

Decision of the European Ombudsman on complaint 514/2000/ADB against the European Commission

Decision

Case 514/2000/ADB - Opened on 21/06/2000 - Decision on 13/06/2001

Strasbourg, 13 June 2001

Dear Mr O.,

On 12 April 2000, you lodged a complaint with the European Ombudsman on behalf of Industry and Investor Relations LTD (IIR), concerning the Commission's refusal to pay the final invoice for the contract PRS/97/501327.

On 21 June 2000, I forwarded the complaint to the President of the European Commission. The European Commission sent its opinion on 7 September 2000, I forwarded it to you with an invitation to make observations. On 31 October 2000, you informed me that you were waiting for further advice from a Brussels-based lawyer. I informed you that a new deadline for the submission of your opinion had been set to 31 January 2001. On 23 February 2001, Mr. Mark Philimore, another co-director of IIR informed me that IIR was preparing a rebuttal of the Commission's opinion. To date, I have received no observations on the Commission's opinion.

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

THE COMPLAINT

In 1995, the European Commission created a Task Force "Maritime Systems of the Future" (hereafter MTF). Its objective was to support and promote the various Commission activities in the fields of maritime research and development and industrial competitiveness. In that context, DG III of the Commission launched a call for tenders to organise the public relations of the MTF. Following the tender procedure, Industry and Investor Relations LTD (hereafter IIR) was awarded contract PRS/97/501327.

On 20 October 1999, the Commission informed the complainant, that for various reasons relating to the quality and quantity of IIR's work, the final invoice submitted to the Commission by IIR had not been approved.

The complainant therefore contacted the European Ombudsman and was advised that before



lodging a complaint IIR had to make administrative approaches to the Commission. On 25 October 1999 and 3 November 1999, the complainant contacted the Commission to complain about its refusal to pay the invoice. IIR also inquired about the remedies to appeal against this decision. In its reply dated 20 March 2000, the Commission repeated its refusal to pay the invoice. It referred to article 4.4 of the contract, and provided no further advice on remedies.

On 12 April 2000, the complainant lodged a complaint with the European Ombudsman, considering that the work for the Commission had been carried out and that IIR's invoice should be paid. The complainant made following allegations

- The Commission refused to pay the final invoice as foreseen by contract PRS/97/501327.
- It took the Commission almost six months to answer a letter inquiring about the remedies against the Commission's refusal to pay an invoice. Moreover, this reply was incomplete.
- The work requested by DG III did not accord with the contract or with the tender handed in by IIR.
- The required work had been completed. Written justification can be provided.
- Delays and other problems that arose during the completion of the contract originated in flaws internal to the Commission and stemmed from a lack of communication with the contractor.
- One of the Commission's officials appointed as interface with the contractor did not have the necessary PR experience.

THE INQUIRY

The European Commission's opinion

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

Shortly after the award of the contract, IIR was informed that the mandate of MTF was likely to change further to new inclusions in the Community's 5th Framework Programme for Research. The concentration of all the maritime activities in one key action would eliminate the need for the Task Force. In that context, IIR was asked to develop a flexible communication strategy.

The changes created difficulties for IIR's work. Parts of the tasks assigned to MTF were transferred to MIF (Maritime Industries Forum). Thus, it was agreed with IIR to re-structure the work to be undertaken. Three work items were agreed upon. During the extended contract period (January 1999 - June 1999) IIR's work was based on the production of two newsletters and on the development of a web site and of a press campaign leading up to the MIF Plenary in June 1999. On 20 October 1999, the Commission refused to pay the final invoice of the contract because all three work items were considered unsatisfactory.

Regarding the complainant's specific allegations, the Commission made following statements:

- Although IIR had benefited of a reduced work programme, neither had it delivered all the work items agreed, nor had it met the requested quality standards. The Commission therefore informed IIR that the final invoice of 47 430 ₣ could not be approved. By a letter of 25 October 1999, IIR informed the Commission that it would provide a detailed response to the Commission's evaluation of its work. IIR never provided such a response.
- The Commission regretted the delay in replying to the complainant's letter of 25 October 1999.



It was caused by the Commission's internal restructuring, i.e. the merger of three Directorates General (DG II, XXII and XII/D). The letter was sent on 20 March 2000. However, the complainant had changed address without informing the Commission. The letter was returned undelivered. It was resent on 16 May 2000. The delay in replying therefore partially originated in the complainant's action. As to the substance of the reply, there is no procedure for an administrative appeal. The Commission stated that there is no administrative appeal process. In case of disputes, the appropriate procedure is mentioned in article 8 which provides that any dispute under the contract shall be "brought before the Brussels courts".

