

Decision on the European Commission's decision to recover funds from a company that was part of a consortium that was awarded an EU-funded contract (case 523/2021/LM)

Decision

Case 523/2021/LM - Opened on 20/05/2021 - Decision on 03/02/2022 - Institution concerned European Commission (No further inquiries justified) |

The complainant took part in a consortium that was awarded an EU-funded contract in an African country. The European Commission sought to recover funds from the complainant after a partner company in the consortium failed to carry out one of the contracts, concerning the supply of road maintenance equipment. The complainant claims it was unaware of the contract and that its signature on the contract documents had been forged. After almost five years without contact, the Commission wrote to the complainant again, asking it to pay the amount due plus interest. The complainant says it is not contractually liable and filed a complaint to the relevant criminal prosecutor's office concerning the allegedly forged signature.

As the question of alleged fraud is currently the subject of legal proceedings in Italy, the Ombudsman cannot take a position on the recovery of funds. However, the Ombudsman considers that, should the recovery proceed following the legal action, the complainant should not be liable for any late payment interest for the period during which the Commission was inactive on the file (that is almost three years). The Ombudsman closed the inquiry with the finding that no further inquiries are justified.

Background to the complaint

1. The complainant is a company based in Italy. Together with another company (hereinafter, 'company X'), it was part of a consortium that participated in a call for tenders in 2011 for a series of contracts, funded by the EU, concerning the supply of equipment for road construction and maintenance projects in an African country. The call for tenders was divided into six lots. The complainant said it submitted an offer only for one of the lots (lot 5).

2. In October 2014, the Commission contacted the complainant, asking it to reimburse EUR 127 356. The Commission stated that these funds had been paid to company X for one of the lots under the call (lot 4) but it had failed to fulfil the contract. The EU Delegation in the African



country in question, which was responsible for overseeing the contract, said that the complainant had signed a declaration [1] that it was severally and jointly liable [2] with company X for the execution of the contract.

3. In November 2014, the complainant replied to the Delegation. It said that it was not aware of the existence of a contract for lot 4, to which the letter referred, because it had only participated in the call for tenders for lot 5, which involved training services. The complainant said it would transmit the correspondence to its project partner because it considered that the letter had been addressed to it by mistake.

4. The Commission wrote to the complainant again in February 2015, saying that the company X had not replied to the Commission's requests for payment. It included copies of the contractual documents, including the declaration of joint and several liability, signed by the complainant, and authorising company X to sign contractual documents on its behalf. [3]

5. In March 2015, company X sent a letter to the Delegation in which it took full responsibility for the failure to execute the contract for lot 4 and gave an address where it could be contacted.

6. In October 2019, the Commission wrote a letter to the complainant asking it to pay EUR 176 912.31, covering the sum it had sought to recover in 2015 and interest for late payment [4]. The complainant contacted the Commission several times in the course of 2020, arguing that it was not contractually liable. It claimed that its legal representative had never signed the declaration of joint and several liability. The complainant sent an expert evaluation to the Commission attesting that the signature was not authentic and, in January 2020, it filed a complaint to the relevant criminal prosecutor's office concerning the alleged forgery. The complainant also requested access to the original contractual documents.

7. In its correspondence with the complainant, the Commission maintained that the complainant was contractually liable to repay the amount in question. It also stated it does not hold the originals of the requested documents, which are in the possession of the national authorities in the African country in question.

8. Dissatisfied with the Commission's replies, the complainant turned to the Ombudsman in March 2021.

The inquiry

9. The Ombudsman opened an inquiry to assess how the Commission handled the procedure to recover funds.

10. In the course of the inquiry, the Ombudsman inquiry team inspected the Commission's file on this case and met with representatives from the Commission. The complainant then submitted comments on the report of the inspection meeting.



Arguments presented to the Ombudsman

Arguments by the complainant

11. The complainant argued that it was part of the consortium only for lot 5 of the procurement procedure (but not lot 4). It claimed that company X never informed it of the results of the call for tenders, therefore the complainant was not aware that company X had signed a contract with the Commission. It claimed that, only when the Commission sent the complainant copies of the contractual documents in February 2015, did it realise that the signature in support of its participation in the tenders was not authentic. However, after company X sent its letter in March 2015, accepting full responsibility, the complainant believed that company X would reimburse the Commission. The complainant thus considered that it was not necessary to report the falsified signature to the criminal prosecutor. The complainant argued that it did not want to jeopardise its relationship with company X, and potentially undermine its ability to repay the Commission, by reporting the matter to the criminal prosecutor.

12. The complainant took issue with the fact that it took the Commission almost five years to resume contact with it about the matter. In the absence of updates from the Commission, the complainant assumed that company X had paid its debt. It claimed that this delay was not only bad administrative practice, but meant the complainant delayed taking action about the allegedly forged signature. Furthermore, it argued that the Commission is seeking to impose late payment interest, even though any potential late payment would be the result of the Commission's delay.

13. The complainant believes that, since company X sent a letter accepting full responsibility in March 2015, the Commission should have recovered the funds from it then. The complainant also wants the Commission to verify the signature on the original contractual documents, and believes it should request the originals of these documents from the national authorities in the African country to this end.

Arguments by the Commission

14. The Commission argued that the complainant assumed joint and several liability with company X by signing a declaration required for all consortium members under the call for tenders. Therefore, the Commission has the right and obligation to recover the money from the complainant, unless a court of law concludes that the signature on the documents is forged, that is, that it is not attributable to the complainant's legal representative. The Commission questioned why the complainant did not file a criminal complaint immediately after becoming aware that it was liable, jointly and severally, in respect of the contract for lot 4 but, instead, waited five years to do so.

15. The Commission stated that company X never replied to its numerous requests for payment



and, in its letter of March 2015, it had not committed to pay its debt. The Commission had not contacted the complainant between February 2015 and October 2019 because it was engaged in discussions on how to proceed with the recovery against company X. It eventually inquired into the assets of company X and decided to waive the recovery when it found out that the company had no seizable assets.

The Ombudsman's assessment

16. Joint and several liability implies that two parties are both responsible for the same debt and that, in the event that one party fails and/or refuses to pay the debt, the other party is fully responsible for the entire of the sum due. The question of whether the complainant is contractually liable towards the Commission depends on whether the relevant criminal prosecutor concludes that the signature on the documents in question was forged. This matter thus falls outside the Ombudsman's remit.

17. The role of the Ombudsman in this case is thus to assess whether the Commission has handled the file in accordance with the principles of good administration.

18. The principles of good administration imply that administrations should deal with matters within a reasonable time and without unjustified delays. What is a 'reasonable time' depends on the circumstances of each case. Factors to be considered include the complexity of the case, its importance for the party involved, the various procedural steps followed by the administration and the context of the case. [5] Each procedural step should be taken within a reasonable period following the previous step. [6] Moreover, if the duration of an administrative procedure exceeds what is a reasonable time, it is for the administration to prove the existence of special circumstances such as to justify the delay. [7]

19. From the documents inspected by the Ombudsman's inquiry team, it appears that, up to April 2015, the Commission sent numerous requests for payments to company X, without receiving any reply. It also sought external support to try to contact company X. However, the Commission appears to have taken no action on the case between April 2015 and the end of February 2018: almost three years. During this period, the Commission says that it was internally discussing whether it could waive the recovery against company X and start a process to recover the funds from the complainant. However, in February 2018, the Commission started to inquire into the seizable assets of company X. The Commission resumed contact with the complainant only in October 2019, just before the expiry of the limitation period of its entitlement to recover funds from the complainant through its joint and several liability obligation [8] .

20. The Commission was therefore inactive on the file for almost three years, between April 2015 and February 2018. There were no objective reasons for the Commission to take three years to conclude that it should collect information concerning the financial viability of company X before deciding whether to waive recovery against this company. This inaction was unreasonably long and the Commission has not provided adequate explanations to justify the delay [9] , which had the effect of considerably increasing potential late payment interest due on



the unpaid amount.

21. The Ombudsman considers that if the Commission decides to pursue the recovery vis-a-vis the complainant (depending on the outcome of the criminal proceedings in Italy concerning the allegedly forged signature), it should waive the late payment interest for the period it was inactive on the case.

22. However, at this stage, further inquiries by the Ombudsman would serve no useful purpose.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

No further inquiries are justified at this stage.

The complainant and the European Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 03/02/2022

[1] The “ *declaration du soumissionnaire* ”.

[2] In contracts including two or more parties, a ‘several and joint liability’ clause means that all parties are liable for meeting the obligations under the contract.

[3] The “ *declaration du soumissionnaire* ”, the declaration on honour and the “ *procuration* ”.

[4] EUR 127 356 plus EUR 49 556.31 interest.

[5] See for instance judgment of the Court of Justice of 17 December 1998, *Baustahlgewebe v Commission*, case C-185/95 P, paragraph 29, available at

[http://curia.europa.eu/juris/showPdf.jsf?jsessionid=8F1C0778C9B8C96192ACB213E890C455?text=&docid=43779&\[Link\]](http://curia.europa.eu/juris/showPdf.jsf?jsessionid=8F1C0778C9B8C96192ACB213E890C455?text=&docid=43779&[Link]) and the Ombudsman’s decision in case 484/2015/DR, paragraph 28, available at <https://www.ombudsman.europa.eu/en/decision/en/90382> [Link].

[6] See for instance judgment of the Court of Justice of 2 June 1994, *De Compte v Parliament*, case C-326/91 P, paragraph 21, available at

[http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98282&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&\[Link\]](http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98282&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&[Link]).



[7] See for instance judgment of the Court of Justice of 5 May 1983, *Ditterich v Commission* , case 207/81, paragraph 26, available at

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=91654&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&>
[Link]

[8] Article 105 of the Financial Regulation.

[9] See, for instance, judgement of the General Court of 20 July 2017, *ADR Center SpA v. Commission* , T-644/14, paragraph 178, in which the Court held that a delay of 13 months was an unreasonably long delay between the auditors sending their final report to the Commission and the Commission sending the reports to the beneficiary.

<https://curia.europa.eu/juris/liste.jsf?language=en&num=T-644/14> [Link]