

## **Decision of the European Ombudsman on complaint 1287/2003/JMA against the European Commission**

Decision

**Case 1287/2003/JMA - Opened on 29/09/2003 - Decision on 24/06/2004**

Strasbourg, 24 June 2004

Dear Mr X,

On 15 July 2003, you lodged a complaint with the European Ombudsman against the European Commission on behalf of the firm Y. Your complaint concerns the decision of the Commission services to refuse your request for a transfer between budget heads of up to 20% of the costs initially foreseen in the contract you had signed with the institution.

On 29 September 2003, I forwarded the complaint to the President of the Commission. On 24 November 2003, I received the Commission's opinion, which I forwarded to you with an invitation to submit your observations. I received your observations on the Commission's opinion on 5 January 2004.

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

### **THE COMPLAINT**

According to the complainant, the facts of the case are, in summary, as follows:

The complainant's firm, Y, entered into an agreement with the Commission for the development of an energy related project. In his capacity as project co-ordinator, the complainant requested a transfer between different budget lines of up to 20% of the costs initially foreseen in the contract. The complainant considered that this type of request was permitted under Article 22, section 5 of the Standard Annex II of the contract (General Conditions). The complainant argued that this provision does not contain any cap, and that his request therefore complied with the terms of the contract. Notwithstanding the permissibility of his request for a transfer, the Commission informed him that no budget transfers could be accepted once the final cost statement had been sent.

In reply to the requests made by the complainant, the Commission confirmed its position.



In summary, the complainant alleges that the Commission's refusal to accept his request for a transfer between budget heads of up to 20% of the costs initially foreseen in the contract is unfair, since it contravenes Article 22, section 5 of the Standard Annex II of the contract (General Conditions).

## THE INQUIRY

### **The Commission's opinion**

In its opinion, the Commission first set out the general background to the problem. The institution explained that the contract was signed in June 2000 between the Commission and several contractors, and involved the development of a project on energy systems. The co-ordination of the project was initially under the responsibility of the firm Z, which was replaced at a later stage, by the firm Y. The Commission's contribution to the project amounted to EUR 800 000.

The start of the work was delayed as a result of both the delayed signature of the contract and a longer than foreseen preparatory phase. Since the first stages of the project were completed satisfactorily, the Commission did not raise any objections to the content of the first intermediate technical reports numbers 2, 3 and 4 submitted by the contractors. On 4 December 2002, however, its services refused to approve the intermediate technical report number 5, which covered the period from 1 January 2002 to 30 June 2002. The Commission considered that this report introduced a number of modifications and deviations from the technical objectives initially foreseen. Some of these modifications were not foreseen in the contract and, therefore, should have been approved through an amendment, as required by Article 7 of the contract.

The final technical report covering the period from 1 January 2000 to 31 December 2002 was also refused on the following grounds: the results presented were only partly in line with the work programme; the co-ordinator had failed to report in detail about different changes in the work programme of the different contractors and had not asked for the corresponding amendments; and lastly, one of the major activities in a demonstration project, namely the dissemination of the project results, had only been partly carried out.

Prior to the refusal of the fifth intermediate progress report, the Commission sent two faxes to the co-ordinator dated 4 October 2002 and 20 November 2002 concerning the intermediate payments. In its faxes, the Commission requested that the co-ordinator should pay special attention to article 22.5 of Annex II of the Contract which restricts budget shifts between cost categories and/or contractors.

The contract expired on 31 December 2002, and the final cost statements were submitted by Y on 27 February 2003. Neither the first version of the Final Technical Report, submitted on 27 February 2003, nor the amended version, which the co-ordinator submitted after the Commission had asked for additional information, could be approved, since the different reports which Y had furnished provided sufficient information.

On 9 May 2003, the co-ordinator submitted a request for a budget shift up to 20 %. It included



three letters which, according to the cover letter, were from some of the contractors. The identification of the authors of the attached letters was not possible because the letters were submitted as simple copies from an electronic file, some without heading, some without date and none provided with a signature. The Commission explained that these documents could therefore not be accepted as a formal request. Furthermore the figures contained in the letter and in its annexes did not correspond to those reflected in the final report. Due to the unclear situation, the Commission could not identify whether the request was for a shift of up to 20 % or for a larger shift.

The Commission explained that part of the work programme had not been performed as requested, and therefore that it was difficult for its services to understand the grounds for a request, which represented an increase of personnel costs. The Commission expressed its general reluctance to accept budget shifts aimed at increasing some cost categories of budgets to amounts that are not justified by the work done. In the case of the contract at stake, the Commission noted that the contractor never submitted a clear justification for the request.

Due to the unclear explanations, the technical officer wrote to the co-ordinator on 2 June 2003 asking for the original letters from the contractors as well as clear detailed arguments in support of the different shifts. He also pointed out in his e-mail that the Commission could not accept a request for a shift of investment costs to personnel, if some of the demonstration objectives had not been performed as provided in the contract. Finally, he underlined a number of discrepancies between the different reports. The Technical Officer subsequently received an internal note from DG TREN's legal department dated 23 May 2003, stating that requests for budget shifts could not be approved if they are submitted after the final cost statement.