- Given the aforementioned changes in the MTF's work, the work carried out by the complainant could not concord with the contract anymore. However, from the minutes of the meetings with IIR it can be seen that the latter was aware of all the developments and that it never objected to the changes. Furthermore, the changes implied that for the same budget, IIR would have less work.

- IIR failed to meet the work agreed on in terms of quantity and quality. A registered letter informed the complainant thereof on 20 October 1999. The issue had however been abundantly discussed with IIR before that date.

- The exchange of e-mails between the Commission and the complainant shows that the delays were almost entirely caused by the complainant. The Commission has steadily tried to accelerate the project in view of the deadline imposed by the MIF Plenary Session of 23-24 June 1999.

- The Commission official handling the file has professional competence covering a large part of IIR's work. He has in particular worked as an IT professional. Furthermore, the Commission awards contracts in areas where the in-house competence is insufficient. The complainant cannot expect therefore his counterpart within the Commission to have a professional experience equivalent to his own. In any case, his evaluation of IIR's work is considered to be objective and responsible also in terms of the Community's financial interests.

In summary, the Commission acknowledges that the change in the situation of the MTF has occasioned difficulties in the contract. However, even in that context, the complainant has not responded adequately to the remaining works agreed on.

The complainant's observations

The Ombudsman did not receive any observations from the complainant.

THE DECISION

1 The Ombudsman's scope of review in contractual cases

1.1 According to Article 195 of the EC Treaty, the European Ombudsman is empowered to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it. Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

1.2 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. In particular, the Ombudsman is of the view that he should not



seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

1.3 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

2 Refusal to pay the final invoice

2.1 The complainant alleged that the Commission refused to pay the final invoice as foreseen by contract PRS/97/501327.

2.2 The Commission replied that although IIR had benefited from a reduced work programme, neither had it delivered all the work items agreed, nor had it met the requested quality standards. The Commission therefore refused to approve the final invoice. IIR never provided the Commission with a detailed response to the Commission's evaluation of its work.

2.3 The Ombudsman notes that by a reasoned decision of 20 October 1999, the Commission refused to make the final payment foreseen by article 4.2 of the contract. Thirty percent of the contract price was to be paid after the acceptance of the final report by the Commission. The Commission provided IIR with an evaluation of the works carried out during the contract and concluded that the quality and quantity of the work did not justify a further payment. The Commission appears to have given a reasonable explanation for its refusal to pay. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case.

3 Delay and substance of the reply to the complainant.

3.1 The complainant alleged that it took the Commission almost six months to answer a letter inquiring about the remedies against the Commission's refusal to pay an invoice. Moreover, this reply was incomplete.

3.2 The Commission replied that the delay was partially caused by the restructuring within the Commission services. A further two-month delay occurred because the complainant had not informed the Commission of IIR's new address. The Commission referred to the contract as far as the remedies are concerned.

3.3 The Ombudsman notes that the Commission regretted the delay in replying to the complainant and provided the Ombudsman with a reasonable account of explanation for this delay.

3.4 Regarding the substance of the reply, a public administration has an obligation to reply to requests for information made by the citizens. However, in the present case the information



requested by the complainant was explicitly mentioned in the contract. Article 8 provides that any dispute under the contract shall be "*brought before the Brussels courts*". Therefore, the Ombudsman finds that there is no instance of maladministration in relation to this aspect of the case.

4 Further allegations

4.1 In support of his complaint, the complainant has further argued that the work requested by DG III did not accord with the contract or with the tender handed in by IIR. The required work had been completed and written justification could be provided. Delays and other problems which arose during the completion of the contract, originated in flaws internal to the Commission and stemmed from a lack of communication with the contractor. Finally, the complainant alleged that the Commission official appointed as interface with the contractor did not have the necessary PR experience.

4.2 In its opinion, the Commission has explained that due to the changes in the MTF the objectives of the original contract had changed. From the minutes of the meetings with IIR, it can be seen that the latter was aware of all the developments and that it never objected to the changes. The changes implied that for the same budget, IIR would have less work. IIR however, failed to meet the work agreed on in terms of quantity and quality. A registered letter informed the complainant thereof on 20 October 1999 although the issue had been abundantly discussed with IIR before that date. The exchange of e-mails between the Commission and the complainant shows that the delays were almost entirely caused by the complainant. Finally, the Commission official handling the file has professional competence covering a large part of IIR's work. His evaluation of IIR's work is considered to be objective and responsible also in terms of the Community's financial interests.

4.3 The Ombudsman notes that the complainant has not provided the rebuttal mentioned in its letters to the Commission and the Ombudsman. The Commission has given reasonable explanations for its actions which have not been contradicted during the present procedure. Therefore, the Ombudsman finds that there is no instance of maladministration in relation to these aspects of the case.

5 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN