

Decision of the European Ombudsman on complaint 1509/2000/JMA against the European Commission

Decision

Case 1509/2000/JMA - Opened on 29/11/2000 - Decision on 14/11/2001

Strasbourg, 14 November 2001

Dear Mr E.,

On 21 November 2000, you lodged a complaint with the European Ombudsman on behalf of Transition Consulting Limited (TCL), against the European Commission. Your complaint concerned the refusal of the Commission services to recognise part of the work performed by your firm in the context of a contract with TACIS in Central Asia.

On 29 November 2000, I forwarded the complaint to the President of the European Commission. On 12 March 2001, I received the Commission's opinion, which I forwarded to you with an invitation to make observations. On 23 April 2001, I received your observations on the Commission's opinion.

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

THE COMPLAINT

According to the complainant, the facts were as follows:

On 26 February 1996, the complainant's firm, Transition Consulting Limited (TCL), entered into a one-year contract for the provision of services with TACIS, the EC Technical Assistance Programme to the former Soviet Union. The complainant was engaged in "technical support to TACIS' enterprise restructuring and development programme in Central Asia".

The complainant explained that the problem arose as TACIS disputed his claim for fees based on time spent. As a result of this difference, the Commission claimed from Transition Consulting a sum it considered to be an overpayment. The complainant enclosed with his letter some exchanges with the Commission services regarding the dispute, in particular with officials from TACIS and with the Accounting department.

The Commission's claim was based on the non-acceptance by the TACIS desk officer of a



number of timesheets submitted by the complainant concerning days spent on TACIS projects, on the basis of the non respect of the programme's "productivity" standards. The complainant contended that he had met the standards of the contract as set out in the original contract with the Commission.

The complainant indicated that following the TACIS request, he agreed to reduce the amount of days charged to less than the days performed. He claimed, however, that his concession was extracted under duress by the TACIS desk officer, who suggested that this amendment was a condition of his continuing eligibility for consulting work from the TACIS programme. Subsequently he was never called upon to "use up" the approximately 50% of days in his outstanding contract.

Although the complainant sought to have these matters discussed with the Commission hierarchy above the desk officer, no account was apparently taken of his offers. He thus considered that this attitude had been very inequitable.

In the complainant's view, the problem resulted from the poor management of the TACIS programme. He explained that desk officers as well as management were changed frequently during this period. In this environment, there was little effective control over the desk officer's use of consultants, and no recourse for the consultant contracted by the Commission.

In summary, the complainant alleged that,

1. the non-acceptance of actual days spent by his firm on TACIS projects was unfair, and therefore there were no grounds for the Commission to ask TCL for the reimbursement of sums already advanced, and
2. the complainant's initial agreement to reduce days charged to less than days performed was extracted from him under duress by the responsible TACIS desk officer, who told him that this was a condition of his firm's continuing eligibility for any further consulting work from TACIS.

THE INQUIRY

The Commission's opinion

The Commission, in its opinion of 12 March 2001, first outlined the background of the case, and then replied to the specific allegations made by the complainant.

Background

The institution explained that Transition Consulting, the complainant's firm, had been retained under contract 96-0245 to provide expert advice to TACIS. The contract was signed on 20 February 1996 and expired a year later. It provided for 172 man-days of input and associated expenses, for a total value of 149.656 ₺.

The contract provided a framework within which the Commission could purchase the services of the consultant, according to its needs. The final amount received by the consultant, therefore, depended on the amount of work he had provided. In the event, the Commission indicated that



its services had not called on the contractor's services after October 1996.

On signing the contract, the Commission made the standard advance payment of 35.000 ₺. The Contractor submitted an interim claim for fees and direct expenses on 12 September 1996, covering the period March-August 1996. It was met in full, and in making the payment the Commission recovered half of the advance. The Contractor submitted a claim for reimbursable expenses covering the full period of the contract on 10 March 1997, which was also met in full by the Commission.

On 31 May 1999, the Commission sent a fax to the Contractor reminding him that the contract had expired over two years earlier, and that no claims for payment had been received since March 1997. The Commission invited the Contractor to submit any outstanding claims, failing which the Commission would take steps to recover the outstanding amount of the advance. In response to this letter, the Contractor submitted a final payment claim on 22 June 1999, which summarised the services provided over the full period of the contract, including unbilled work from September until October 1996. The claim was rejected on the grounds that the Commission was not satisfied with the quality of the services provided during the contract. The Commission wrote to the Contractor to this effect on 28 October 1999, and on 10 November 1999 issued the corresponding recovery order for 17.500 ₺.

In reply to the complainant's request for further explanations, the Commission invited him to discuss the matter with the Task Manager's Head of Unit by letter dated 6 March 2000, in which it indicated also how to contact the European Ombudsman. The Commission pointed out that the contractor did not avail himself of the opportunity to raise his concerns with the Head of Unit, nor did he make use of the contractual provisions to settle disputes in the Belgian courts.

The complainant's specific allegations

As for the statement made by the complainant concerning the assessment of his work by the responsible TACIS' Task Managers, the Commission explained that such task had been developed by three different Commission officials. The second one of them, Ms Hiltunen, had been responsible for the evaluation of the contractor's first invoice in September 1996. She expressed dissatisfaction with the quality of the work covered, in particular as regards the high number of work-days carried out at the complainant's home office (37), which she did not consider consistent with the quality of work actually produced.

As a result of this objection, and following a meeting with Ms Hiltunen in October 1996, the complainant agreed to credit the Commission several days in his future payment claim. The Commission official recalled that meeting to have been businesslike. The Commission therefore dismissed the complainant's claim that he had agreed to credit the Commission only under duress. In fact, when submitting his final payment claim on 22 June 1999, the contractor failed to credit the Commission as he had previously agreed.

