

Decision of the European Ombudsman on complaint 1449/2000/OV against the European Commission

Decision

Case 1449/2000/OV - Opened on 11/12/2000 - Decision on 24/08/2001

Strasbourg, 24 August 2001

Dear Mr B. and Mr V.,

On 10 November 2000, you made a complaint to the European Ombudsman on behalf of Tractebel Division Wallonie concerning alleged maladministration by the European Commission in relation to the Service Contract Number RE/YOU/07/01/97.

On 11 December 2000, I forwarded the complaint to the President of the European Commission. On 10 January 2001, I received a copy of the fax you sent on 8 January 2001 to the Commission Delegation in Bosnia-Herzegovina concerning the payment of ≈ 3,371,10. The Commission sent its opinion on 12 March 2001. I forwarded it to you with an invitation to make observations, which you sent on 23 April 2001.

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complaint is made on behalf of a Belgian development-engineering company which on 30 May 1997 concluded a contract with the Commission for water supply reconstruction projects in Banja Luka, Ribnik and Sipovo in Republika Srpska. On 11 August 1997, the Commission however took the decision not to authorise further services in the Republika Srpska. Because of the stoppage of the activities, the complainant suffered a financial loss. On 16 September 1997 the Commission authorised to resume the activities.

The contract came to an end on 30 March 1998 because of external elements which led to extra costs. Since August 1997, the complainant tried unsuccessfully to reach an agreement with the Commission on the payment of those costs, respectively with the DG 1A in Brussels, the DG Relex and the Commission Representation in Sarajevo.



On 10 November 2000, the complainant wrote to the Ombudsman claiming that:

1. the Commission should pay the Debt Statement n° 003 of 25 January 2000 amounting to $\text{¤} 3.371,10$ (interests for one year delay payment of invoices n° 885, 886 and 887);
2. the Commission should pay $\text{¤} 13.240$ ($\text{¤} 7.920 + 5.760 + 4.560 = 18.240 \text{¤} 5.000$) as a reasonable financial compensation for extra works carried out due to special circumstances which were beyond the complainant's control in Republika Srpska.
3. The complainant also alleged that on 1 August 2000, the Commission informed the complainant by fax that it would review the outstanding claims, but in November 2000 the complainant was still waiting for that review.

On 10 January 2001, the complainants sent a copy to the Ombudsman of their fax to the Commission Delegation in Bosnia-Herzegovina, in which they informed that the payment of $\text{¤} 3,371.10$, representing the interest for late payment, had been received on 3 January 2001.

THE INQUIRY

The Commission's opinion

The Commission first recalled the facts of the complaint. On 30 May 1997, the complainant signed a contract with the Commission ¤ in the framework of the 1997 Phare Water Programme - for "Consultancy services for preparation of Design and Tender Documents for Water Supply Reconstruction Projects in Banja Luka, Ribnik and Sipovo", three municipalities in the Serb entity of Bosnia and Herzegovina (Republika Srpska - RS). For the value of the contract RE/YOU/07/01/97 a maximum of $\text{¤} 157,616.00$ was foreseen.

The assignment started on 11 June 1997 at a time of political tension between the international community and the RS government. On 10 July 1997 the complainant was requested not to travel to Pale due to political reasons. On 24 July 1997, the complainant submitted the draft preliminary report and the assessment reports. On 6 August 1997, the Commission forwarded comments to the complainant concerning these documents. In the same letter, the complainant was requested to deliver implementation strategies before proceeding.

On 11 August 1997, the Commissioner for External Relations formally decided to suspend most EC programmes in the RS. On 27 August 1997, the complainant sent a claim for a further $\text{¤} 17,600.00$. Although the Commission's decision directly affected the complainant's assignment, the contract itself was not suspended. Following this decision, on 11 August 1997, the complainant's experts were instructed not to undertake new missions to the sites of the projects, but on 1 September 1997 were invited to pursue work as far as possible from their office.

On 20 November 1997, the complainant sent to the Task Manager the final draft of the preliminary Report and Assessment Reports for approval. On 16 December 1997, the complainant requested an extension of the duration of the contract for an additional five months and stressed that certain decisions of the local authorities resulted in unforeseeable extra costs



resulting in a claim for compensation of ₺ 20,400.00. The contract was extended but with no cost increase. On 15 November 1999, the delegation notified the complainant that its payments has been processed, including the reasonable compensation of ₺ 5,000.00 being in line with the contractual provisions. Therefore the contract was considered closed.

As regards the complainants' first claim, the Commission regretted the delay, but observed that the amount of ₺ 3,371.10 was transferred to the complainant's bank account in early January 2001.

As regards the second claim for a total of ₺ 13,240.00 as compensation for extra work, the Commission's opinion examined separately the three amounts in question.

