begrüßte die Antwort der Kommission, brachte jedoch weitere spezifische Behauptungen vor. Ferner erklärte er sich bereit, seine Behauptung über die oben genannte mögliche Fälschung zurückzuziehen.

Der Bürgerbeauftragte schlug der Kommission vor, sich mit dem Beschwerdeführer in Verbindung zu setzen, um eine endgültige Einigung zu erzielen.

In ihrer Antwort erklärt sich die Kommission bereit, den zusätzlichen Forderungen des Beschwerdeführers teilweise nachzukommen (insgesamt 36 000 USD und 747,89 EUR), um „



eine für beide Parteien befriedigende Lösung " zu finden. Zu diesem Zwecke übermittelte sie dem Beschwerdeführer ein Protokoll mit ihrem Vorschlag.

Die Schlichtung zwischen dem Beschwerdeführer und der Kommission wurde schließlich im August 2008 bestätigt. Der Saldo auf dem Projektkonto wurde mit Zahlungen von 48 486,79 EUR und 101 938,40 USD an den Beschwerdeführer abgeschlossen.

In seiner Entscheidung betonte der Bürgerbeauftragte, dass die Reaktion der Kommission in diesem Fall vorbildlich gewesen sei. Sie war während des gesamten Verfahrens sorgfältig und konstruktiv vorgegangen und hat überdies zusätzliche relevante Zahlungen geleistet, die von ihren eigenen Dienststellen und dem Beschwerdeführer ermittelt wurden.

THE BACKGROUND TO THE COMPLAINT

1. In 2001, the complainant, an Italian company, and the Commission signed a service contract financed by the European Development Fund (EDF). The contract was entitled 'Management of the Monrovia and rural areas water supply project'. Its aim was to provide an adequate supply of water to returnees and displaced people in Liberia over a 24-month period (October 2001 to October 2003).

2. To execute the tasks under the service contract, the complainant was entrusted with, among other things, the management of an imprest account, which it had established with a local bank. The project began in December 2001 and funds were made available to the imprest account at the same time.

3. In May 2003, due to the deterioration of the internal security situation, the Commission formally advised its implementing partners involved in the programme to consider suspending activities. The complainant decided, however, to continue working on the project.

4. On 6 June 2003, the above-mentioned local bank ceased its activities due to the outbreak of civil war in Monrovia. This made the transfer of funds into banks in Liberia impossible. The Commission therefore approved the establishment of an alternative imprest account in Italy.

5. Later in 2003, the Commission carried out an audit and a review of the project. These resulted in various disputes with the complainant on both technical and financial issues.

6. On 7 April 2004, the complainant presented its final project reports.

7. Despite several subsequent exchanges of correspondence with the Commission, the complainant still had a number of grievances with it. On 4 November 2005, it therefore turned to the European Ombudsman.



THE SUBJECT MATTER OF THE INQUIRY

8. The Ombudsman opened his present inquiry into the complainant's following allegations and claims.

Allegations

(1) Over a period of 15 months, from 24 July 2003 to 19 October 2004, the Commission failed to reply to the complainant's repeated requests for replenishment of the imprest account.

(2) Considering that at no time during the implementation of the contract did the Commission accuse the complainant of inadequate technical or financial performance, and that the amount, justification and contractual validity of the imprest fee were never questioned, the complainant's legitimate expectations were severely infringed, as it could not have imagined that the Commission would retroactively contest the imprest fee, a full year after the completion of the project.

(3) It took the Commission a full year after the end of the project to notify the complainant of any problem, notwithstanding the fact that the issue had been brought to its attention much earlier by contracted accountants.

(4) The Commission ignored the complainant's requests for (a) the post-project cost/benefit analysis and technical evaluation; and (b) the return to the complainant of its accounts that the Commission had decided not to pay.

(5) Because of the Commission's unreasonable delays in replenishing the imprest account, the complainant pre-financed 30% of the project.

