

Decision of the European Ombudsman on complaint 270/2003/GG against the European Commission

Decision

Case 270/2003/GG - Opened on 17/02/2003 - Decision on 04/09/2003

Strasbourg, 4 September 2003

Dear Madam,

On 6 February 2003, you made, on behalf of GAW-GmbH, a complaint to the European Ombudsman concerning the European Commission's handling of project reference 33428 (D/95/A/020/PIII/FPC-R).

On 17 February 2003, I forwarded the complaint to the President of the Commission.

On 8 April 2003, you sent me further information in relation to your complaint which I forwarded to the Commission on 28 April 2003.

The Commission sent its opinion on 4 June 2003. I forwarded it to you on 6 June 2003 with an invitation to make observations, which you sent on 23 June 2003.

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

THE COMPLAINT

The original complaint

In 1995, a consortium of firms or institutions from four (later five) Member States was awarded a contract under the Leonardo da Vinci programme (Contract D/95/A/020/PIII/FPC) for a project concerning language qualifications ("Europäische Sprachenqualifikation für Berufspraktiker im Bereich Tourismus"; project reference 3428). The aim of the project was to develop and prepare linguistic examinations for persons working in the tourism sector. The contract was concluded for a period of two years (1 December 1995 until 31 December 1997). The Commission's contracting partner was a body called "Reiseverkehrsakademie Düsseldorf – RVA – der GFS-GmbH".

A new contract was subsequently drawn up providing for an extension of the project by somewhat more than a year (1 January 1998 until 30 April 1999; project reference 33428). This contract was concluded between the Commission and "Reiseverkehrsakademie Düsseldorf –



RVA – der GAW-GmbH". The co-ordinator of the first contract had previously informed the Commission that the GmbH was now called ("heißt jetzt") GAW (letter of 2 February 1998) (1) .

It subsequently emerged that GFS-GmbH and GAW-GmbH (although managed and owned by the same family) were two different companies. GFS-GmbH has since gone bankrupt.

The Commission considered that it had been deceived and requested GAW, on 17 December 2001, to pay back the amount that had already been paid out under the new contract. On 2 January 2002, the manageress of GAW-GmbH objected.

On 12 November 2002, the Commission informed the complainant that it had decided to reject its appeal of 2 January 2002 and that the complainant should repay an amount of € 43 113,22. The Commission pointed out that in its view, no legally binding contract had been concluded in relation to project reference 33428, given that it had subsequently emerged that GAW-GmbH was not identical with GFS-GmbH but a separate company. In a letter of 29 November 2002, the complainant appealed against this decision and asked the Commission to pay a sum of € 16 200 that in its view was still outstanding under contract 33428. This appeal was rejected on 23 January 2003, and on 27 January 2003 the Commission reminded the complainant that it had not yet repaid the relevant sum.

In two letters of 3 February and a further letter of 6 February 2003, the complainant informed the Commission that it did not accept the latter's position. The complainant took the view that the contract for the third year had unambiguously been concluded with GAW-GmbH and that the Commission had not objected to this change in good time. It added that any omission to inform the Commission (which the complainant disputed) would in any event have been the fault of the former GFS-GmbH. The complainant further informed the Commission that it did not have any funds and that it would have to start bankruptcy proceedings if the Commission insisted that it should repay the relevant amount.

In its complaint to the Ombudsman, the complainant basically argued that the Commission was wrong to claim the said sum back on account of an alleged misunderstanding in relation to the change of contractual partner. According to the complainant, this misunderstanding did not call into question the correct usage of the Community funds and should therefore not be sanctioned by the maximum penalty, that is to say repayment of the sums that had already been passed on to its partners, together with interest, which would bankrupt it. The complainant stressed that the present dispute affected not only itself but also its partners and that the matter dated back several years.

In the complainant's view, the relevant Community funds would in any event have been lost if GFS had continued the contract, given the latter had fallen bankrupt. According to the complainant, the fact that the new GAW-GmbH had carried on the project in its third year had thus saved Community funds. The complainant also stressed that the project had yielded positive results. It therefore claimed that the Commission should pay the amount that (according to the complainant) was still outstanding under the new contract. The complainant asked the Ombudsman for urgent help, suggesting that the Ombudsman should see to it that the recovery



order be suspended.

The complainant's further letter

On 8 April 2003, the complainant forwarded to the Ombudsman a letter dated 26 March 2003 that it had received from the competent Member of the Commission and copies of two letters it had sent to the Commission on 8 April 2003. In these last-mentioned letters and in the letter to the Ombudsman, the complainant mentioned inter alia that the final accounts for the "project 99/01" were still missing.

THE INQUIRY

The complaint was rapidly forwarded to the Commission for its comments. The Ombudsman drew the Commission's attention to the fact that the complainant considered the matter to be urgent. At the same time, however, the complainant was informed that the Ombudsman has no power to suspend decisions taken by the Commission.

The Commission's opinion

In its opinion, the Commission made the following comments on the complaint:

Doubts as to the financial handling of the project by the complainant had arisen on the occasion of the evaluation of the final report that had been submitted for the first contract in February 1998. The Commission had several times asked for information and for supplementary evidence. However, the documents submitted by the complainant had not allowed the Commission correctly to analyse the eligible costs. The Commission had therefore asked Deloitte & Touche for an external audit which was carried out on 26 and 27 November 2000.

Through this audit, the Commission had become aware that its contractual partner ("GFS") had gone bankrupt in the meantime and had been "recreated" under another name ("GAW"), thus changing the status whilst tacitly continuing the contract. The audit had also shown a nearly total lack of adequate financial accounts. Among other things, most of the invoices and supporting documents had been written by hand or did not exist at all, and there were no "time sheets" to prove staff costs. The auditors therefore concluded that all the costs were ineligible.

By letter of 16 July 2001, the Commission informed the complainant that it would ask for the repayment of a sum of 116 299 € (96 107 € plus interest) already paid under the first contract and of the advance payment of 43 113,22 € (37 800 € plus interest) made under the second contract. The first recovery order was sent to the complainant on 21 February 2002, the second on 17 December 2001.

The first recovery order was returned to the Commission by the complainant on 7 March 2002. The complainant ("GAW") argued that it was not the addressee and that it did not represent "GFS" with whom the initial contract had been concluded. The second recovery order was also disputed by the complainant.

In May 2002, the Commission had consulted its Legal Service which had concluded that the second contract was void since it was vitiated by a substantial error concerning the person of



the contractual partner. The Legal Service had advised against taking legal action with a view to recovering the sums paid under the first contract.

On 18 October 2002, the co-ordinator of the project had been received by the Commission with a view to finding a "friendly solution". Doubts as to the seriousness of the contractor had however continued after this meeting.

The Commission had therefore decided to proceed with the recovery of the advance payment made under the second contract whilst modifying the legal basis for this demand which was now the nullity of the contract. The new recovery order for 43 113,22 € was sent to the complainant on 27 January 2003.

The European Anti-Fraud Office (OLAF) had also been seized of the matter. By note of 11 February 2003, OLAF had informed the Commission that it had opened an external inquiry concerning the complainant.

Regarding the arguments put forward by the complainant, the Commission considered that there had not simply been a "misunderstanding". The Commission's services had only been informed about a change in the name of its contractual partner, and it had been stressed that there was no change of the contracting organisation (see letter of 2 February 1998). The Commission had also been informed that the new representative of the company was Mrs J.F., replacing Mrs M.F. However, some months later, on 20 August 1998, GFS-GmbH had been declared bankrupt (without the Commission being informed thereof). This showed that there were two different entities and that the F. family had to be aware of this fact. The argument that the complainant had "saved" Community funds was not convincing. If the Commission had been made aware of the bankruptcy, no further payment would have been made after that date.

The evidence submitted by the complainant did not allow the Commission to ascertain the costs related to the project. This rendered all the costs ineligible.

In conclusion, the Commission considered that even a small organisation was able to have financial accounts, keep files with the necessary supporting documents and handle bank transactions. Furthermore, the multitude of supporting documents written by hand and the confusion as to the links between the co-ordinator (Mr F.), the promoter (the firm directed first by Mrs M.F. – the wife – then after the bankruptcy by Mrs J.F. – the daughter) and the partners and as to their respective roles raised fundamental doubts regarding the seriousness with which this project had been implemented.

The Commission's services therefore considered that the costs that had been declared were ineligible even though the project appeared to have had some results.

Regarding the complainant's further letter to the Ombudsman of 8 April 2003, the Commission made the following comments:

The complainant's request for payment for the "project of 1999" (an expected amount of 43



387,50 €) that had been submitted on 20 July 2001 and had since been examined was on the point of being closed. In this case, part of the costs could be considered eligible. This amount was however less than the advance payment of 101 237,50 €. The exact amount to be recovered was not yet known but would very probably be around 6 401,17 €. A closure letter informing the complainant accordingly would be sent in the coming days.

The complainant's observations

In its observations, the complainant maintained its complaint and took the view that the Commission had wrongly presented some of the facts of the case. The complainant also pointed out that most of what the Commission had written in the factual part of its opinion related not to itself but to the former GFS-GmbH. It stressed that GFS-GmbH and itself were two separate legal persons.

The complainant asked the Ombudsman to see to it that the involvement of OLAF should be withdrawn and that all its (the complainant's) supporting documents that were in the hands of its tax consultant should be examined.

