

Decision on the decision by the European Commission to recover EU funds granted under a contract for the provision of technical assistance in Gabon (case 1650/2021/EIS)

Decision

Case 1650/2021/EIS - Opened on 01/07/2022 - Decision on 13/03/2023 - Institution concerned European Commission (No maladministration found) |

The case concerned the decision by the European Commission to recover EU funds granted under a contract for the provision of technical assistance in Gabon. The complainant considered that the cost of the protective measures it had adopted when the ‘contracting authority’ suspended the contract should have been added to the price of the contract, and thus covered by EU funds. The complainant also claimed that, as the amount recovered by the Commission was equivalent to the amount owed to the complainant by the contracting authority for the protective measures, the Commission should have offset the amount it sought to recover by this amount.

The Ombudsman considered that there was a sound legal basis for the Commission’s decision, and that it was reasonable for the Commission to recover the funds. The Ombudsman therefore closed the inquiry with a finding of no maladministration.

The complaint

1. The complainant, an EU-based consulting firm providing international services, signed a contract with the ‘contracting authority’ [1] , the National Authorising Officer of the European Development Fund (EDF) in Gabon, in January 2014. The contract concerned the provision of long-term international technical assistance for a project concerning vocational training in Gabon.
2. The Delegation of the European Union to Gabon endorsed the contract for funding under the EDF on behalf of the EU. The European Commission was not a party to the contract, but rather the donor of the funds. In that capacity, it monitored and supervised how the funds were spent.
3. According to the General Conditions of the contract, the contracting authority could suspend the contract if the contractor failed to meet its obligations. [2] Where this occurred, the



contractor had to adopt protective measures. [3] According to the General Conditions, the costs caused by such protective measures could be added to the contract price, unless the suspension was necessary as a result of a breach or default in the performance of the contract by the contractor. [4]

4. In February 2016, the contracting authority notified the complainant of the suspension of the contract, until the mid-term evaluation of the contract was concluded, due to the failure to deliver on the agreed outputs under the contract. As a result of the suspension, the complainant adopted protective measures.

5. In April 2016, the contracting authority informed the complainant of its decision to lift the suspension of the contract, even though no mid-term evaluation had taken place. It stated that, notwithstanding the complainant's performance to date, the complainant could propose an amendment to the contract within 20 days, so as to outsource certain activities.

6. In August 2016, the complainant submitted to the contracting authority a debit note claiming EUR 32 720, which amounted to the costs it had incurred in adopting the protective measures.

7. Between January and June 2017, the contracting authority and the Delegation exchanged views on the debit note. The Delegation argued that, since the contracting authority had suspended the contract due to the complainant's failure to perform, the Commission was not liable to cover the cost of the protective measures. The contracting authority said that the decision to suspend the contract had been taken on the basis of a reasonable presumption of non-compliance by the complainant, but that, since such presumption could not be confirmed nor rebutted in the absence of a mid-term evaluation of the contract, the protective measures should be covered by EDF funding. The contract ended in October 2017.

8. In October 2020, the Delegation, which had been mandated by the contracting authority to recover the unused prepaid amounts arising from the contract, informed the complainant of its intention to recover the amount of EUR 72 497.50. The complainant then stated that it was entitled to offset the recovery of the unused amounts against the sum owed to it by the contracting authority for the protective measures it had adopted during the suspension of the contract. Therefore, the complainant only paid EUR 39 775.50, withholding an amount equivalent to the cost of the protective measures (EUR 32 720).

9. On 3 December 2020, the Delegation stated that it maintained its position as regards the funding of the protective measures, and sent the complainant a debit note for the amount of EUR 32 720. On 2 June 2021, the Commission recovered the amount of EUR 33 437.15, which included the cost of the protective measures and the interest for late payment, by deducting the amount from another payment that was due to the complainant by the Commission.

10. Between February and July 2021, the complainant and the Commission exchanged further correspondence. The Commission endorsed the position adopted by the Delegation as regards the refusal to finance the additional costs of the protective measures.



11. Dissatisfied with the Commission's replies, the complainant turned to the Ombudsman in September 2021.

The inquiry

12. In the course of the inquiry, the Ombudsman asked the Commission to provide further clarifications on its position as regards some of the complainant's arguments.

The Commission's refusal to finance the additional costs of the protective measures with EU funds

Arguments presented to the Ombudsman

13. The complainant argued that the Commission's decision not to include the expenses for the protective measures in the amount funded by the EDF was unjustified. The complainant argued that the suspension of the contract was based on a presumption that it had failed to perform, which was never confirmed. The mid-term evaluation of the contract never took place and the suspension was consequently lifted.

