

Decision of the European Ombudsman on complaint 253/2003/ELB against the European Commission

Decision

Case 253/2003/ELB - Opened on 03/03/2003 - Decision on 08/10/2004

Strasbourg, 8 October 2004

Dear Mr X.,

On 30 January 2003, you made a complaint to the European Ombudsman concerning a TACIS contract.

On 3 March 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 2 May 2003. I forwarded it to you with an invitation to make observations, which you sent on 30 June and 1 July 2003.

On 17 October 2003, I wrote to the President of the Commission seeking a friendly solution to your complaint. The Commission sent its reply on 14 November 2003. I forwarded it to you with an invitation to make observations, which you sent on 1 April 2004.

You called my services to obtain information on the inquiry on 6 March 2003, 10 June 2003 and 27 October 2003.

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 are, in summary, as follows:

The complainant is the chairman and managing director of company Y, which was awarded a TACIS service contract. At the end of the contract, the complainant submitted to the Commission remaining invoices for a total amount of EUR 71 022.81, which the Commission refused to pay. These invoices concern four elements. The complainant's point of view concerning each of these elements is noted below:

- the payment of fees and per diem allowances for an interpreter (EUR 6 370):



The interpreter was the Team Leader's wife. She was highly qualified for the job and had already worked for similar TACIS projects while married to the Team Leader. No rule in the European Union forbids the employment of experts' relatives.

- the payment of expenses for use of a personal vehicle (EUR 3 274.50):

These expenses were approved by the Task Manager. The Commission usually accepts the use of a personal vehicle, instead of a rented vehicle. Moreover, such a practice is in the financial interests of the Commission.

- the payment of part of the fees and expenses on the budget line "Training and study tours" (EUR 9 578.31):

The training programme was sub-divided into 10 separate training activities. Each separate activity had to be approved by the Task Manager together with the corresponding detailed budget. In certain cases, the budget for some items of these separate activities was exceeded. However, the total amount of the budget line for each separate activity was never exceeded.

- the payment of extra backstopping (1) days (EUR 51 800):

The complainant's bid included 49 days of backstopping. The Task Manager, when signing the contract, imposed a reduction in the number of backstopping days from 49 to 21.

Delays in the approval by the Task Manager of the separate activities led to an increase in backstopping days and in expenses.

On 20 August 2002, the Commission refused to pay the remaining invoices. On 4 November 2002, the Commission paid the final invoice (EUR 94 099.60), which did not include the disputed amount of EUR 71 022.81 and closed the contract.

The complainant alleges that the Commission is not entitled to refuse to pay the invoices because the expenses concerned are eligible under the TACIS contract. He claims that the Commission should pay the sum of EUR 71 022.81, as well as interest for late payment.

THE INQUIRY

The Commission's opinion

In summary, the Commission's opinion made the following points:

The contract between the Commission and a consortium composed of company Y and company Z started on 20 December 1999 and had an initial duration of 24 months. An extension of 2 months was granted and the project expired on 19 February 2002.

Payment of interpreter fees and per diem allowances

During the Inception Phase of the project, it was noticed that the project staff intended to employ the wife of the Team Leader. There has been a long-standing practice within TACIS of



not permitting members of the families of Western project staff to be recruited to the same project. The recruitment procedures for such sought-after local positions have to be fair and transparent and to be seen as such from the local perspective.

On 7 April 2000, the complainant was informed by the Task Manager that the Team Leader's wife should not take part in this project. The Commission also informed the complainant that there would be no problem in the Team Leader's wife filling a position with another project, because her abilities as an interpreter were never questioned. The Commission considers that her subsequent appointment is not acceptable and cannot be justified.

Payment for vehicle use

The hire of a vehicle to transport a study tour group was approved by letter of 28 June 2000 based on a figure of EUR 3 275. This figure would normally have been based on a quotation by the vehicle hire company to the contractor. Such a cost is a reimbursable cost and is thus only reimbursed up to the amount of the prior approval based on submission of proof of payment, i.e. the invoice of the vehicle hire company.

The complainant did not hire a vehicle from a car-rental company and instead used one of his own vehicles and invoiced the cost to the Commission based on an estimate of EUR 1.77 per kilometre. The breakdown of prices dated 15 June 2000 and sent by the complainant to the Commission indicates "Hire of vehicle including driver for 12 days" and shows that the cost was based on an official rate per kilometre established by the French tax authorities. However, the rates approved by these authorities are in fact lower, the maximum rate being EUR 0.6339 per kilometre.

