Decision of the European Ombudsman on complaint 1552/2002/OV against the European Commission

Decision
Case 1552/2002/OV - **Opened on** 19/09/2002 - **Decision on** 28/06/2004

Strasbourg, 28 June 2004
Dear Mrs N., Dear Mr C., Dear Mrs G.,

On 30 August 2002, you made a complaint to the European Ombudsman on behalf of THALES ATM concerning the financial settlement of contract TN/063 with the European Commission.

On 19 September 2002, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 20 January 2003. I forwarded it to you with an invitation to make observations, which you sent on 28 March 2003.

On 5 June 2003, I requested further information from the Commission and asked the Commission to comment on your request to have your file re-examined in order to reach an amicable solution. The Commission sent its additional opinion on 22 July 2003. On 27 August 2003, the Commission also sent a copy of the minutes of a meeting held on 9 July 2003 between the Commission services and the complainant's representatives. I forwarded the opinion to you with an invitation to make observations, which you sent on 30 September 2003. On 3 November 2003, you also sent a copy of the above minutes.

On 28 November 2003, I wrote to the Commission in order to seek a friendly solution to your complaint. The Commission sent its additional opinion on 30 January 2004. I forwarded it to you with an invitation to make observations, which you sent on 30 March 2004. On 6 May 2004, you sent the minutes of a further meeting, held on 6 November 2003, between the Commission services and the complainant's representatives.

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant is the Consortium THALES ATM, composed of Siemens AG, Siemens

Plessey, Alenia and Deutsche Aerospace-Dasa (hereafter "the Consortium"). The complaint concerns the financial settlement of contract TN/063 by the Commission, specifically the complainant's request for payment of an outstanding amount and a request by the Commission for reimbursement. The contract, which concerned training courses and studies for Air Traffic Control and Airports in nine countries of the former Soviet Union, was signed on 9 December 1993 between the Consortium and the Commission in the framework of the TACIS programme. The budget of the contract, as subsequently amended, was EUR 11 383 243.

All the services were duly provided and completed by the Consortium in good co-operation with the Commission. As regards Article 83 of the Specific Conditions of the Contract which requires the written approval from the Commission for the modification of Consortium staff, the complainant pointed out that the project required a large number of actors to intervene and that, in practice, some CVs of new staff members were not submitted to the Commission. However, the Commission neither requested the said CVs, nor alleged a breach of contract on basis of Article 83 of the Specific Conditions.

The Consortium received a payment of EUR 7 767 549.19 for the expenses incurred. At a later stage, the Commission alleged that the complainant had not followed closely the TACIS Guidelines which provided that payments could only be made upon presentation of original supporting documents and in accordance with the established format. The members of the Consortium have faced difficulties in collecting all the justification documents. The complainant observed that these Guidelines were provided to the Consortium at the beginning of 1995, i.e. after the signature of the contract and the completion of most of the services. On 15 July 1999, the Commission sent a recovery order to the complainant for an amount of EUR 5 369 141.

Given the complexity of the file submitted by the complainant, the Commission requested an audit in January 2000. The audit report, which was made available to the complainant in February 2001, contained a number of contradictions and mistakes that raised serious questions about its validity. According to the audit report, the format in which the Consortium presented the file in September 1999 was not in compliance with the TACIS Guidelines, in particular as regards the CVs of the experts working in the programme. Further to the audit report, a modified debit note was sent to the complainant on 11 December 2001 for an amount of EUR 6 347 183.51 instead of EUR 5 369 141. The complainant points out that the recovery order is unacceptable and disproportionate to the extent that it is based on the formal interpretation of the contract, without taking into account the work actually carried out.

On numerous occasions, but without success, the complainant requested the re-appraisal of the Commission's position in order to obtain a fair and equitable settlement of the contract. In its last letter of 21 June 2002, the Commission rejected the complainant's request.

Not satisfied, the Consortium complained to the Ombudsman on 30 August 2002, hoping to achieve an amicable settlement of the matter. The complainant made the following two allegations:

1) The Commission's recovery order for EUR 6 347 183.51 is unjustified because it is based on

certain alleged formal defects which do not alter the complainant's material compliance with the contract.

2) The Commission refused to pay the outstanding amounts owed for the services duly rendered under the said contract, which amount to EUR 1 357 985.

