

Decision of the European Ombudsman on complaint 54/2001/ADB against the European Commission

Decision

Case 54/2001/ADB - Opened on 20/03/2001 - Decision on 06/02/2002

Strasbourg, 6 February 2002

Dear Mr R.,

On 4 January 2001, you made a complaint to the European Ombudsman concerning the requirements set out in a tender procedure for a head of mission post in a construction site of Public Works in Mali.

On 20 March 2001, I forwarded the complaint to the President of the European Commission. The European Commission sent its opinion on 17 May 2001. I forwarded it to you with an invitation to make observations, which you sent on 16 July 2001.

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

THE COMPLAINT

The complainant is an experienced engineer who worked on many road construction projects in developing countries. In 1999, the German company Beller Consult participated in and won a tender procedure for the supervision of the second section of a road construction project in Mali (National road 24), financed by the European Development Fund (EDF). Beller Consult drew up a list of people selected to participate in the project. An engineer was selected for the post of head of mission but it turned out that he could not carry out the project anymore. Beller Consult therefore contacted the complainant for the post. According to the complainant, however, the Delegation of the European Commission in Mali rejected the complainant's participation in the project because his diploma was not a university degree.

The complainant contacted the Commission to complain about the situation. The Commission considered that it had acted in accordance with the applicable EDF procedures and refused to review its position.

On 4 January 2001, the complainant therefore lodged a complaint with the European Ombudsman and made the following allegations:



1. The Commission's recent rejection of the complainant's participation in a project on the basis of his diploma amounts to inconsistency with the Commission's previous practice. Between 1992 and 1994, the complainant had worked on an identical project financed by the Commission.
2. In requiring a university diploma for engineers, the Commission is discriminating both against those who are not graduates but who are older and experienced, and against those who hold a diploma obtained in an Official Institute for Public Works.
3. The Commission exceeded its powers in rejecting the complainant's participation in the project. This choice was to be made by the contracting authority (in this case, the Minister of Public Works and Transports of the Republic of Mali).

THE INQUIRY

The Commission's opinion

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

1. According to established case law of the European Court of Justice, the authorities of each ACP State have the power to prepare, negotiate and conclude public works contracts financed by the European Community in the framework of the financial and technical cooperation provided by the Lomé Conventions. The interventions of the European bodies *"are solely intended to establish whether or not the conditions for community financing are met."* (1) They have *"the right but also the duty to ensure that the procedural rules are complied with"* (2) .

The Commission states that terms of reference in tendering procedures vary according to each project. Concerning the project carried out between 1992 and 1994, the terms of reference of the tender did not require any university diploma. The complainant's application for the post of head of mission was therefore accepted on the basis of his CV and his non-university diploma. On the contrary, concerning the project of the construction of the National Road 24, the contracting authority decided that the terms of reference of the tender procedure would set out a university diploma as a requirement for the post of head of mission. Article 3.1.1 of the Instructions to the Tenderer therefore stipulates that the head of mission has to hold a university diploma. According to the above-mentioned case law of the Court of Justice, it is up to the contracting authority to assess the minimum level of training, of qualification and professional experience of the applicants. Even if the two projects seem to be very similar, this assessment can logically vary according to each project. The Commission does not intervene in such an assessment.

2. As regards the allegation of discrimination by the Commission against engineers who do not hold a university diploma, the responsibility of setting out the selection criteria lies with the contracting authority, i.e. the ACP State.

3. Pursuant to Article 35 and 36 of the general regulation on works, supply and service



contracts financed by the EDF, the choice of the successful tenderer is made by the contracting authority. Nevertheless, in accordance with the above-mentioned case law of the European Court of Justice, the Commission has the duty to ensure that the procedural rules are complied with. It also has to advise the contracting authorities and the economic operators in order to ensure that the requirements of the tender procedure are met. In this case, the adviser to the Delegation merely notified Beller Consult that the proposed head of mission differed from the one proposed during the tender procedure and that his qualifications did not comply with the requirements set out in the terms of reference. The adviser to the Delegation did therefore not exceed his powers and only acted to ensure that the EDF Regulation was complied with. In this context it is worth noting that during the tender procedure, three applications have been rejected because the heads of missions did not hold a university diploma.

The complainant's observations

The European Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. In his reply, the complainant maintained his allegations and stated the following:

1. The Commission wrongfully stated that in 1992, the complainant had a post of head of mission for another road construction project. The project for which the Commission rejected the complainant's participation and the project carried out in 1992 were the same. He had already worked as a head of mission on the project in 1992. Thanks to his professional experience, the complainant was the best candidate for the post.
2. The complainant repeated his allegation of discrimination by the Commission against older and experienced engineers who do not hold a university diploma.
3. The contracting authority was not aware of the complainant's possible participation in the project. In fact, the Adviser to the Delegation referred directly to Beller Consult, without contacting the contracting authority beforehand. Following the case law of the Court of Justice cited by the Commission in its observations, *"it would therefore be incompatible with the sovereignty of the ACP States and the responsibilities reserved to them by the Convention, for the Commission's agents to deal directly, in place of the ACP States, with undertakings submitting tenders for or awarding contracts financed by the Fund; indeed, such action would constitute interference in a sphere reserved solely to the authorities of those states"*. Moreover, the Commission threatened Beller Consult with the cancellation of the tender procedure.