As regards the claim of ₺ 2,920.00 (RS), the Commission acknowledged that the suspension of fieldwork in August 1997 was a result of the political decision taken by Commissioner Van den Broek. The Commission however stressed that the complainant should have suspended project activities until the approval of a so-called Assessment Report. In this respect, the EC supervisors (MOB) questioned the claim as they considered that in any case the complainant's experts could not have re-started before the middle of September. On 15 September 1997 the complainant was informed that the suspension had been lifted and that it could proceed with the fieldwork. However, the complainant did not re-start activities until November. Certain changes on the ground could have been avoided if the complainant had started earlier after the end of the suspension period.

In May 1998, the Task Manager confirmed that reasonable compensation should result in the payment of ₺ 5,000.00 out of the claimed 7,920.00 (resulting in a difference of ₺ 2,920.00). Such compensation was in line with the contract, article 43 of which related to "force majeure" (*"additional costs reasonably and necessarily incurred"*). Having endorsed a reasonable compromise, the EC supervisors (MOB) accepted to cover costs related to the suspension and resumption of work under the contract. The company therefore obtained the maximum amount granted under the contract.

As regards the claim of ₺ 5,760.00 (Sipovo project), the Commission observed that in a letter of 20 November 1997, the complainant mentioned changes brought to the Sipovo project but did not refer to any additional work and cost implications which were only brought to the attention of the Task Manager in December 1997. In September 1997, the latter had informed the complainant that any services initially not included in the contract were to be approved by the Commission beforehand. Such additional services would result in an increase of contract value and therefore necessitate an addendum to the contract before their provision. After this warning, the complainant should have taken all the necessary precautions to ensure the agreement of the Commission to any extra costs. Thus the complainant is to be considered entirely responsible for its own decisions.

The complainant argued that it acted in good faith based on the approval by IMG of its Assessment Report. However, IMG was never appointed by the Commission to endorse project-related documents. This was the Commission's role, based on the advice from the MOB



Supervisors. The complainant acknowledged this in the letter of 20 November 1997 as it requested the approval by the Commission Task Manager of the said Assessment Report. By refusing to pay the requested amount, the Delegation confirmed in November 1999 that this claim was not acceptable. The Delegation confirmed this on 28 February 2000 and maintained its position also after an additional review at the end of 2000.

As regards the claim of ₧ 4,560.00 (Ribnik), the Commission stated that it was correct that the Terms of Reference indicated a higher amount for the project than the one eventually budgeted in the Financing Proposal (which was reviewed in light of budgetary constraints for the Water programme, ₧ 1.213,000.00 against ₧710,000.00). However, a full copy of the Financing Proposal had been sent to the complainant shortly after the contract was signed. Having noticed the discrepancy, the complainant sent an e-mail to the EC Supervisor (MOB) on 15 July 1997 requesting clarification. Neither waiting for the reply, nor having finalised its Assessment Report, the company proceeded with the design based on the higher budget. When the reply was received on 29 July 1997, the complainant claimed this was too late and requested compensation of ₧ 4,560.00 for *"hydraulic redesign and optimisation for a new lower budget"* (6 working days at ₧ 760.00) on 27 August 1997.

On 10 September 1997, the Commission notified the complainant that it did not consider the claim founded and that it refused to pay the requested amount. On 28 February 2000, the Delegation confirmed again its position in writing after the additional review. The Commission confirmed its position again after the additional review end 2000. Consequently, the Commission considers that the outstanding claims raised in relation to the compensation for extra works (₧ 13,240.00) can not be met.

As regards the complainant's last allegation that it was still waiting for the review of its claims announced by the Delegation in August 2000, the Commission observed that such a review was carried out towards the end of 2000. It resulted in maintaining the Delegation's position.

The complainant's observations

The complainant maintained its claims for compensation amounting to a total of ₧13,240.00.

As regards the suspension of the works in RS (claim of ₧ 2,920), the complainant observed that the Commission's position in the matter was not appropriate: The Commission's decision of 11 August 1997 not to authorise further services in RS for an undetermined period resulted in the full stoppage of the complainant's activities. This deeply disturbed the progress of the project and the complainant's staff organisation. Since its request for compensation is reasonable and moderate, the complainant request full compensation.

As regards the revision of the Sipovo project (claim of ₧ 5,760), the complainant observed that it was not appropriate for the Commission to maintain that the project changes were the complainant's own decision, since the Commission Task Manager did not give his formal approval. The main project changes were requested by the new elected Sipovo officials, and the Municipality of Sipovo requested to modify the location of the Vrazici water works. Also, the project has been carried out in close cooperation with MOB supervisors appointed by the Commission. The latter instructed the complainant by phone to revise and complete the studies



and documents according to Local Authorities instructions, in order to receive the Local Authorities' final approval and to report to the Commission. The abrupt cancellation of the Commission's visit to Banja Luka announced on 15 July 1997 led to the cancellation of all technical meetings and consequently no formal approval could be received.

As regards the revision of the Ribnik assessment report (¤ 4,560), the complainant stated that the Commission did not question that the report had been revised due to discrepancies found in the contract documents.

THE DECISION

1 The alleged unpaid debt statement

1.1 The complainant claims that the Commission should pay the Debt Statement n° 003 of 25 January 2000 amounting to ¤ 3.371,10 (interests for one year delay payment of invoices n° 885, 886 and 887). The Commission regretted the delay, but observed that the amount of ¤ 3,371.10 was transferred to the complainant's bank account in early January 2001.