(6) The complainant was subjected to unusual and unfair treatment during the closure of the project, since project closure and final technical and financial reports had to be undertaken at the complainant's expense *after* the end of the project, although the contract did not provide for that.

Claim for EUR 161 086.99, made under three counts

(a) The payment of outstanding invoices that have been declared and fully taxed in the complainant's annual financial submission to the tax authorities:

- Pre-financed imprest expenditure (2 invoices): USD 75 931.95
- Technical assistance fees and retention (1 invoice): EUR 38 880.53

(b) Default and compensatory interest plus devaluation on the delayed invoices and imprest pre-financing (amounts applicable up to the end of December 2005):



- On Technical Assistance: EUR 4 847.49
- Devaluation losses from pre-financing of imprest account: USD 8 495.18
- Default/compensatory interest on imprest pre-financing: USD 20 988.75

(c) Unforeseeable, non-contractual post-project obligations:

- Costs and expenses met after end of project: EUR 27 774.21

THE INQUIRY

9. On 31 January 2006, the Ombudsman asked the Commission to submit an opinion, which it did on 28 July 2006. The opinion was forwarded to the complainant for observations, which it sent on 26 September 2006. On 10 July 2007, the Ombudsman made a proposal for a friendly solution. The Commission replied to this proposal on 8 January 2008. The reply was forwarded to the complainant, who submitted its observations on 25 January 2008. The Ombudsman forwarded the complainant's observations to the Commission, which sent an additional reply on 26 June 2006. On 31 July and 8 September 2008 respectively, the complainant and the Commission informed the Ombudsman of the final agreement they had reached to settle the case.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

10. This inquiry has ended with a successful settlement between the parties, based on a proposal for a friendly solution issued by the Ombudsman. That proposal concerned part (a) of the claim set out in point 8 above.

11. In light of the successful outcome of the present inquiry, and the considerable efforts of both parties to reach an amicable settlement, the main part of the present decision focuses on the issues that were the subject of the Ombudsman's proposal for a friendly solution. As for the additional issues, the full assessment of which has already been communicated to the parties in the Ombudsman's friendly solution proposal, it suffices to note the following.

12. With regard to the first above-mentioned allegation, the Ombudsman found in his proposal for a friendly solution that the Commission appeared to have failed to reply to two requests for replenishment of the imprest account set up for the project, and that this failure appeared to be inconsistent with the relevant contractual rules. In its reply to the proposal for a friendly solution, the Commission emphasised, in summary, what it considered to be exceptional circumstances, and that delays had occurred in particular because of a need for additional checks in order to



protect the financial interest of the Community. The complainant did not submit specific comments in response to these additional remarks made by the Commission. At the present point, it is appropriate to note that the Commission did not specifically rebut the Ombudsman's above-mentioned finding that the contractual rules were not followed strictly. However, given the secondary nature of this part of the case, and the fact that a settlement has been reached, the Ombudsman does not consider it necessary to examine this matter further.

13. With regard to the remaining allegations, the Ombudsman found no maladministration in respect to the second, third, fifth and sixth allegations. With regard to the fourth allegation, the Ombudsman concluded that there were not sufficient grounds for further inquiries. In relation to the fifth allegation specifically, the complainant submitted additional material subsequent to the proposal for a friendly solution, in support of its arguments. However, taking this material into account for a second assessment of this part of the case would require further inquiries, a step that that would not be appropriate at this point. Furthermore, the Ombudsman notes that, at the Commission's own initiative and notwithstanding his finding of no maladministration, the settlement included a decision to pay compensation in the interest of an amicable resolution of the problem (see point 28 below).

14. With regard to the claim, the Ombudsman did not find any justified allegations that corresponded to parts (b) and (c) thereof. They could therefore not be accepted.