In addition, the complainant questioned the professional qualifications of the engineer who was proposed for the project for which the complainant was rejected and asked the Ombudsman to review them. Finally, the complainant considered the age limit of 60 years contained in the terms of reference to be discriminatory. The Ombudsman notes that these specific allegations did not form part of the original complaint and should therefore not be considered in the following decision.

THE DECISION

1 Alleged inconsistency with the Commission's previous practice



1.1 The complainant alleged that the Commission's recent rejection of his participation in a project on the basis of his diploma amounted to inconsistency with the Commission's previous practice. Between 1992 and 1994, the complainant had worked on an identical project financed by the Commission.

1.2 The Commission argued that it is up to the contracting authority to determine the minimum level of training, of qualification and professional experience of the applicants. This can vary according to each project. In this case, pursuant to Article 3.1.1 of the terms of reference, the head of mission had to hold a university diploma.

1.3 The Ombudsman notes that, according to the case law of the Community Courts, *"the procedure for placing public works contracts involves a division of powers between the Commission and the authorities of the ACP State concerned"*. The authorities of each ACP State are responsible for preparing, negotiating and concluding the contracts. The Commission in turn is responsible for the adoption of the financing decision and for the proper management of the EDF resources in particular by controlling the compliance with the relevant procedural rules (3).

1.4 In the present case, the complainant could not participate in the project because of the provisions contained in the terms of reference adopted by the Malian authorities. In comparison to the previous project on which the complainant had worked, the Malian authorities adopted more restrictive criteria and required that the head of mission should hold a university diploma.

1.5 Given that the complainant did not hold the required university diploma, there is nothing to indicate that the Commission has acted inconsistently in considering that the complainant's participation in the project would involve an infringement of the terms of reference as adopted by the contracting authority. Thus, the Ombudsman considers that there is no instance of maladministration as regards this aspect of the case.

2 Alleged discrimination by the Commission

2.1 The complainant alleged that, in requiring a university diploma for engineers, the Commission is discriminating both against those who are not graduates but who are older and experienced, and against those who hold a diploma obtained in an Official Institute for Public Works.

2.2 The Commission considered that only the ACP states were responsible for the drawing up the criteria of minimum qualification. It was therefore up to the ACP State services to determine whether a university diploma was an appropriate qualitative selection criterion.

2.3 As noted in paragraph 1.3 above, it is the contracting authority, i.e. the ACP State, which is responsible for the criteria set out in the terms of reference. The Ombudsman therefore concludes that there is no evidence of maladministration as regards this aspect of the case.

3 Alleged abuse of power by the Commission

3.1 The complainant alleged that the Commission exceeded its powers in rejecting the complainant's participation in the project. This choice was to be made by the contracting authority (in this case, the Minister of Public Works and Transports of the Republic of Mali).



3.2 The Commission recognises that the choice of the successful tenderer is made by the contracting authority. However, it argued that it has the duty to ensure that the procedural rules are complied with. It also has to advise the contracting authorities and the economic operators so as to ensure that the requirements set out in the tender documents are met.

3.3 The Ombudsman notes that according to the case law of the Court of Justice mentioned both by the complainant and the Commission, *"It would (.) be incompatible with the sovereignty of the ACP States and the responsibilities reserved to them by the Convention, for the Commission's agents to deal directly, in place of the ACP States, with undertakings submitting tenders for or awarding contracts financed by the Fund; indeed, such action would constitute interference in a sphere reserved solely to the authorities of those states"* (4) .

3.4 However, the Ombudsman also notes that *"the Commission has not only the right but also the duty, as part of the responsibilities conferred upon it for the proper management of the resources of the fund, to ensure that the appropriate procedural rules are complied with"* (5) .

3.5 In the present case, Beller Consult, before informing the Malian authorities, contacted the Delegation of the Commission in Mali proposing alternatives to the head of mission originally foreseen in its application (fax of 8 February 2000). In reply, the Commission informed Beller Consult that the complainant's participation in the project would not meet the requirements set out in the terms of reference and that this could jeopardise the funding of the project. The Commission thereby appears to have acted in its capacity as supervisor of the procedure. It did therefore not exceed its powers. Thus, the Ombudsman concludes that there is no maladministration as regards this aspect of the case.

4 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

(1) Case 126/83, *STS Consorzio per sistemi di telecomunicazione via satellite SpA v. Commission* [1984], ECR page 2769, paragraph 11 to 19.

(2) Case 267/82, *Développement SA et Clemessy v. Commission* , [1986], ECR page 1907, paragraph 25 to 27.

(3) see footnote 2 above

(4) see footnote 1 above



(5) see footnote 2 above