THE INQUIRY

The Commission's opinion

On 9 December 1993, a contract TN/063 was signed between Thomson-CSF (now THALES), leader of the Consortium, and the Commission for the provision of technical assistance to nine countries in the former Soviet Union with regard to Air Traffic Control and Airports. The contract, which had a value of EUR 10.8 million, was concluded under the TACIS programme.

In November 1994, the Commission agreed to pay advances totalling EUR 7.24 million, corresponding to 80 % of fees, as well as EUR 528 000 as reimbursable costs. The project started in the last quarter of 1994 and the bulk of the work was carried out in 1995. However, during that year, communications from the contractor were poor. In particular, the contractor omitted to provide inception reports, interim reports and the monthly report on the deployment of experts, but instead delivered directly the final reports. On 31 October 1995, an addendum extending the implementation period to 30 months was signed for an additional EUR 600 000 (This document was signed by the complainant on 22 November 1995). The contract ended on 8 June 1996.

At the final stage of the project, there was substantial disagreement between the Commission and the contractor as to the amount payable, because the Commission realised that the services rendered differed seriously from those set out in the Terms of Reference. The Commission has withheld the payment of the final invoices for fees and direct expenses (EUR 2.4 million outstanding) and of the remaining reimbursable amount. The Commission requested that the contractor justify the fees and direct expenses according to Annex D, the financial part of the contract. In April 1997, the Commission returned all pending invoices to the contractor.

On 10 July 1997, the Commission held a meeting with the contractor. The conclusion of the meeting was that the problem was due to different interpretations of the type of contract (lump-sum or fee-based). It was also agreed that the contractor would provide evidence of the resources actually used on the project on the basis of internal accounting systems. On 10 September 1999, the requested documents were sent to the Commission.

On 10 January 2000, the Commission issued debit note N° 3240018257 for an amount of EUR 5 369 141. Meanwhile, the Commission ordered an audit to examine the file submitted in September 1999 by the contractor. Following the conclusion of the audit report, the Commission issued a supplementary recovery order for an amount of EUR 978 042.51 which brought the total sum to be recovered to EUR 6 347 183.51. Since this date, several contacts were made with the contractor, but no agreement was reached.

The complainant's position is based on the following assertions: a) During the implementation of the project, the Commission did not point out that there were discrepancies between the performance and the contractual obligations. Therefore, the contractor should be paid in full since this silence is considered as a tacit approval; b) The experts included in the contract were a "mere example", thus the contractor had no obligation to request prior approval from the Commission in case of change of an expert; and c) The contract was a lump-sum contract with no obligation to account for the resources used.

On these points, the Commission commented as follows:

1. The Commission considers that the present dispute constitutes a purely contractual disagreement between two parties. Article 53 of the Special Conditions of the contract explicitly foresees that *"the law of the contract is the Belgian law. Any dispute between the Commission and the Consultant arising from the present contract, and which can not be settled amicably between the two parties, shall be submitted to the Belgian Courts"* .

2. As regards arguments a), b) and c) raised by the contractor above, the Commission has the following observations:

(a) The quality of the Consortium's performance was unacceptable: More than half of the work was subcontracted to unauthorised companies. Only 9 % of the work was done on site as opposed to the 60 % indicated in the methodology. Fewer than 20 % of the reports contractually due have actually been submitted.

The Consortium is of the view that the contractual changes were authorised during implementation by tacit agreement of the Commission because the reports were never contested and *"were deemed to be approved by the Commission if this Institution did not notify any observation to THALES ATM within a period of 30 days after their receipt"* . The Consortium's reasoning cannot be accepted considering that Article 85 of the Special Conditions only concerns the reports that had been submitted. Since almost 80 % of reports were missing, it follows that the project's output as a whole was not, and could not be, approved, even tacitly, by the task managers.

The complainant also argues that the Commission should have contested the Consortium's execution of the contract at the time when the missing reports should have been submitted and that, by not doing so, the Commission had tacitly renounced to its right to do so afterwards. The Commission observed that only the final payment releases the contractor from his contractual obligations. Article 92.3 of the General Conditions in fact provides that *"The payment of interim payments does not have the character of final payment releasing the recipient from his obligations"* . Therefore, the Commission has the legitimate right to contest the execution of the contract at the end of the project.

In light of the above, the Commission cannot accept the Consortium's statement that *"all services were duly provided in full respect of the expectations of the Commission"* . The Commission therefore confirms its recovery order.

(b) The utilisation of contractual experts was mandatory, and no change could occur without prior approval from the Commission. The contractor's final claim was for the services of 240 experts, of whom only 19 had been officially approved in the contract. Again, the Consortium is using the "Commission's tacit approval" argument to legitimate the non-respect of the contractual provisions. However, according to Article 83 of the Special Conditions and Article 84.1 of the General Conditions, it was the contractor's obligation to ask for the replacement of experts when needed, and not the Commission's obligation to investigate the experts' identity. Authorisations for 221 new experts were never requested and were thus not given.

The complainant's argument that *"in practice some of the new CVs were not submitted because the Commission's representatives were fully aware of their identity"* is not serious. Being 221, the number of the new experts cannot be defined as "some", especially because that figure corresponds to more than twice the number of the experts foreseen in the contract.

Furthermore, more than half of the work done was subcontracted to unauthorised companies, although Article 60.2 of the General Conditions states that *"The consultant may not assign the contract without authorisation of the contracting authority"* .

(c) As is clearly established by Article 54 of the Special Conditions, the contract *"(...) is a composite contract within the meaning of Article 54 of the General Conditions. The contract price comprises direct expenses and reimbursable costs"* . Article 54.5 of the General Conditions define a composite contract as a contract in which *"the price shall be fixed and the services paid for according to two or more of the methods laid down in paragraph 2 (lump-sum contracts), 3 (unit-price contracts) and 4 (cost-plus contract). In such contracts the Special Conditions shall indicate the method by which the prices shall be fixed"* . In this context, Article 92 of the Special Conditions stipulates that *"Payments for fees, and where appropriate for direct expenses, shall be calculated on the basis of duration of services provided, exclusive of any leave period."* Fees and reimbursable sums are paid following the method of unit-price contract according to Annex D and on the basis of supporting documentation which justifies the work performed and the actual expenses incurred. Article 98 of the Special Conditions foresees that per-diems are to be paid as lump sums.

The Commission concluded that there had been no maladministration and that it had sufficient legal grounds to recover the full amount of EUR 6 347 183.51 as calculated by the auditors. The Commission considered its attitude as sound management of public funds.

The complainant's observations

The complainant first stated that the Commission's presentation of the facts was misleading and not substantiated by any material proof. The complainant was never provided with a copy of the Terms of Reference on the basis of which the Commission ordered an "independent" audit. This audit seems to have been commissioned to substantiate the claim for payment made by the Commission.

The complainant made the following 4 points concerning what it called the Commission’s misleading presentation of the facts:

a) The auditor's report acknowledges that the payment procedures were in accordance with the contract.

b) From the auditor's report (annex IV), it appears that implementation of the project was carried out throughout 1994. The delays were not within the complainant's control, which was acknowledged by the Commission by extending the duration of the project by 18 months.

c) As regards the alleged irregularities in the reporting, the complainant referred to the auditor's report, according to which *"one could suppose that all the reports have been submitted and approved by the Commission"* . The contractor had to re-send reports which the Commission has lost. The Consortium is able to provide some of the inception or interim reports which it kept in its files. The Commission does not provide proof for the figure of 80 % of the reports which were not submitted.

d) With regard to the Commission's statement that the services rendered differed greatly from those set out in the Terms of Reference, the complainant stated that the contract was implemented, from the technical point of view, to the satisfaction of the European Commission and the beneficiaries, who expressed their satisfaction. The technical performance of the contract was never an issue prior to the audit. What caused the withholding of the payment of the final invoice was a purely formal issue, as the Consortium used a format for the financial statement which did not completely correspond to the Commission's expectations.

If the quality of the Consortium's performance was unacceptable, the complainant wonders why the Commission waited until 2001, when the audit report was issued and 5 years after the end of the performance of the contract, to raise this point. The Commission, the Task Managers and the Monitoring Unit could not be unaware of the problems if they existed. When the implementation has been completed for almost 7 years, it is difficult to accept that the Commission raises the question of the execution of the project at this stage.

As regards the approval of the experts and subcontractors, the complainant stated that the Commission's figures were not correct, as more than 75 % of the work has been carried out by formally approved subcontractors. This matter also was never an issue during the project implementation, and was only raised in the auditor's report. The Commission, even if not informed formally, knew about the subcontractors which had an outstanding reputation. It was also clearly mentioned in the Consortium's proposal - accepted by the Commission - that, given the size of the project, not all possible experts and subcontractors were listed.

The Commission has manifestly infringed the principle of proportionality in so far as its requests for reimbursement are solely based on a formal interpretation of the contract, without taking into account the reality of the works carried out or the satisfaction of the beneficiaries. The Commission position is based on an alleged infringement of secondary obligations of an administrative nature concerning the lack of approval of the replacement of certain staff members of the Consortium and the non-submission of certain interim reports.

The Commission has also infringed the principle of legitimate expectations, because during the 30 months of the execution of the contract, the Commission did not raise objections in relation to the alleged non-compliance with the administrative formalities. The Commission's passivity during this long period led the Consortium to believe that its behaviour was fully compliant with the contract. In the light of this position, the Consortium could not reasonably foresee that the Commission would subsequently consider that an alleged failure to comply with the administrative formalities would amount to a complete breach of contract giving rise to a request for full reimbursement of the partial payments made in 1994 and 1995 and to the non-payment of the final invoice submitted.

In order to reach an amicable settlement, the complainant requested that the Ombudsman obtain from the Commission the documents and reports which substantiate the Commission's opinion.

Further inquiries

On 5 June 2003, the Ombudsman wrote to the Commission in order to be provided with the documents which substantiate the Commission's opinion of 20 January 2003, as well as with the Terms of Reference on the basis of which the Commission ordered an audit. The Ombudsman also asked the Commission to take a position on the complainants' request to have the file re-examined in order to reach an amicable solution.

The Commission's additional opinion

The Commission sent a copy of the Terms of Reference of the audit carried out by TCLM, the final audit report, the contract TN/063, the General Conditions for CEC Public Service Contract Applicable in the TACIS Programme, and the contract addendum.

The Commission observed that, according to annex IV of the audit report, only 37 reports instead of 90 were prepared. Contrary to what is stipulated in Article 69.2 of the Special Conditions, the complainants stated that they were unable to deliver inception and interim reports "since no obligation was foreseen in the contract to keep interim and inception reports".

As to the approval of unauthorised subcontractors, the complainants' argument "that given their quality they would have certainly received the formal approval of the Commission" lacks any legal basis.

As regards the request for an amicable solution, the Commission observed that all the services concerned (DG AIDCO, DG BUD, Legal Service and OLAF) met in July 2003 and a decision was taken to fix an appointment with the complainants. A copy of the minutes of this meeting, which was held on 9 July 2003, was forwarded to the Ombudsman with the Commission’s additional opinion.

The complainant's second observations

In summary, the complainant repeated that the Commission's position amounts to a breach of the principle of legitimate expectations, given that the Commission's behaviour during a long period of time led the Consortium to believe that its performance was fully compliant with the contract. The Consortium could not foresee that the Commission would consider that an alleged non-compliance with certain administrative formalities would constitute a complete breach of contract giving rise to a request of full reimbursement of partial payments made in 1994 and

1995 and to the non-payment of the final invoice.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinions and observations, the Ombudsman considered that there could be an instance of maladministration by the Commission. In accordance with Article 3(5) of the Statute (1) , he therefore wrote to the President of the Commission on 28 November 2003 to propose a friendly solution on the basis of the following analysis of the issue in dispute between the complainant and the Commission:

1.1 The complainant alleged that the Commission's recovery order for EUR 6 347 183.51 is unjustified because it is based on certain alleged formal defects which do not alter the complainant's material compliance with the contract. In its observations, the complainant clarified that, by issuing a recovery order, the Commission had manifestly infringed the principle of proportionality, because its position is based on the alleged violation of secondary obligations of an administrative nature. The complainant further argued that the Commission has also infringed the principle of legitimate expectations, because during the 30 months of the execution of the contract, the Commission did not raise objections in relation to the alleged non-compliance with the administrative formalities. The Commission's passivity during this long period led the Consortium to believe that its behaviour was fully compliant with the contract.

1.2 The complainant also alleged that the Commission refused to pay the outstanding amount of EUR 1 357 985 owed for the services duly rendered under the said contract. For both aspects of the complaint, the complainant wanted an amicable solution to be reached with the Commission.

1.3 The Commission observed that the complainant had omitted to provide several reports on the implementation of the contract. Also, the services rendered differed seriously from those set out in the Terms of Reference. The Commission therefore issued a debit note for an amount of EUR 5 369 141. The Commission also ordered an audit to examine the file submitted by the complainant. Further to the conclusions of the audit, the Commission issued a supplementary recovery order which brought the total sum to be recovered to EUR 6 347 183.51. In its opinion, the Commission rejected the assertions of the complainant, on which the allegations are based. The Commission more particularly referred to the large number of experts which it had not approved, to the complainant's policy of subcontracting works and to the reports which were missing. The Commission also quoted the contractual provisions concerning the reimbursement of the costs.

1.4 On the basis of an analysis of the file, the Ombudsman comes to the following findings: Further to the complainant's proposal for an amicable solution in the framework of the Ombudsman's inquiry, the Commission services had a meeting with the representatives of the complainant on 9 July 2003. Both the Commission and the complainant sent the Ombudsman a copy of the minutes of this meeting, from which it appears that one of the possibilities envisaged

was to consider the complainant's proposal for an amicable solution (mentioned in the last intervention of the Commission's representative). The minutes also mention the fixing of a calendar, by mid-October 2003, for the presentation of new supporting evidence by the complainant.

1.5 The Ombudsman notes that in the conclusions of the audit report of September 2000, on the basis of which the Commission issued its final recovery order of EUR 6 347 183.51 (i.e. the same amount as the one envisaged in the audit), it is mentioned that *"As financial auditors, a strict interpretation of the contract and the TACIS financial rules, has been applied for. As such, some adjustments might be interpreted differently by the Commission for final decision"* . The audit report thus explicitly leaves room for the Commission to take a more lenient approach with regard to the recovery order. Although the auditors appear to have indicated that the Commission could lawfully have adopted an approach which would have been more favourable to the complainant, the Commission has not presented any reason for not doing so.

1.6 From the file it appears that the contract that is the subject of the present complaint, was carried out during the period from December 1993 to June 1996. In November 1994, the Commission paid advances for an amount of EUR 7 240 000, as well as EUR 528 000 as reimbursable costs. On 22 November 1995, an addendum for an additional EUR 600 000 was signed. In April 1997, the Commission returned all pending invoices to the complainant. Before, the Commission had withheld the payment of invoices for fees and direct expenses (EUR 2 400 000 outstanding). On 10 September 1999, the complainant sent, at the Commission's request, further supporting evidence. The Commission issued a first debit note on 10 January 2000. After the audit, a supplementary recovery order was sent to the complainant on 14 December 2001.

1.7 It appears thus from the above that the first recovery order was issued more than 5 years after the payment of the main sum of the contract to the complainant.

1.8 As response to the complainant's argument that the Commission had not contested the execution of the contract when reports were missing, the Commission argued, referring to Article 92.3 of the General Conditions, that only the final payment releases the contractor from his contractual obligations, and that therefore it had the legitimate right to contest the execution of the contract at the end of the project. However, the Commission did not indicate that it had contested the material execution of the contract during the contract period or shortly afterwards. Nor did the Ombudsman find proof in the file that the Commission had done so.

1.9 In these circumstances, the Ombudsman considers that, during the contract period and the period following the termination of the contract until April 1997, when invoices were for the first time sent back to the complainant, the complainant could reasonably think that the Commission appeared to have no particular problems with the way in which the contract had been executed.

1.10 When taking decisions, the Commission should take into consideration the relevant factors and give each of them its proper weight in the decision (2) . Similarly, the Commission should respect the fair balance between the interests of private persons and the general public interest

(3) . By acting to recover the full amount mentioned in the context of a strict interpretation in the audit report, the Commission appears to have failed to strike a fair balance between the private and public interest in this case. Moreover, the Commission appears not to have taken into consideration an important element, namely that during the contract period and the period following it, it had not contested the execution of the contract. The Ombudsman's provisional conclusion, therefore, is that this constitutes an instance of maladministration.

The proposal for a friendly solution

On the basis of the above considerations and in accordance with Article 3 (5) of the Statute of the Ombudsman, the Ombudsman proposed a friendly solution between the complainant and the Commission which would consist in the Commission agreeing to negotiate further with the complainant and to reconsider its recovery order, on a basis which takes account of the above findings.

The Commission's response

The Commission disagrees with the conclusion reached by the Ombudsman. The Commission is of the opinion that it contested the quality of the execution of the contract in due time by rejecting the payment of the last invoices totalling EUR 3.4 million (see minutes of the meeting of 17 April 1996) and simultaneously requesting all reports which had to be produced under the contract.

The period of three years between the end of the contract and the issuing of the recovery order is due to the behaviour of the contractor, who for three years has been rejecting the Commission's numerous requests to provide evidence of the resources actually used. This rejection was based on the complainant's interpretation that the contract was a lump-sum contract in which there is no obligation to provide information about the resources used. It was only in September 1999 that the contractor agreed to provide the list of the resources actually used. This enabled the Commission to evaluate the work done, and the recovery order was issued a few months later.

The subsequent three years for issuing the second recovery order should not be considered as an element of passivity. Given the contractor's rejection of the first recovery order, the matter was assigned to independent auditors for them to calculate the value of the rendered services. The audit itself took one year. In addition to confirming that the amount of the first recovery order was right, it indicated the auditor's suspicions of collusion. The elements noted by the auditors, including lack of control, lax management and the poor level of the contractor's performance could be explained by this possible collusion. That is why the Commission, already in 2001, transmitted the case to OLAF for their consideration.

However, since the last communication to the Ombudsman, another meeting took place between the Commission and the complainant on 6 November 2003. It is clear from the minutes of this meeting that negotiations are still ongoing. The Commission fully appreciates the efforts made by the company to provide further information, but must await the formal reply of OLAF regarding the transmission of the file. Evidently, the answer of OLAF will influence the position to be taken by the Commission. Thus, the Commission is still pursuing the recommendation of the Ombudsman to reach a friendly solution with the complainant.

The complainant's third observations

The complainant observed that there was nothing in the minutes of the meeting of 17 April 1996 from which it could be deduced that the Commission questioned the quality of the services rendered by the Consortium. Moreover, this meeting took place almost at the stage of the termination of the contract. The Commission continued to confuse the fulfilment of the primary and material obligations with the secondary and formal obligations, and the disagreement at the time only concerned the administrative and financial issues.

The Commission further tries to give a misleading presentation of the facts when it argues that the Consortium rejected the Commission's requests to provide evidence of the resources actually used in the implementation of the contract. The dispute between the Commission and the Consortium derives from the diverging interpretation of the provisions of the contract and the documents which should be provided in order to prove the work performed in accordance with the Guidelines. These Guidelines were provided to the Consortium at the beginning of 1995, i.e. well after the signature of the contract and the completion of most of the services rendered. In the light of the different interpretations, a verbal "gentlemen's agreement" was achieved on 10 October 1997 aiming at clarifying the documentation needed from the Consortium members' internal accounting systems to prove the resources that had been used to perform the contract. The Consortium provided the Commission with a file including all these justification documents in September 1999. The recovery order of 15 July 1999 was thus sent out before the documentation provided by the Consortium could have been reviewed.

The Commission further misinterpreted the aims and objectives of the audit carried out in 2000. The Commission's statement that *"given the contractor's rejection of the first recovery order, the matter was assigned to independent auditors for them to calculate the value of the rendered services"* is fallacious, since the audit took place because of the numerous and comprehensive documentation provided by the members of the Consortium in September 1999. Moreover, the reference to "suspicions of collusion" can only be qualified as mere speculative statements lacking any material basis. The audit report did not address any issues concerning potential collusion between the members of the Consortium.

The complainant requested the confirmation of the Ombudsman's provisional conclusion of maladministration contained in the proposal for a friendly solution of 28 November 2003. The complainant further declared its good faith in trying to reach a friendly solution with the Commission, from which it is currently awaiting a formal reply in relation to the documentation files proving the services rendered under the contract.

The complainant also sent a copy of the minutes of its meeting with the Commission held on 6 November 2003.

THE DECISION

1 The scope of the Ombudsman's inquiry

1.1 The Ombudsman considers that the scope of the review that he can carry out in contractual cases is necessarily limited. The Ombudsman does 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. In the present case, Article 53 of the Special Conditions provides that *"The Law of the contract is the Belgian law (...) Any dispute (...) which cannot be settled amicably between the two parties, shall be submitted to the Belgian courts"* .

1.2 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.

2 The alleged unjustified recovery order and non payment of the outstanding claim

2.1 The complainant alleged that the Commission's recovery order for EUR 6 347 183.51 is unjustified because it is based on certain alleged formal defects which do not alter the complainant's material compliance with the contract. In observations, the complainant argued that, by issuing a recovery order, the Commission had manifestly infringed the principle of proportionality, because its position is based on the alleged violation of secondary obligations of an administrative nature. The complainant further argued that the Commission has also infringed the principle of legitimate expectations, because during the 30 months of the execution of the contract, the Commission did not raise objections in relation to the alleged non-compliance with the administrative formalities. The Commission's passivity during this long period led the Consortium to believe that its behaviour was fully compliant with the contract. The complainant also alleged that the Commission refused to pay the outstanding amount of EUR 1 357 985 owed for the services duly rendered under the said contract. For both aspects of the complaint, the complainant wanted an amicable solution to be reached with the Commission.