A. Claim for payment

The facts and assessment

15. As noted above, the complainant claimed, among other things, the following:

(a) Payment of outstanding invoices that have been declared and fully taxed in the complainant's annual financial submission to the tax authorities. These were as follows:

- Pre-financed imprest expenditure (2 invoices): USD 75 931.95
- Technical assistance fees and retention (1 invoice): EUR 38 880.53

16. With regard to this claim, the Commission noted in its opinion that it had unsuccessfully tried to settle the pending payment with the complainant. A verification of total expenditures gave a total of USD 1 927 868.92. Replenishments received amounted to USD 1 856 703.09. The balance in favour of the complainant was USD 71 165.83 due on the imprest account. There was also a pending invoice of EUR 38 880.53. The Commission stated that it was ready to accept that the contract signed with the complainant did foresee a fee for the management of the imprest account, in addition to the remuneration provided through the service contract. In this context, it further stated that the provisions of Annex II A of the service contract lay down a specific fee for the amount of EUR 216 000 for this purpose (set out in Annex II C). It also noted, however, that this was a manifest error committed by its services, because the same



service should never be remunerated twice and that was the reason why the auditors concluded that the claims should be rejected. Moreover, it pointed out that, before this amount could be settled, the issue of the justification of expenditures for equipment and furniture bought from project funds and used in the complainant's residence must be resolved. Indeed, it had tried unsuccessfully to close the accounts by urging the complainant to settle the issue of unjustified expenditure.

17. The Ombudsman addressed the issue of the fee for the management of the imprest account as follows.

18. The contract in question is entitled 'Management of the Monrovia and rural areas water supply project.' According to the contract form, the contract price is EUR 270 180. When a divergence exists between the provisions of the various documents, they should be interpreted in accordance with the order of precedence indicated in Article 3 of the special conditions of the contract. According to this Article:

" The order of precedence of contract documents shall be as follows:

- The Contract Form,*
- The Special Conditions of the contract,*
- Annex I T/A Terms of Reference.*
- Annex IIA Budget Management Procedures.*
- Annex IIB Technical Prescriptions.*
- Annex IIC Imprest Account Cost Estimate.*
- Annex III Contract Price Breakdown.*
- Annex IV Tax and Custom Arrangement.*
- General Conditions for service contracts financed by the European Development Fund (Annex IV to Decision no. 3/90 of the ACP/EEC Council of Ministers of 29 March 1990) "*

19. According to Article 2, Belgian law is applicable to the contract. Pursuant to Annex I to the contract, its duration would be " [u]p to 360-man days in Liberia and up to 120 days in Italy, over a 24-month period. " Paragraph 1 of Annex IIA to the contract provides, among others, the following:

" The contract is for the management and supervision through an Imprest Account of the programme for improving access to clean waters in Monrovia and rural areas (...) EDF resources will be made available through a guaranteed Imprest Account (...) The cost estimate in EUR is



attached in Annex IIC (...) "

20. Paragraph 2.4.2 of Annex IIA provides that "*[f]or the management of the Imprest Account(s) and the cost of dedicated financial resources, the Contractor shall receive the fee set out in the Annex IIC. This fee shall not be subject to retention and may be drawn pro-rata from the account at the end of each reporting period. "*

21. Annex IIC contains a section 'E', entitled 'PROGRAMME MANAGEMENT', which provides for the amount of EUR 216 000 (24 months x EUR 9 000). Annex IIC contains no provision referring explicitly to a fee for "the management of the imprest account." The fee for the management of the imprest account mentioned in paragraph 2.4.2 of Annex IIA, thus, seems to refer to the amount indicated in section E of Annex IIC for the management of the programme, taking into account that Annex IIC does not contain a separate provision concerning a fee for the management of the imprest account and that the contract was for the management, through an imprest account, of a water supply programme.

22. Annex III, which is entitled 'Contract Price Breakdown', includes, in particular, the following data:

" Fees (forfeit) for man-days of service

a) Services of Mr Craig Smith:

in Liberia: EURO

Fees per man/day for 300 days at EUR 425/day 127.500

Per diems per man/day for 300 days at EUR 138/day 41.400

in Italy:

Fees per man/day for 120 days at EUR 350/day 42.000

b) Services in Liberia for approved short term experts

Fees per man/day for 300 days at EUR 300/day 18.000

Per diems per man/day for 300 days at EUR 138/day 8.280

Travel costs ...

Total 270.180 ".

23. In light of the above, the Ombudsman considered the position taken by the Commission in this case to be reasonable, namely, that the services of the complainant's relevant staff referred



to in Annex III are not distinguishable from the "management of the programme" mentioned in section E of Annex IIC. Hence, it seemed that the contract provided for a double fee for the same services which were to be provided by the complainant with relation to the management of the water supply programme. Consequently, it appeared that there was inherent logical inconsistency between the relevant provisions of the contract and that the declaration of will made by the Commission, when concluding the contract, concerning the contractor's remuneration for the management of the programme, was not error-free. As the Commission stated in its opinion, this problem was due to a manifest error made by its services.

24. In the context of its reply to the complainant's first claim, the Commission accepted that there was a balance in favour of the complainant of USD 71 165.83 due on the imprest account and a pending invoice of EUR 38 880.53 for technical assistance fees. Apparently, with an eye to reaching an amicable settlement of its dispute with the complainant, the Commission stated that it was ready to accept that the contract signed with the complainant did foresee a fee for the management of the imprest account, in addition to the remuneration provided through the service contract. However, it pointed out that before the relevant amount could be settled, the issue concerning the justification of expenditures for equipment and furniture, bought from project funds and used in the complainant's residence, should be resolved. In this regard, the Commission said that it had raised the issue by letter of 26 June 2003. Nevertheless, the Commission did not indicate in its opinion that a copy of this letter was included in the voluminous documentation attached to the complaint. This letter also did not appear in the list of annexes attached to the Commission's opinion. Besides, such a problem was not included in the findings of the mid-term audit review communicated to the complainant and attached to the complaint. Moreover, the Commission did not, in any way, refer to the amount of money involved.

25. In its observations on the Commission's opinion, the complainant:

(a) noted that the last imprest invoices of USD 4 766.12, verifiably delivered with the final report, had been ignored by the Commission;

(b) pointed out that, with the exception of the aforementioned amount, it agreed with the Commission as regards the balance in its favour and the pending invoice;

(c) welcomed the Commission's statement that it was ready to accept that the contract provided for a fee for the management of the imprest account; and

(d) emphasised that, in its opinion, the Commission introduced, for the first time, a caveat concerning equipment and argued that this clearly referred to another contract that had long since been settled in the complainant's favour, as well as a Protocol of Agreement that had been signed with the Commission.

26. The Ombudsman remarked that:

(a) in its opinion, the Commission did not comment on the part of the complainant's claim



concerning the payment of the last imprest invoices of USD 4 766. 12;

(b) the complainant and the Commission agreed that there was a balance in favour of the complainant of USD 71 165.83 due on the imprest account, and a pending invoice of EUR 38 880.53;

(c) the Commission was ready to accept that the contract provided for a fee for the management of the imprest account (separate from the complainant's remuneration for the management of the programme), but made the settlement of the claim contingent on the resolution of the issue concerning the justification of expenditures for equipment and furniture bought from project funds and used in the complainant's residence;

(d) in its opinion, the Commission failed to show that it had raised this issue with the complainant before the present inquiry and to provide the further information on this matter;

(e) the Commission also did not explain why this matter prevents it from satisfying, at least in part, the complainant's claim; and

(f) the complainant pointed out that the Commission raised this matter for the first time in its opinion and noted that it refers to the execution of another contract that had been already settled.

27. In light of the above, the Ombudsman concluded that the Commission had not adequately explained its failure to pay to the complainant, at least in part, the amount of money corresponding to its first claim. This failure could have been an instance of maladministration. The Ombudsman therefore made the following proposal for a friendly solution:

In light of his remarks in point [here 26] above, the Ombudsman suggests that the Commission could reconsider its decision (including its reasoning) to refuse to satisfy, even in part, the complainant's first financial claim. In the context of this reconsideration, the Commission could also take into account the Ombudsman's remarks in point [here 18-23] above and the relevant Belgian law, applicable to the contract. The Commission is invited to invite the complainant to a meeting, in order to facilitate the clarification of the legal situation and the search of a solution acceptable to both parties.