The Commission pointed out that the complainant's final invoice included the services provided over the full duration of the contract by task, but did not indicate when the days had in fact been worked. The institution also outlined several inconsistencies between the different invoices which had been submitted. It also stated that this final invoice claimed some fees that were



manifestly unsupported, namely the additional two days fees at home base in relation to "liaison HKF" on the Uzbek accounting project. The Commission noted that in his final invoice the complainant admitted that the five days of work on "Sector Strategy" were a fiasco, thus implying that he should not have billed those days.

Given the inaccuracies and inconsistencies in the invoice and the fact that the contractor had not respected the agreement he had made to credit days to the Commission, Mr McLachlan, the official in charge of the project at the time, concluded that the work performed was not satisfactory, and thus decided that no further payment be made. The Commission stressed that the assessment of the services provided by the Contractor were carried out by its services on a professional and objective basis.

Settlement proposal

In the spirit of reaching a settlement in this case, the Commission explained that it would not seek to enforce the contractor's undertaking to credit the Commission in respect of some of the services charged for the period February-August 1996. It therefore concluded that some elements of the final invoice should have been paid for. On the basis of these new considerations, the institution decreased its request for reimbursement from 17.500 ₺ to 6.159,3 ₺. The Commission explained that it would be notifying the complainant directly of this new proposal.

The complainant's observations

In his observations, received by the Ombudsman on 23 April 2001, the complainant contested some of the statements made by the Commission.

He referred to some of the tasks carried out in the framework of the project. In particular he mentioned the work under the so-called "liaison HKF" and for the "Sector Strategy". As regards the Commission's claim that the two days fees at home base in relation to "liaison HKF" were unsupported, the complainant explained in some detail the nature of this activity and the travelling conditions in order to justify the requested work. In reference to the work on "Sector Strategy" which the Commission qualified as a fiasco, the complainant underlined that the Commission did not provide him with any guidelines on the nature of the work to be done, and thus that the disappointing outcome came as a result of that mutual misunderstanding. He pointed out, however, that the work he did was probably used in the final document produced by TACIS.

The complainant concluded by highlighting his willingness to reach a settlement of this case. He therefore indicated that he would accept the Ombudsman's judgement on the only aspect of the case in which there is still some disagreement, namely the question of the work performed on the "sector strategy report".

THE DECISION

1. Commission's refusal to accept the submissions made by the complainant

1.1 The complainant alleges that the Commission's non-acceptance of actual days spent by his firm on TACIS projects was unfair, and therefore there were no grounds for the institution to ask him for the reimbursement of sums already advanced.



1.2 The Commission explained that its request for a reimbursement of part of the funds already paid was due to the unsatisfactory quality of the services provided during the contract. The institution outlined several inconsistencies between the different invoices which had been submitted. It referred, for instance, to the fact that only one of the two days fees charged for the "liaison HKF" on the Uzbek accounting project was justified. It also indicated that the outcome of the five days of work on the "Sector Strategy report" had been considered, even by the complainant himself, as a fiasco, thus implying that he should not have billed them.

1.3 Following the Commission's proposal for a settlement of the problem, and its reconsideration of the amount to be reimbursed (6.159,3 ₸), the complainant has indicated his willingness to reach a settlement of the case. He therefore indicated his willingness to accept the Ombudsman's judgement on the only aspect of the case in which he feels there is still some disagreement, namely the question of the work performed on the "sector strategy report".

1.4 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 (1) . 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.

1.5 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. 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.

1.6 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.

1.7 In this case, the only outstanding dispute as regards payment of fees concerns the work undertaken by the complainant for a sector strategy report. The Commission has justified its refusal to pay for the work on the basis that it was not satisfactory. The Ombudsman notes that the complainant has not contested the Commission's reasoning, but has explained that the disappointing outcome came as a result of a mutual misunderstanding.

Taking into consideration the subject-matter of the dispute and the previous arguments, the



Ombudsman considers that the position taken by the Commission in relation to the unsettled task and its payment, does not appear to be unreasonable. Thus, the Ombudsman concludes that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

2. The attitude of the Commission services towards the complainant

2.1 The complainant alleges that his initial agreement to reduce days charged to less than days performed was extracted from him under duress by the responsible TACIS desk officer, who told him that this was a condition of his firm's continuing eligibility for any further consulting work from TACIS.

2.2 The Commission stressed that the assessment of the services provided by the contractor were carried out by its services on a professional and objective basis. The Commission dismissed the complainant's claim that he had agreed to credit the Commission only under duress, and quoted the responsible official who considered that the meeting they had held in October 1996 had been businesslike. The institution added that the contractor had failed to credit the Commission as he had previously agreed in his final payment claim on 22 June 1999.

2.3 The Ombudsman notes that no evidence has been drawn in the course of the inquiry which could call into question the behaviour of the Community officials responsible for the supervision of the complainant's work.

It is undisputed that the Commission Task Manager responsible for the evaluation of the contractor's first invoice had expressed dissatisfaction with the quality of the work, and that she had called for a meeting with the complainant in October 1996 to iron out their differences. As a result of the meeting, it was agreed that the complainant would review his account of days actually worked on the project, and credit the Commission a number of days in his future payment claim. There is no evidence, however, that this concession on the part of the complainant had been extracted through duress or any other improper means.

3. Conclusion

On the basis of the European 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

(1) See Annual Report 1997, pages 22 et ss.