The Commission therefore rejected the payment of this cost.

Training and study tours budget

As regards training and study tours, a detailed programme and cost breakdown has to be submitted to the contracting authority for prior written approval in accordance with Annex D of the contract. On this basis, a maximum amount is approved. It is the responsibility of the contractor to keep within this maximum approved amount. If owing to unexpected circumstances, the contractor realises that the approved amount may be exceeded, he may request approval for a modified budget and maximum amount. In this case, no modifications to the approved maximum amounts were requested by the contractor, even though the overspendings were in some cases substantial and should have been noticed. The fact that there were savings on some other training and study tour activities is not relevant. The Commission could not find contractual justification for the additional claimed amounts.

Payment of extra backstopping days

A re-allocation within fees was requested by the Commission as the number of days requested for the Project Director for backstopping in Europe (49 working days) was felt to be excessive and in excess of those for similar projects. The contractor accepted a reduction of 28 days and these 28 days were re-allocated to the Team Leader (+ 23 days) and the short-term experts (+ 5 days). There was therefore no reduction in the total number of Western (or local) man-days. Such minor re-allocations were common practice in 1999 and the contractor had no objection since the total number of chargeable days remained the same.



There were no unreasonable delays in the approval of individual training requests. The contractor wished to have a global approval from the Commission to use the Training and Study tours allocation of EUR 400 000, whereas the practice is that each training activity and study tour has to be individually approved. The Project Director always questioned the need for such individual approvals and resented having to provide the requested information. This resulted in voluminous correspondence and delays. Once properly completed requests were received, the approvals were given in all cases within days. Therefore, the Commission considers that the claim for additional backstopping days is not justified.

The complainant's observations

In his observations, the complainant made, in summary, the following points:

Payment of interpreter fees and per diem allowances

Contrary to what the Commission states, the interpreter was recruited from the start of the project on 20 December 1999 and was paid from 20 December 1999 until 7 April 2000 when the complainant was informed by the Commission that she could not be recruited because she was the wife of the Team Leader. Later, she was recruited for a two-week mission in France.

The Commission refers to a long-standing practice, which is, however, unwritten. Such a practice is contrary to the principles of employment and human rights in the European Union. The complainant can prove that this practice did not exist before, or was not applied to other TACIS projects.

Payment for vehicle use

The payment of reimbursable expenses does not require an invoice from an external firm. The complainant has previously worked for the Commission and knows that an internal document, such as an attestation of commitment of expenditure or an internal charge note, is sufficient.

Regarding the official rate per kilometre, the complainant refers to the official rate for a vehicle with driver. Furthermore, the complainant points out that the Commission never questioned the cost of the vehicle use before the complaint was lodged with the European Ombudsman. The complainant would be ready to reconsider the price if the Commission found it excessive.

Training and study tours budget

According to the complainant, it is absolutely impossible to make precise forecasts for each budget line. Forecasts can only be global for each specific programme. They have always been complied with for each of the 10 training and study tours programmes. Certain budget lines were exceeded in some programmes while others were below the maximum amount. The complainant only used 95.5 % of the total amount (EUR 400 000) for training and study tours.

Payment of extra backstopping days

The complainant's bid was evaluated with a final score of 100 %. There was consequently no need for a re-allocation within fees. The number of backstopping days is directly linked to the number of man/months of technical experts. The number in the original bid was reasonable.

The complainant considers that it was not in his interest to question the need for individual approval of training activities.

According to the complainant, the Inception Report is an update of the initial bid in view of the situation at the start of the project. But the initial bid included a detailed programme of each



training and study tours programme. The documents given to the Task Manager were compliant with the requests. The problem was that the Task Manager systematically refused to take account of the fees for trainers in the "training" budget line. This led the complainant to request a meeting with the Head of Unit and the Task Manager. The meeting took place on 6 December 2000 and the Head of Unit decided in favour of the complainant. From this date, the training and study tours programmes were approved by the Task Manager. Consequently, the delays in approvals of all the training activities should be counted from the end of the Inception Report. The complainant illustrates the delays in approvals by quoting the project assessment report n° 9 of the Monitoring Team and an exchange of e-mails between the Project Director and the Task Manager.