14. In addition, the complainant said that it had notified the contracting authority of its intention to request the refund of the expenses related to the protective measures on 3 March 2016, and therefore within the 30-day deadline established under the General Conditions [5] .

15. The Commission argued that it could find no evidence to support the view that the costs caused by such protective measures should be added to the contract price, and that it had communicated this to the complainant consistently throughout their exchanges. According to the Commission, the reason for the suspension of the contract was due to the complainant's failure to perform, as stated in the suspension decision and reported by the contracting authority in several letters. The Commission also stated that the contracting authority's decision to lift the suspension was conditional upon the complainant submitting, within 20 days, a draft amendment to the contract, outsourcing certain activities. The complainant had failed to do so. Moreover, the Commission said that the failure to carry out a mid-term evaluation was due to lack of cooperation by the complainant, and did not alter the conclusion that the suspension took place because of the complainant's failure to perform.

16. Therefore, the Commission maintained that the complainant did not have the right to be reimbursed for the costs of the protective measures because the relevant Article of the General Conditions [6] , according to which protective measures cannot be added to the contract price if the suspension has been caused by the contractor's failure to perform, was applicable.

17. The Commission also argued that the complainant had failed to notify the contracting authority of its intention to claim the additional costs for the protective measures within the



30-day deadline [7] . The Commission stated that, while the complainant had several exchanges with the contracting authority and the Commission after the notification of the suspension of the contract, its *formal* request for additional costs was not sent until 24 May 2016, that is, beyond the deadline. So, even if the suspension had not been due to a contractual breach by the complainant, the complainant would not have been eligible to have the additional costs compensated, as it had missed the deadline to request this.

The Ombudsman's assessment

18. In cases concerning contractual matters, it is within the Ombudsman's remit to examine whether the EU institution concerned has provided the complainant with a coherent and reasonable account of the legal basis for its actions and with a justification for taking a specific position under the contract. It is not for the Ombudsman to determine whether there has been a breach of contract by either party.

19. According to the General Conditions [8] , the contracting authority can suspend a contract due to the contractor's failure to perform. In its decision on the suspension, the contracting authority specifically referred to the relevant provision in the General Conditions, stating that the complainant had failed to comply with certain contractual obligations in a timely manner. The contracting authority reiterated its concerns about the complainant's performance and delays a number of times in subsequent correspondence. Therefore, its decision to suspend the contract does not appear to have been based on a suspicion or presumption, as the complainant appears to suggest, but rather on the established finding that the complainant had failed to perform its obligations. The evidence provided by the Commission also suggests that it verified that there were shortcomings in how the complainant carried out the contract.

20. The fact that the contracting authority lifted the suspension and informed the Commission that the problems with the complainant's performance had not been confirmed, which implied that the complainant could claim compensation for the costs it incurred due to the protective measures, does not bind the Commission as to its position on the matter. The contracting authority stated in its suspension decision that the contract would be suspended until the conclusions of the mid-term evaluation were available. However, it appears it was referring to the duration of the suspension, and it did not indicate that the conclusion on whether the complainant had breached the contract would depend on the actual *results* of the mid-term evaluation. While the Ombudsman's inquiry could not confirm whether or not the complainant cooperated with the contracting authority to facilitate the mid-term evaluation, this does not alter the conclusion that the suspension was due to the complainant's failure to perform. This conclusion was not conditional upon the results of the mid-term evaluation. In addition, it seems that the lifting of the suspension was conditional upon the complainant submitting, within 20 days, a draft amendment to the contract. However, the complainant did not provide any evidence to suggest that it had complied with this requirement.

21. The Commission did not instruct the contracting authority what position to take in relation to the additional costs, but only expressed its opinion that they should not be included in the total



amount of the contract. The evidence suggests that the Commission expressed this position consistently throughout the procedure. Therefore, the Commission was not bound by the position adopted by the contracting authority as regards the protective measures. [9]

22. In view of the above, it appears reasonable that the Commission did not consider that the expenses related to the protective measures should be funded under the EDF.

23. There is disagreement as to when the complainant formally notified the contracting authority of its intention to request the refund of the expenses related to the protective measures and, therefore, as to whether it complied with the 30-day deadline set out in the General Conditions. However, in view of the above conclusion that the Commission appears to have a solid legal basis to conclude that the protective measures should not be financed under the EDF, there is no need for the Ombudsman to take a position on this issue.

The Commission's decision to recover the additional cost of the protective measures

Arguments presented to the Ombudsman

24. The complainant argued that the amount claimed by the Commission through its debit note (EUR 32 720) is equivalent to the amount owed to the complainant by the contracting authority for the cost of the protective measures. It stated that its debt for the unused amounts should be offset by this amount that it claims it is owed by the contracting authority. The complainant referred to a relevant provision of the General Conditions [10] to support its argument.

25. The complainant stated that, since the Commission was acting on behalf of the contracting authority when it claimed the unused amounts, it should have taken into account this duty of compensation arising from the contractual relationship. The complainant said that this duty was separate from the Commission's decision not to finance the protective measures from the EDF. The complainant thus considered the Commission's credit note to be illegitimate.

26. The Commission stated that it had consistently informed the contracting authority of its position that the amount claimed by the complainant could not be covered by funding under the EDF. The Commission argued that the EU is not a contracting party, but merely the donor of the funds. Therefore, in accordance with the General Conditions [11], the Commission had the right to recover any amount paid in excess under the contract. The Commission further noted that the issuing of its debit note did not affect the complainant's right to claim any amount from the contracting authority, should it consider that the decision to suspend the contract or any other decision concerning the implementation of the contract had affected its contractual rights.

27. The Commission also stressed that it remains accountable to the European Parliament and to the Council for the proper use of EU funds. Delegating budget implementation tasks only modifies the nature of the Commission's responsibility, which changes from the actual



implementation to the control and monitoring of the tasks implemented.

The Ombudsman's assessment

28. The Commission is not a party to the contract, which was concluded between the complainant and the contracting authority. Therefore, it is reasonable and legitimate to conclude that the Commission, as donor of the funds, was entitled to recover those amounts that it considered not eligible for funding under the EDF. The relevant Article of the General Conditions [12] , to which the complainant refers in support of its arguments, appears to entitle the contracting authority to offset any sums due to it by the contractor by not paying any equivalent amounts owed to the contractor. It does not apply to third parties issuing recovery orders. Therefore, this provision does not apply to the case at hand.

29. As shown above, the Commission's decision not to include the expenses related to the protective measures in the total amount of the contract financed under the EDF appears to be justified. Therefore, based on the General Conditions [13] , which entitle the EU to recover the amounts paid to the contractor in excess of the final amount, the Commission's debit note claiming the amount of EUR 32 720 appears to be legitimate.

30. Given that the Commission did not instruct the contracting authority what position to take as regards the reimbursement of the protective measures, the argument that the complainant is still entitled to claim these amounts from the contracting authority is also reasonable. The contractual relationship between the complainant and the contracting authority is not affected by the Commission's stance on the matter.

31. In view of the above, the Ombudsman concludes that there was no maladministration by the Commission.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [14] :

There was no maladministration by the Commission.

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 13/03/2023



[1] The contracting authority is the body responsible for awarding the public contract in question, in this case the *Contrat de Services N° FED/2013/333-881 'Assistance technique internationale long terme au projet d'appui à la formation et l'insertion professionnelles au Gabon'*.

[2] Article 34(4) of the General Conditions for Service Contracts for External Actions Financed by the European Union or by the European Development Fund: “ *Should the contractor fail to perform any of its obligations in accordance with the provisions of the contract, the contracting authority is without prejudice to its right under Article 34.2, also entitled to the following remedies; a) suspension of payments; and/or b) reduction or recovery of payments in proportion to the failure's extent* ”.

[3] Article 35(3) of the General Conditions

[4] Article 35(4) of the General Conditions

[5] Article 35(5) of the General Conditions

[6] Article 35(4) of the General Conditions

[7] Article 35(5) of the General Conditions

[8] Article 34(4) of the General Conditions

[9] In this regard, see also point 37 of the Ombudsman's decision closing the inquiry into complaint 901/2011/OV against the European Commission, available at: <https://www.ombudsman.europa.eu/en/decision/en/12085> [Link].

[10] Article 31(3): “ *Amounts to be repaid to the contracting authority may be offset against amounts of any kind due to the contractor. This shall not affect the party's right to agree on payment in instalments* ”.

[11] Article 31(5): “ *Without prejudice to the prerogative of the contracting authority, if necessary, the European Union may as a donor proceed itself to the recovery by any means* ”.

[12] Article 31(3) of the General Conditions

[13] Article 31(5) of the General Conditions

[14] This complaint has been dealt with under delegated case handling, in accordance with [the Decision of the European Ombudsman adopting Implementing Provisions](#) [Link].