2.2 The Commission observed that the complainant had omitted to provide several reports on the implementation of the contract. Also, the services rendered differed seriously from those set out in the Terms of Reference. The Commission therefore issued a debit note for an amount of EUR 5 369 141. The Commission also ordered an audit to examine the file submitted by the complainant. Further to the conclusions of the audit, the Commission issued a supplementary recovery order which brought the total sum to be recovered to EUR 6 347 183.51. In its opinion, the Commission rejected the assertions of the complainant, on which the allegations are based. The Commission more particularly referred to the large number of experts which it had not approved, to the complainant's policy of subcontracting works and to the reports which were missing. The Commission further quoted the provisions of the contract concerning the reimbursement of costs.

2.3 On 28 November 2003, the Ombudsman made a proposal for a friendly solution between the complainant and the Commission which would consist in the Commission agreeing to negotiate further with the complainant and to reconsider its recovery order. The proposal was based on a provisional finding of maladministration in that the Commission appeared a) to have failed to strike a fair balance between the private and public interests in this case, and b) not to have taken into consideration an important element, namely that during the contract period and the period following it, it had not contested the execution of the contract.

2.4 Whilst not accepting the Ombudsman's provisional finding of maladministration, the Commission indicated - referring to the minutes of the meeting of 6 November 2003 - that negotiations with the complainant were still ongoing and that it appreciated the complainant's efforts to provide further information. The Commission concluded that it was thus still pursuing the Ombudsman's proposal for a friendly solution with the complainant.

2.5 The complainant requested confirmation of the Ombudsman's provisional finding of maladministration and expressed its good faith in trying to obtain a friendly solution with the Commission, indicating that it was waiting for a formal reply from the Commission in relation to the additional documentation it had provided.

2.6 Both the Commission and the complainant sent to the Ombudsman a copy of the minutes of the meeting held between the parties on 6 November 2003, from which it appears that the Commission's representative expressed the readiness of the Commission's services to analyse carefully the new documentation provided by the complainant and to proceed quickly with the evaluation of the file in order to reach a solution.

2.7 On the basis of the information supplied by the Commission and the complainant following the Ombudsman's proposal for a friendly solution, it appears that discussions on the possibility of a friendly solution are ongoing between the parties and that the Commission is still pursuing its efforts in relation to the Ombudsman's proposal for a friendly solution. In these circumstances, the Ombudsman considers that no further inquiries into the complaint appear to be justified at this point.

2.8 As regards the provisional finding of maladministration made in his proposal for a friendly solution of 28 November 2003, the Ombudsman notes that, from the minutes of the meeting held on 17 April 1996 (4) , it appears that the Commission did in fact contest the execution of the contract, but only at a very late stage, namely in April 1996, i.e. two months before the expiry of the contract period (December 1993 - June 1996). Moreover, the Commission does not appear to have responded to the Ombudsman's other provisional finding that it failed to strike a fair balance between the private and public interests in this case. The Ombudsman does not therefore consider that there is any reason to revise the provisional finding of maladministration.

2.9 The Ombudsman also points out that if the complainant is dissatisfied with the eventual outcome of its ongoing negotiations with the Commission it retains the possibility to bring the case before the Belgian courts - in accordance with Article 53 of the Special Conditions which provides that *"Any dispute (...) which cannot be settled amicably between the two parties, shall be submitted to the Belgian courts"* - or to make a new complaint to the Ombudsman.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, the Ombudsman sees no reason to revise his provisional finding of maladministration made in his letter to the Commission of 28 November 2003. However, as it appears that discussions on the possibility of a friendly solution are ongoing between the parties and that the Commission is still pursuing its efforts in relation to the Ombudsman's proposal for a friendly solution, no further inquiries appear to be justified at

this point. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) "As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint".

(2) See Article 9 of the European Code of Good Administrative Behaviour.

(3) See Article 6.2 of the European Code of Good Administrative Behaviour.

(4) In the minutes it is stated that *"payment of the 'first final' invoice would not be made until the Commission was fully satisfied that the contract had been satisfactorily completed and that full supporting documentation was available. An initial part-payment was also not acceptable"* .