According to the complainant, its work had been awarded the European Language Seal.

The complainant asked the Ombudsman to use his influence to help bring about the suspension of the recovery order and the payment of the outstanding amounts from 1998/99 and 1999/2001. It added that further observations would be submitted as soon as the Commission's account for 1999/2001 had been received.

THE DECISION

1 Introductory remarks

1.1 The original complaint concerned a contract concluded between the European Commission and GAW-GmbH (the complainant), a German company. This contract had been concluded in relation to project reference 33428 and for the period from 1 January 1998 until 30 April 1999. It was a sequel to an earlier contract that had been concluded between the Commission and "GFS-GmbH" in relation to project reference 3428 and for the period from 1 December 1995 until 31 December 1997.

1.2 In its further letter of 8 April 2003, the complainant first mentioned a "project 99/01". In its opinion, the Commission noted that the complainant's request for payment under the "project for 1999" would shortly be dealt with. It appears that these references relate to a further contract that seems to have been concluded between the Commission and the complainant in 1999. Given that the complainant has not provided any details about the contents of this contract and that the Commission's decision on the complainant's claim for payment under this contract appears to be imminent, the Ombudsman considers that it would not be appropriate to deal with the grievances the complainant may have in relation to this contract within the framework of the present inquiry.

1.3 In its opinion, the Commission pointed out that the European Anti-Fraud Office (OLAF) had been seized of the matter. By note of 11 February 2003, OLAF had informed the Commission



that it had opened an external inquiry concerning the complainant. In its observations on the Commission's opinion, the complainant asked the Ombudsman to see to it that the involvement of OLAF should be withdrawn. The Ombudsman considers that the complainant has thus submitted a further claim. Given that it is difficult to imagine how the Commission should be able to withdraw a matter from OLAF that it has submitted to this body and regarding which OLAF has already opened an inquiry, this claim should probably be understood as asking OLAF to terminate its inquiry. However, there is no evidence to suggest that the complainant has made any prior administrative approaches to OLAF to that effect. The Ombudsman therefore considers that he is unable to deal with this claim in the present inquiry.

1.4 The present decision thus only deals with the complainant's original allegation concerning the recovery order issued under project reference 33428. In this context, the complainant had asked the Ombudsman for urgent help, suggesting that the Ombudsman should see to it that the recovery order be suspended. It should be noted that the Ombudsman has no power to suspend decisions taken by the Commission. This fact was brought to the complainant's attention in the letter informing it about the opening of the inquiry by the Ombudsman.

2 Allegedly incorrect recovery order

2.1 On 17 December 2001, the Commission sent the complainant an order for the recovery of the advance payment of 43 113,22 € (37 800 € plus interest) made under the second contract. The complainant's appeal of 2 January 2002 against this decision was rejected by the Commission on 12 November 2002. In its complaint to the Ombudsman, the complainant alleged that the Commission's decision was wrong and that the Commission should moreover pay the sum of € 16 200 that in its view was still outstanding under the relevant contract.

2.2 The Commission pointed out that the first contract had been signed with "GFS-GmbH". According to the Commission, its services had only been informed about a change in the name of its contractual partner, and it had been stressed that there was no change of the contracting organisation (see letter of 2 February 1998). The Commission stressed that it was only through an audit into the first contract that it had become aware that its contractual partner ("GFS") had gone bankrupt in the meantime and had been "recreated" under another name ("GAW"), thus changing the status whilst tacitly continuing the contract. According to the Commission, GFS-GmbH and the complainant were two different entities. The Commission therefore took the view that the second contract was void since it was vitiated by a substantial error concerning the person of the contractual partner. It further submitted that the evidence provided by the complainant had not allowed it to ascertain the costs related to the project and that all the costs were therefore ineligible.

2.3 The present complaint concerns allegations and claims arising from a contract concluded between the Commission and the complainant.

2.4 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 (2) . 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.

2.5 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.

2.6 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.

2.7 In the present case, the Commission has put forward a coherent and reasonable account of the reasons for which it believes that the relevant contract is void, thus providing a justification for its decision to refuse to pay further amounts to the complainant and to recover the amount already paid. It should be noted in this context that the complainant itself accepts that GFS-GmbH and itself are two separate legal persons. There is therefore no need for the Ombudsman to consider the Commission's further argument that the evidence submitted by the complainant had not allowed it to ascertain the costs related to the project and that all the costs were therefore ineligible.

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

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) See also the Ombudsman's decision of 20 June 2002 on complaint 1453/2001/GG (available on the Ombudsman's website - <http://www.ombudsman.europa.eu> [Link]), which concerned the same contracts.

(2) See Annual Report 1997, pages 22 sequ.