1.2 The Ombudsman notes that the amount of ¤ 3,371.10 was indeed transferred to the complainant's bank account. This appears from a fax of 3 January 2001 from the Commission Delegation in Bosnia-Herzegovina to the complainant and from fax of 8 January 2001 from the complainant to the Commission Delegation, in which the former informed that the payment of ¤ 3,371.10 representing the interest for late payment had been received on 3 January 2001. It therefore appears that this claim was settled to the satisfaction of the complainant.

2 The claim for ¤ 13.240 as compensation for extra work

2.1 The complainant claims that the Commission should pay ¤ 13.240 (¤ 2.920 + 5.760 + 4.560 = 13.240) as a reasonable compensation for extra works carried out due to special circumstances which were beyond the complainant's control in Republika Srpska (RS, Sipovo, Ribnik).

2.2 In its opinion, the Commission explained in detail why it could not accept the complainant's claims. As regards the claim of ¤ 2,920.00 (RS), the Commission explained that it had already paid ¤ 5,000.00 as a reasonable compensation and that this was in line with Article 43 of the contract. As regards the claim of ¤ 5,760.00 (Sipovo project), the Commission stated that the complainant was entirely responsible for its own decision to bring changes to the project without referring to additional work and costs implications, and that any services initially not included in the contract were to be approved by the Commission beforehand. As regards the claim of ¤ 4560.00 (Ribnik), the Commission observed that, without waiting for a reply nor having finalised its Assessment Report, the complainant proceeded with the design based on the higher budget.

2.3 It appears that the framework of the complaint's claims for financial compensation is the Service Contract n° RE/YOU/07/01/97 signed between the complainant and the Commission on 30 May 1997 for "Consultancy services for preparation of Design and Tender Documents for Water Supply Reconstruction Projects in Banja Luka, Ribnik and Sipovo".

2.4 It has therefore to be recalled that the European Ombudsman does not seek to establish



whether either party has acted in conformity with the contract. This question can only be dealt with effectively by a court of competent jurisdiction which would have the possibility to hear arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on the disputed issues of fact. In the present case, it appears from Article 10 of the contract that, for all matters not covered by the contract provisions, the performance shall be governed by the law of Belgium. Article 11 of the contract provides that any dispute arising out or relating to this contract will be referred to the exclusive jurisdiction of the competent court in Brussels, Belgium.

2.5 However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes its view of its position to be justified. The Ombudsman shall therefore verify whether the Commission did so in the present case.

2.6 As regards the first claim of 2,920.00 (Republika Srpska), the Ombudsman notes that the Commission had, as a reasonable compromise, agreed to cover costs related to the suspension and resumption of work under the contract, because these costs were the result of a decision taken by Commissioner Van den Broek further to the political situation in the region. It therefore informed the complainant on 15 November 1999 that it would grant a financial compensation of ₣ 5,000.00 out of the ₣ 7,290.00 requested. The ₣ 5,000 was the maximum amount under the contingency in the contract and the complainant therefore obtained the maximum amount possible.

2.7 As regards the second claim of ₣ 5,760.00 concerning Sipovo project, it appears from the Commission's opinion that the complainant had unilaterally decided to bring changes to the contract which increased the contract value. The Commission never gave its agreement for the extra costs which were made as a result of that. The Commission therefore refused to pay the compensation for these additional costs.

2.8 As regards the third claim of ₣ 4560.00 concerning the Ribnik project, it appears that the complainant, having noticed the discrepancy in the budget of the Terms of Reference and the budget of the Financing Proposal, did not wait for the Commission's clarification on this point and proceeded with the design based on the higher budget. The Commission therefore considered that the claim was not founded.

2.9 It appears from the above that the Commission has provided the Ombudsman with a reasonable explanation for its refusal to grant financial compensation to the complainant. No instance of maladministration was therefore found with regard to this aspect of the case.

3 The alleged delay in reviewing the outstanding claims

3.1 The complainants alleged that on 1 August 2000, the Commission informed them by fax that it would review the outstanding claims, but in November 2000 the complainants were still waiting for that review. The Commission observed that such a review was carried out towards the end of 2000. It resulted in maintaining the Delegation's position.

3.2 From the documents in the file, it appears that a first review of the claims by the



Commission already took place in February 2000. The results of this review – the refusal of the claims for additional costs – were communicated to the complainant in a letter of 28 February 2000 from the Commission Delegation in Bosnia-Herzegovina. From the Commission's opinion it further appears that, although with some delay, the Commission has again reviewed the outstanding claims by the end of 2000 but has maintained its previous position. No instance of maladministration was therefore found with regard to this aspect of the case.

4 Conclusion

As regards the first part of the complaint, it appears from the Commission's comments and the complainant's observations that the Commission has taken steps to settle the matter and has thereby satisfied the complainant.

On the basis of the Ombudsman's inquiries into parts 2 and 3 of this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN