

## **Decision of the European Ombudsman on complaint 395/2001/GG against the European Commission**

Decision

**Case 395/2001/GG - Opened on 30/03/2001 - Decision on 02/10/2001**

Strasbourg, 2 October 2001

Dear Mr B.,

On 15/16 March 2001, you made, acting for the Ecole Normale Supérieure de Lyon, a complaint which concerns Contract no. BMH4-CT96-0010. You claimed that the Commission had failed to pay the balance due under this contract (≈ 550,000 minus ≈ 506,369,28).

On 30 March 2001, I forwarded the complaint to the Commission for its comments.

The Commission sent its opinion on your complaint on 26 June 2001. I forwarded the Commission's opinion to you on 3 July 2001 with an invitation to make observations, if you so wished, by 31 August 2001 at the latest. No such observations were received from you.

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

### **THE COMPLAINT**

In 1996, the Commission and several contractors entered into Contract no. BMH4-CT96-0010 which concerned a project called "Proliferation, differentiation, apoptosis: what's the difference ?" (also referred to as the "Biomed 2" contract) carried out in the context of the Biomedicine and Health research and technological development programme. The co-ordinator of this project was the complainant, a French university (more specifically, its Laboratoire de Biologie Moléculaire et Cellulaire ≈ CNRS UMR 49).

According to Article 3 (2) of the contract, the Commission "shall contribute up to and including 50 % of the allowable full costs and/or, as appropriate, 100 % of the additional costs up to 550,000 ECU". The allowable costs were estimated to amount to ≈ 1,266,384.

Article 3 (2) of the contract further provides that the estimated apportionment between the participants was set out in a table following the contract signatures. This table contains inter alia figures for two contractors working on a full cost basis, CSIC and NeuroSearch. The costs of



CSIC were estimated to amount to € 375,333 whilst an EU contribution of € 104 000 was foreseen. The costs of NeuroSearch were estimated at € 495,051 with an EU contribution of € 50,000.

In the end, the project cost around € 940,000, i.e. less than expected. The total contribution paid by the Commission amounted to € 506,369,28.

The complainant asked the Commission to pay the balance between this sum and the € 550,000 mentioned in the contract in regard of the contributions due to CSIC and NeuroSearch. The Commission refused to do so.

The complainant thus turned to the Ombudsman, arguing that the Commission should pay the above-mentioned balance.

## THE INQUIRY

The complaint was sent to the Commission for its opinion.

### **The opinion of the Commission**

In its opinion, the Commission made the following comments:

The amount of € 550,000 was the maximum contribution allocated to this project by the Commission. However, this sum was not to be paid automatically. The allowable costs had to be proven by the contractors and then accepted by the Commission. On this basis, the Commission had accepted costs amounting to € 506,369,28. The balance (€ 550 000 minus € 506,369,28) was not due since it did not correspond to allowable costs that had been proven by the contractors and accepted by the Commission.

Contractors working on a full cost basis could receive a contribution of up to 50 %. This meant that this percentage represented the maximum that they could obtain. This percentage was however not binding. It was thus possible to agree on a lower ratio when negotiating the contract and to include this lower ratio in the table setting out the estimated apportionment of allowable costs between the participants. Although the allowable costs and the corresponding EU contribution could vary, as long as the overall sum did not exceed the maximum contribution provided for in the contract, the relevant ratio remained stable for each contractor.

According to the table included in the contract, the costs of CSIC were estimated to amount to € 375,333 whilst an EU contribution of € 104 000 was foreseen. The EU contribution thus amounted to 27.71 % of the estimated costs of this contractor. In the end, the costs that could be accepted with regard to CSIC amounted to € 337,757.57. CSIC consequently received a contribution of € 93,588.4 (i.e. 27.71 % of the costs accepted by the Commission).

Likewise the costs of NeuroSearch had been estimated at € 495,051 with an EU contribution of € 50,000. The resulting ratio was 10.10 %. Since costs of € 191,446.53 had been accepted for NeuroSearch, this contractor had received a contribution of € 19,336.05.



### **The complainant's observations**

No observations were received from the complainant.

## **THE DECISION**

### **1 Failure to pay outstanding amount**

1.1 The complainant claims that the Commission failed to pay a balance (¤ 550 000 minus ¤ 506,369,28) that in its view was due to two of the contractors who had performed work under Contract no. BMH4-CT96-0010.

1.2 The Commission points out that the amount of ¤ 550,000 was the maximum contribution allocated to this project by the Commission. It further notes that the two contractors concerned had worked on a full cost basis and that the contract provided for a contribution of up to 50 % of costs in such case. The Commission takes the view, however, that a different ratio (27.71 % and 10.10 % of costs respectively) had been agreed for the two contractors. According to the Commission, these ratios had to be respected and the Commission had thus been right in making a contribution of 27.71 % and 10.10 % of accepted costs respectively with regard to these contractors.

1.3 The complainant did not comment on the Commission's opinion.

1.4 The present allegation concerns the obligations arising under a contract concluded between the Commission and the complainant.

1.5 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.

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

1.7 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.



1.8 In the present case, the Commission has put forward a coherent and reasonable account of the reasons for which it believes that the balance claimed by the complainant is not due.

1.9 In these circumstances, there appears to be no maladministration on the part of the Commission.

## **2 Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it appears that there is no maladministration on the part of 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 sequ.