The submissions presented to the Ombudsman after his friendly solution proposal

28. The Commission informed the Ombudsman that, further to his proposal and in the interests of taking steps to settle the matter, it had reassessed the file and accepted the Ombudsman's proposal. The Commission gave the following information (in summary) of how it intended to respond to the proposal. First, it would meet the payments referred to in part (a) of the claim. Second, the Commission itself had identified a relevant further payment to be made. This consisted of default and compensatory interest on imprest prefinancing, amounting to USD 2 066.87. With regard to this, the Commission explained that, despite its initial position not to grant this compensation, and despite the Ombudsman's conclusion that the allegation relevant



to this point had not been justified, the Commission had, nevertheless, decided to propose the above-mentioned payment to compensate the complainant's pre-financing costs. The Commission pointed out that it proposed this payment exclusively for the purpose of reaching an amicable settlement. It went on to state that the said payment could not be interpreted as a recognition or admission of the allegations and accusations made by the complainant in its comments to the Ombudsman.

29. The Commission furthermore noted that, in its submissions to the Ombudsman, the complainant had made a number of highly critical comments concerning the Commission and its services. The Commission did not wish to respond to these, except for one comment in which the complainant suggested that a letter had been falsified by the Commission's services. The Commission made its acceptance of the Ombudsman's proposal for a friendly solution contingent upon a withdrawal of this accusation by the complainant.

30. In its observations on the Commission's reply to the Ombudsman's proposal, the complainant welcomed the Commission's willingness to find a friendly solution. It also formulated additional specific claims, including claims for interest and compensation for fluctuations in exchange rates. At the same time, it expressly renounced one of its claims made in the present inquiry, and expressly withdrew its accusations referred to in point 28 above.

31. In light of the complainant's new claims, the Ombudsman sent its observations to the Commission. He proposed that the Commission could contact the complainant with a view to reaching a final settlement.

32. In its reply of 26 June 2008, the Commission stated its willingness to partly meet the complainant's additional claims (totalling USD 36 600 and EUR 747.89) with a view to finding "*an amicable settlement satisfactory to both parties*". It could not, however, agree to certain claims for additional interest, explaining that these related, respectively, to tax circumstances in the Member State concerned, and to a part of the case in respect to which the Ombudsman had concluded that no maladministration had occurred.

33. The Commission stated that it had sent the complainant a protocol containing its proposal for a settlement.

34. On 3 July 2008, the complainant informed the Ombudsman that it intended to sign the protocol. The settlement between the complainant and the Commission was finally confirmed by both parties on 31 July and 8 September 2008 respectively. The settlement implied that the balance of the project account was closed with payments of EUR 48 486.79 and USD 101 938.40 to the complainant.

The Ombudsman's assessment after his friendly solution proposal

35. In light of the parties' submissions following the Ombudsman's proposal for a friendly solution, the Ombudsman concludes that his proposal has had a successful outcome.



36. The Ombudsman would furthermore like to emphasise that the Commission's response in this case has been exemplary. Already at the point of submitting its opinion, the Commission seized the opportunity to thoroughly examine the relevant events and review the actions of its services. It identified shortcomings, admitted these openly, and expressed its willingness to take corrective measures. When subsequently responding to the Ombudsman's proposal for a friendly solution, the Commission also adopted a very thorough and constructive approach. In particular, the Commission is to be commended for its willingness to make full and constructive use of Article 3(5) of the Ombudsman's Statute, whose purpose, among others, is to promote friendly solutions in an open and non-legalistic dialogue.

C. Conclusions

The Ombudsman concludes that a friendly settlement has been achieved.

The complainant and the European Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 1 December 2008