In conclusion, the complainant is of the opinion that there were administrative irregularities, unfairness and discrimination, abuse of power, lack or withholding of information, lack of communication and unnecessary delays.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman did not consider that the Commission had responded adequately to all the complainant's allegations. In accordance with Article 3 (5) of the Statute (2) , he therefore wrote to the President of the Commission to propose a friendly solution on the basis of the following analysis of the issues in dispute between the complainant and the Commission.

1 The allegation that the Commission is not entitled to refuse to pay the invoices because the expenses are eligible

1.1 The complainant alleges that the Commission is not entitled to refuse to pay the invoices because the expenses concerned are eligible under the TACIS contract. He claims that the Commission should pay the sum of EUR 71 022.81, as well as interest for late payment.

1.2 The Commission considers that there are no legal grounds to pay the amount claimed by the complainant.

The Ombudsman notes that the complainant's allegation concerns four different types of expenses, each of which will be considered separately:

The payment of fees and per diem allowances for an interpreter

1.3 The complainant argues that the interpreter was recruited at the start of the project and that there is no rule in the European Union forbidding the employment of experts' relatives.

1.4 The Commission explains that there has been a long-standing practice within TACIS of not permitting members of the families of Western project staff to be recruited to the same project. Furthermore, on 7 April 2000, the complainant was informed by the Task Manager that the interpreter chosen, the Team Leader's wife, should not take part in this project.

1.5 The Ombudsman considers that it is reasonable for the Commission to regulate the



employment of spouses in the framework of TACIS projects and notes, in this context, that the Staff Regulations make provision as regards incompatible employment of spouses of officials of the European Communities. However, from the evidence available to the Ombudsman, it appears that the Commission has neither adopted a rule forbidding members of the families of Western TACIS project staff to be recruited to the same project, nor published information about its practice in this regard.

1.6 The Ombudsman also notes that, according to the evidence available, the interpreter was recruited on 20 December 1999 at the start of the project and that the Commission only informed the complainant that her employment was unacceptable on 7 April 2000.

1.7 In the light of the above, the Ombudsman's provisional conclusion is that the Commission failed to inform the complainant in due time of its practice governing the recruitment of experts' family members and that its refusal to pay for the interpreter's services during the period from 20 December 1999 to 7 April 2000 therefore appears unjust.

The payment of expenses for use of a personal vehicle

1.8 The complainant argues that the expenses for use of a vehicle were approved by the Task Manager and that the Commission usually accepts the use of a personal vehicle. Moreover, the payment of reimbursable expenses does not require an invoice from an external firm, an internal document being sufficient.

1.9 According to the Commission, the hire of a vehicle was approved and the complainant was informed that such a cost is reimbursable up to the amount of the prior approval on submission of proof of payment. However, the complainant did not hire a vehicle but used one of his own vehicles instead. The Commission also argues that the breakdown of prices sent by the complainant as supporting evidence of this cost showed that the rate per kilometre used to evaluate the cost of the use of the vehicle does not correspond to the rate officially published by the French tax authorities, which is lower.

1.10 The Ombudsman notes that the practice known by the complainant, who previously worked with the Commission, is that a personal vehicle can be used as long as it is proved that the vehicle was used for the project.

1.11 The Ombudsman's provisional conclusion therefore is that the explanations given by the Commission to reject the payment of the use of a personal vehicle do not exclude the possibility to refund the cost of the use of vehicle. On the one hand, the Commission did not dispute the fact that a different practice prevailed between the Commission and the complainant during the execution of previous contracts. On the other hand, the Commission's argument concerning the rate per kilometre charged by the complainant seems to imply that this cost could be reimbursed. Thus, the Commission's refusal to reimburse the cost of the use of a vehicle seems unjustified.

Training and study tours budget

1.12 The complainant argues that each separate training activity was approved by the Task Manager with the corresponding budget. The budget of these separate activities was exceeded in some cases, but the total amount of the budget line was never exceeded.



1.13 According to the Commission, the overspendings were in some cases substantial and the fact that there were savings on some other training and study tour activities is not relevant.

1.14 The Ombudsman notes the Commission's argument according to which a special procedure applies to the approval of a modified budget and that such modifications were not requested by the complainant. The complainant did not comment on the Commission's argument.

1.15 In the light of the above, the Ombudsman's provisional conclusion is that the Commission has put forward a coherent and reasonable account of the reasons for which it believes that the relevant expenses cannot be reimbursed.

Payment of extra backstopping days

1.16 The complainant argues that delays in the approval by the Task Manager of the separate training activities led to an increase in backstopping days and in expenses. The complainant provided evidence of the delays that he experienced.

1.17 The Commission states that it requested a re-allocation within fees as the number of backstopping days was felt to be excessive and in excess of that for similar projects. The Commission argues that there were no unreasonable delays in the approval of individual training requests.

1.18 The Ombudsman notes that the Commission did not provide, in its opinion, any supporting evidence concerning the length of time it took to approve individual training requests. The Ombudsman's provisional conclusion therefore is that the Commission has not yet put forward 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.

The proposal for a friendly solution

The European Ombudsman suggested that the Commission could consider reviewing its decision not to reimburse the invoices submitted by the complainant for the payment of interpreter fees and per diem allowances, of vehicle use and backstopping extra-days, together with appropriate interest.

The Commission's response

In reply to the Ombudsman's proposal, the Commission made the following points:

The payment of fees and per diem allowances for an interpreter

The Commission has not adopted a rule forbidding members of the families of Western Tacis project staff to be recruited for the same project, nor published information about its practice in this regard. However, it has been constant practice among Task Managers not to allow the recruitment of such family members, where a family relationship was known. Moreover, since such staff are normally recruited as Support Staff, which does not require prior approval by the Commission, and since such staff are not normally "named" in contracts, it is possible that some have been recruited by other projects, without the knowledge of the Commission.

The Commission considers that non-payment for the services of the same interpreter between the start of the project on 20 December 1999 and 7 April 2000 was not part of the complainant's



original complaint. Moreover, it is not correct, since no part of the claimed fees for interpreters' services covering this period was rejected by the Commission. The claimed interpreters' costs in respect of this period were paid in full, although the interpreters for whom the services were charged were not named on the contractor's invoice.

The payment of expenses for use of a personal vehicle

The basis for the rejection of the claimed costs was that the approval was clearly on the basis of a reimbursable cost. The payment of reimbursable expenses normally requires an invoice from an external firm. Any derogations are only approved in exceptional cases, upon the prior request of the contractor, and taking into account the particular circumstances of the case.

Although the Commission believes that there is no legal or contractual justification for making any payment in respect of this claimed amount, it could agree to reimburse this cost, if it is based on the official rate per kilometre as established by the French Tax Authorities, i.e. EUR 0.6339 per kilometre. The Commission is expecting a new invoice with an amount recalculated on that basis.

Payment of extra backstopping days

Individual requests had to be submitted in respect of each training/study tour activity. Each individual submission and request for approval should have included:

- the programme of the training activity/study tour (main topics to be covered, location(s), duration, proposed dates);
- the list of the proposed participants and their professional positions;
- the proposed budget of the training activity/study tour.

Once a properly completed request for a training or study tour activity was submitted there was no undue delay in sending the approval notification to the contractor. The Commission extracted information from the project files and attached to its response a table called "Training Package Implementation Summary" concerning the length of time it took to approve individual training requests. The Commission considers that it shows that there was no unreasonable delay in approving the contractor's requests.

The complainant's observations

The complainant expressed his disagreement with the Commission's proposal as regards the payment of expenses for use of a personal vehicle.

As regards the delay for approving training requests, the information given by the Commission is, according to the complainant, wrong.

THE DECISION

1 Preliminary remarks

1.1 The present case concerns a dispute arising from a TACIS contract between the complainant and the Commission. At the end of the contract, the complainant submitted to the Commission remaining invoices for a total amount of EUR 71 022.81, which the Commission



refused to pay.

1.2 In many Member States, the Ombudsman does not deal with contractual disputes, either because of the general characteristics of such contracts under national law, or because the law establishing the Ombudsman's mandate expressly excludes contractual matters. As stated in the Annual Report for 1995, part of the mission of the European Ombudsman is to help relieve the burdens of litigation, by promoting friendly solutions and by making recommendations that avoid the need for proceedings in courts. The European Ombudsman, therefore, does deal with complaints of maladministration that arise from contractual relationships.

1.3 The Ombudsman does not, however, seek to determine whether there has been a breach of contract by either party. 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. However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes that its view of the contractual position is justified.

2 The allegation that the Commission is not entitled to refuse to pay the invoices because the expenses are eligible

2.1 The complainant alleges that the Commission is not entitled to refuse to pay the invoices because the expenses concerned are eligible under the TACIS contract. He claims that the Commission should pay the sum of EUR 71 022.81, as well as interest for late payment.

2.2 After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman wrote to the President of the Commission to propose a friendly solution in accordance with Article 3 (5) of the Statute.

2.3 The Ombudsman will examine the Commission's reply to the proposal for a friendly solution as regards each of the four different types of expense to which the complaint relates:

The payment of fees and per diem allowances for an interpreter

2.4 The Commission accepts that it has not adopted a rule forbidding members of the families of Western Tacis project staff to be recruited for the same project, nor published information about its practice in this regard.

2.5 The Ombudsman does not accept the Commission's view that non-payment for the services of an interpreter between the start of the project on 20 December 1999 and 7 April 2000 was not part of the complainant's original complaint. However, the Ombudsman notes that the complainant has not contradicted the Commission's statement that it paid all claimed interpreters' costs in respect of the period between 20 December 1999 and 7 April 2000. The Ombudsman therefore considers that the Commission has now given a reasonable explanation of its position as regards this aspect of the complaint.

2.6 The Ombudsman notes that the Commission confirms that it has not adopted a rule forbidding members of the families of Western TACIS project staff to be recruited for the same



project, nor published information about its practice in this regard. Moreover, the Commission acknowledged that it is possible that in some cases family members have been recruited to the same project. The Ombudsman takes the view that it is appropriate for the Commission to regulate the employment of family members in the framework of projects such as TACIS, but points out that the aims of such regulation could be better achieved in future, whilst also ensuring fairness and transparency, by adopting and adequately publicising the rules and principles that are applied. The Ombudsman will make a further remark below to this effect.

The payment of expenses for use of a personal vehicle

2.7 The Commission states that although it believes that there is no legal or contractual justification for making any payment in respect of this claimed amount, it could agree to reimburse this cost, if it is based on the official rate per kilometre as established by the French Tax Authorities, i.e. EUR 0.6339 per kilometre. The Commission is expecting a new invoice with an amount recalculated on that basis.

2.8 The complainant informed the Ombudsman that he disagrees with the Commission's proposal.

2.9 The Ombudsman concludes that no friendly solution could be achieved on this aspect of the complaint. Since the Ombudsman considers that the approach adopted by the Commission in reply to the proposal for a friendly solution appears reasonable on this point, no further inquiries appear justified as regards this aspect of the complaint.

Training and study tours budget

2.10 The Ombudsman considers that the Commission has put forward a coherent and reasonable account of the reasons for which it believes that the relevant expenses cannot be reimbursed. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

Payment of extra backstopping days

2.11 According to the Commission, once a properly completed request for a training or study tour activity was submitted there was no undue delay in sending the approval notification to the contractor. The Commission provides evidence concerning the length of time it took to approve individual training requests, which shows that there was no unreasonable delay in approving the contractor's requests. The Commission believes that there is no justification for the payment of any additional backstopping days.

2.12 According to the complainant, the Commission provided the Ombudsman with incorrect information on this issue.

2.13 The Ombudsman takes note of the information extracted from the Commission's project files and presented in a table called "Training Package Implementation Summary". He observes that the length of time to approve individual training requests is calculated from the date of receipt of properly completed requests and that this table shows that the approval was given within 1 to 19 days.

In view of the additional evidence provided by the Commission, the Ombudsman considers that the Commission has now provided the Ombudsman with a coherent account of the legal basis



for its actions and why it believes that its view of the contractual position is justified on this aspect.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, the Ombudsman takes the view that there are no grounds to pursue his inquiry into the complaint as regards the payment of expenses for use of a personal vehicle and finds no maladministration as regards the other aspects of the complaint. The Ombudsman therefore closes the case.

FURTHER REMARK

The Ombudsman takes the view that it is appropriate for the Commission to regulate the employment of family members in the framework of projects such as TACIS, but points out that the aims of such regulation could be better achieved in future, whilst also ensuring fairness and transparency, by adopting and adequately publicising the rules and principles that are applied.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) That is, time spent by the Project Director in the European Union rather than the beneficiary countries.

(2) *"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."*