In view of these circumstances, the Technical Officer wrote to the co-ordinator on 10 June 2003, indicating that the submission of additional information could no longer be accepted. In a letter dated 29 July 2003, the Commission confirmed its view on late submissions of requests for a budget shift and consequently did not approve the corresponding request.

On 15 July 2003, the complainant submitted an official complaint to the responsible Commission services. At his request, a meeting was organised on 5 August 2003 to discuss all related matters.

The Commission's project analysis, based on the assessment of all documents and reports received, as well as on the results of inspections of the different project sites, concluded that the work performed under the contract included serious deviations from the work programme. Accordingly, on 13 August 2003, the Commission communicated its intention to terminate the contract, in accordance with Article 7.3 (b) of Annex II. The Commission sent a final termination letter on 14 October 2003.

The Commission concluded by stating that having considered, (1) the late submission of the request for budget shifts, (2) the insufficient level of detail provided with regard to the justification and the size of such shifts, and (3) the preliminary information submitted to the co-ordinator as regards the Commission's processing of such shifts, the Commission could not



accept the request.

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

In his observations on the Commission's opinion, the complainant stated, in summary, that his query only referred to the Commission's refusal of a 20% transfer between the budget lines of the contract. In his view, the position stated in the internal note from the Commission services dated 23 May 2003 was at odds with the contract, as illustrated by the initial acceptance of his request by the Commission services in their e-mail of 2 June 2003.

The complainant pointed out that, as project coordinator, he was obliged to act in the interests of the project contractors.

## **THE DECISION**

### **1 Commission's handling of the project**

1.1 The complainant alleges that the Commission's refusal to accept his request for a transfer between budget heads of up to 20% of the costs initially foreseen in the contract was unfair since it contravened Article 22, section 5 of the Standard Annex II of the contract (General Conditions).

In his observations, the complainant states that the final position taken by the Commission is at odds with the contract, as illustrated by the initial acceptance of his request by the Commission services on 2 June 2003.

1.2 The Commission argues that it could not have accepted the demand for budget shifts because of the late submission of the complainant's request, the insufficient level of detail provided as regards their justification, the size of such shifts, and the preliminary information submitted to the co-ordinator as regards the institution's processing of the request.

1.3 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 which is binding upon it (1) . Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

1.4 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. The Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

1.5 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes



that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration.

This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

1.6 The Ombudsman has carefully examined the contract between the Commission and the complainant's firm.

The general conditions applicable to the contract, including the reimbursement of costs, are spelled out in Annex II to the contract (General conditions). The definition of eligible costs, in particular the nature of the transfers to be allowed, are laid down in Point 5 of Article 22 of Annex II, which states that,

*"Contractors shall be authorized to transfer between themselves the budget set out in the table of the indicative breakdown of estimated eligible costs, provided that:*

*- they inform the Commission of such transfer upon signing an agreement confirming that the scope of the project and the conditions of participation [...] are not fundamentally altered.*

*and,*

*- the total amounts transferred do not exceed 20% of the amount allocated to the beneficiary in the table of the indicative breakdown of estimated eligible costs".*

1.7 The Ombudsman notes that, as regards transfers between contractors not exceeding 20% of the costs initially foreseen, contractors do not enjoy unfettered discretion to shift costs among themselves, but that they must ensure compliance with certain requirements, namely that that the changes do not alter the scope of the project and the conditions of participation.

On the basis of the information supplied both by the complainant and the Commission during the inquiry, it appears that the conditions for the application of Point 5 of Article 22 of Annex II (General Conditions) were spelled out in an internal note drafted by the Commission services on 23 May 2003, which sought to align its decisions in this area with the criteria developed by the Court of Auditors. As regards transfers between contractors not exceeding 20% of the costs initially foreseen, the Commission took the view that compliance with the above conditions requires that the beneficiary's request should take place prior to the submission of the final cost statement.

1.8 As regards the complainant's contract, it appears that the Commission concluded that his request for a transfer between the different partners to the project could not be accepted because it had been submitted late, namely following the presentation of the final cost statement. Moreover, the institution informed the complainant of its reasoning by letter of 29 July 2003.



The Ombudsman considers that the content of the Commission's decision does not appear to be in conflict with previous representations made by the Commission services to the complainant, in particular those included in the Commission's e-mail of 2 June 2003. The Ombudsman notes that the Commission services' e-mail dated 2 June 2003, in reply to the complainant's request of 9 May 2003, does not appear to give assurances of a favourable decision in the future, but rather asked for information to verify whether the requested transfers met the necessary conditions (2) .

1.9 In view of the above, the Ombudsman considers that the Commission has provided 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.

In these circumstances, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration.

## **2 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the 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 the European Ombudsman's Annual Report 1997, p. 22.

(2) *"The Commission needs original letters from all contractors arguing on the different shifts in detail, otherwise the Commission has no information on the reasons for the shifts [...]"*.