

Decision of the European Ombudsman on complaint 1217/2000/PB against the European Commission

Decision

Case 1217/2000/PB - Opened on 18/10/2000 - Decision on 08/05/2001

Strasbourg, 8 May 2001

Dear Mr P.,

On 26 September 2000, you made a complaint to the European Ombudsman on behalf of the European Federation of Engineering Consultancy Associations concerning your Federation's proposal that the Commission should set up a public procurement conciliation body.

On 18 October 2000, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 31 January 2001. I forwarded it to you with an invitation to make observations, which you sent on 30 March 2001.

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

THE COMPLAINT

In September 2000, the complainant, acting on behalf of the European Federation of Engineering Consultancy Associations (EFCA), wrote to the Ombudsman concerning EFCA's wish that the European Commission should ensure the creation of a recourse body for procurement procedures. It had come to EFCA's attention that the Commission had considered the setting-up of such a body, and EFCA had therefore written to the Commission, in April 2000, supporting the idea and making suggestions as to the nature and functioning of the body.

In June 2000, EFCA received a letter from Commission which stated in brief terms that the Commission had chosen not to propose the setting-up of a procurement body.

In his complaint to the Ombudsman, the complainant alleged that the letter from the Commission failed to adequately account for the Commission's decision not to pursue the setting-up of a procurement body.

THE INQUIRY



The European Commission's opinion

The complaint was forwarded to the European Commission for opinion.

In its opinion, the Commission explained its position as follows.

The idea of an administrative body for procurements has been evoked in the White Paper of the Commission on administrative reform adopted on 1 March 2000. The White Paper suggested that the Commission should consider the establishment of an independent body to examine complaints relating to the procedures for awarding contracts. The Commission considered this suggestion in the context of the preparatory work of its proposal for a new Financial Regulation but decided not to pursue, in the framework of this proposal adopted on 26 July 2000 (COM(2000)461 final), the objective of creating an administrative body for procurements.

The reasons for this position were the following:

- The establishment of an independent review body would have gone further than the obligations which Directive 89/665 imposes on the Member States as regards review procedures. Article 2(1) of that Directive requires that Member States take the necessary measures to ensure that the decisions taken by the contracting authorities can be reviewed effectively. Article 2(8) of the Directive makes it clear that the review procedure may be either administrative or judicial. There is thus no requirement under the Directive to set up both an independent administrative review procedure and a system of review by a court. In the Community legal order, judicial review by the Court of First Instance of acts taken by the Community institutions in the context of procurement contracts exists. There is, furthermore, the possibility of appeal on a point of law to the Court of Justice. Outside the courts, operators may also complain to the Ombudsman;
- The Commission is proposing clearer rules in the proposal for a new Financial Regulation mentioned above on how tender contracts should be awarded. Given the tenor of those rules, the Commission considered that it was unnecessary to add a new procedure providing for supplementary administrative review. It has to be borne in mind, regardless of whether or not such supplementary administrative tender procedure has a suspensory effect, that a balance must be struck between an efficient tender procedure on the one hand and satisfactory mechanisms for redress on the other. The Commission considered, in making its proposals, that the disadvantages of a supplementary system of review outweighed the advantages which such a system could procure.

The Commission added that its position was adopted in the framework of the recasting of the Financial Regulation and is without prejudice to the fact that the matter deserves to be raised in a broader context.

The complainant's observations

The complainant stated that EFCA's first letter to the Commission had not merely supported the idea raised in the Commission's White Paper, which concerned a complaint body regarding the *award* of contracts, but had also suggested that a procurement body should be established to examine complaints concerning on-going projects. The Commission's opinion had not addressed this matter.



THE DECISION

1 The failure to provide a reasoned reply

1.1 The complainant alleged that the Commission had failed to adequately account for its decision not to pursue the creation of a complaint body for procurement procedures, a possibility that had been raised in a Commission White Paper. The Commission's opinion in the present inquiry has set out the reasons why the Commission decided not to pursue the creation of such a body.

1.2 The Ombudsman considers that the Commission's opinion has adequately clarified the reasons why the Commission decided not to pursue the creation of a complaint body for procurement award procedures. As regards the complainant's wish that the Commission consider the idea of creating a complaint body relating to on-going projects, the Ombudsman notes that this idea would not appear to have been a subject in the Commission's White Paper referred to above. It would therefore not appear that there has been a discussion and decision on this matter which the Commission is obliged to account for.

2 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.

Yours sincerely,

Jacob SÖDERMAN