

## **Decision of the European Ombudsman on complaint 1379/2003/JMA against the European Commission**

Decision

**Case 1379/2003/JMA - Opened on 29/09/2003 - Decision on 08/11/2004**

Strasbourg, 8 November 2004

Dear Mr M.,

On 22 July 2003, you lodged a complaint with the European Ombudsman against the European Commission concerning contractual problems you were facing with the firm Planet Consultants BV in the framework of a project entitled "Support to the Democratic Electoral Process in Cambodia" financed by the Commission.

On previous occasions, you had lodged with the European Ombudsman a number of complaints related to the same subject-matter (complaints 0674/2003/JMA and 1057/2003/JMA), which had been declared inadmissible.

On 29 September 2003, I forwarded your complaint to the President of the Commission with a request for comments. I received the Commission's opinion on 5 January 2004, which I forwarded to you with an invitation to make observations. On 10 March 2004, you sent me your observations on the Commission's opinion.

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

### **THE COMPLAINT**

The facts of the case are, in summary, as follows:

On 8 April 2003, the complainant first lodged a complaint with the Ombudsman against the European Commission. The complaint was registered under file number 674/2003/JMA. In his complaint, the complainant referred to a number of problems he had encountered to carry out the project entitled "Support to the Democratic Electoral Process in Cambodia", financed by the Commission.

The complainant explained that since 1990 he has been working as a consultant in the field of elections, democracy and governance. During this period, he obtained a number of contracts



from the Commission. Having worked since 1997 as a consultant to a leading pro-democracy NGO in Cambodia, he became the Co-Director (along with a Cambodian counterpart) and Team Leader of the Registration Component of the European Commission's Technical Assistance Project for the National Assembly elections in Cambodia in February 1998. Following the successful implementation of the project, the complainant was asked to undertake a follow-up mission later in 1998 in the context of a new project ("Support to the Democratic Electoral Process in Cambodia" - Project no: KEIM/B7-3000/97/0513-01). On 6 October 1998, he received a copy of the contract sent to him by the firm Planet Consultants BV, which was the consultant to the project. He signed the document and returned it to the consulting firm on the same day. Because the work was to begin immediately, he had to make travel arrangements to leave his residence in Leeds/Bradford on 7 October 1998.

After arriving at the airport and having contacted Planet Consultants BV, he was informed that the EC Delegation in Bangkok, which is also responsible for the Cambodian affairs, had not made the necessary arrangements for him, and therefore that he should have to wait. As a result of the situation, the complainant was not able to leave until 23 October 1998. He stayed in Cambodia until 23 December 1998, when he returned home.

The complainant alleged that he has received no payment for his services during the period from 7 to 22 October 1998, in breach of the terms of his contract and despite his lengthy efforts to secure the payment. The complainant argues that he was entitled to 16 days payment, plus accrued interest, for an amount of 4 800 EUR.

On the basis of the available information, the Ombudsman considered that the complainant had not addressed his request to the responsible Commission services, and therefore that the complaint had not been preceded by the appropriate administrative approaches to the institution concerned as required by Art. 2.4 of his Statute. He therefore decided to declare the complaint inadmissible on 28 April 2003. In his letter, the Ombudsman suggested that the complainant contact the responsible services in the Commission, and invited him to consider renewing his complaint should the Commission fail to reply within a reasonable time, or if the reply was not satisfactory.

The complainant wrote to the Commission on 1 May 2003. In the absence of a reply, he lodged a new complaint with the Ombudsman on 9 June 2003 which was registered under file number 1057/2003/JMA. After an examination of the new complaint, the Ombudsman contacted the responsible Commission services with a request to reply to the complainant and to send him the requested information. Further to this intervention, the Commission replied to him on 1 July 2003. In view of the steps which the Commission had taken to settle the matter, the Ombudsman decided to close the case on 15 July 2003.

On 22 July 2003, the complainant wrote to the Ombudsman and pointed out that the Commission's reply merely stated the facts of the case, without offering a clear explanation. He argued that the situation was the result, not merely of actions taken by Planet Consultants BV, but also of the Commission's failure to honour the terms of its own contract with Planet Consultants BV. The complainant argued that the reasons for the decision of Planet



Consultants BV not to pay him were to be found in the Commission's refusal to fully reimburse Planet Consultants BV. He considered this situation unacceptable and asked the Ombudsman to take the Commission to task.

Taking into consideration the new evidence, the Ombudsman decided to register the complainant's letter as a new complaint (reference 1379/2003/JMA), and started an inquiry.

In summary, the complainant alleges that despite the Commission's financial contribution to Planet Consultants BV, the institution refused to intervene in order to ensure proper compliance with the terms of his contract, in particular as regards the payment of the complainant's outstanding dues for the period from 7 to 22 October 1998. The complainant therefore claims that he should receive payment of 4 800 EUR plus the accruing interest.

## THE INQUIRY

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

In its opinion, the Commission first described the factual background to the case.

The institution explained that, in the framework of the project entitled "Support to the Democratic Electoral Process in Cambodian", the Commission signed a service contract No. KHM/B7-3000/97/0513-01 with Nethconsult -a network of independent Dutch consultant firms- for the provision of technical assistance. A first amendment, signed on 30 December 1998, adjusted the total execution time to 17 months. Second and third amendments were signed on 30 June 1998 and 6 October 1998 respectively.

On the basis of an internal agreement, Planet Consultants BV, a member of the Nethconsult network, was to implement the contract. On 6 October 1998, the complainant signed an expert collaboration agreement with Planet Consultants BV, whereby he was to operate as the project's European Co-Director for a period of three months.

As a preliminary procedural matter, the Commission referred in its opinion to the time elapsed since the problem first appeared. It pointed out that when the dispute between the complainant and Planet Consultants BV arose, none of the parties informed its services. Only on 1 March 2003 did the complainant contact the Commission services about the problem. The Commission therefore took the view that the Ombudsman should have declared the complaint inadmissible because, in breach of Article 2.4 of his Statute, it had been lodged more than two years after the problem came to the attention of the complainant.

As regards the problem itself, the Commission first noted that there was no contractual relationship between the complainant and the Commission. Whilst the complainant had contracted with Planet Consultants BV, the Commission's contractual relationship had been established with Nethconsult. The Commission referred to Article 12 of the contract which ruled out any responsibility for claims arising out of the contract and relating to damages caused to a third party. The contract also precluded any request for indemnity or re-instatement relating to such claims from being addressed to the Commission.



The Commission argued that it had fulfilled its own contractual obligations. It noted that rider 3 of the contract had been signed on 6 October 1998, the day foreseen for the departure of the expert. Apparently, its delegation did not receive the rider in time to authorize the departure of the expert on the expected date. According to the emails attached to the complaint, the delegation gave its approval by 16 October 1998 enabling the expert to leave as of 23 October 1998. The institution explained that this type of setback is not unusual in the framework of development co-operation, as the communications between headquarters and delegations can be slow due to unforeseen circumstances. It also indicated that a contract for technical assistance does not constitute an employment contract, in that payment is dictated by the resources and services provided. The time foreseen for missions by experts in service contracts is of a maximum duration, although the service may be provided for a shorter period.

The Commission referred to Article 7 of the contract signed between the Commission and Nethconsult which specifies that payments shall be made upon acceptance of the reports specified in Article 4 received with duly established invoices covering work effectively done and costs incurred. The fees, on the other hand, are only to be payable for days of effective work and travel. Invoices should include certificates of presence and work, in the form of presence sheets, signed by the national project director.

On 10 March 1999, Planet Consultants BV sent the Commission an invoice corresponding to the complainant's mission fees for the period October-December 1998 for an amount of 26 866.67 EUR. No fees were requested for the period from 7 to 22 October 1998. The timesheets concerning the services rendered during this period and signed by the complainant mentioned that the latter was on stand by. The Commission issued the payment according to the invoice and was thus in compliance with its contractual obligations.

The Commission considered that the dispute regarding the payment of fees for the period of availability of experts between the signature of contracts and the start of missions is to be governed by the relevant provisions of the contract concluded between the complainant and Planet Consultants BV. These conditional clauses take into account unexpected events which may delay the effective start of the mission, even though no legal protection for the expert is foreseen in these cases.

The Commission stressed that it has no right to intervene in the contract signed by the complainant and Planet Consultants BV. Thus, any complaint for unpaid fees should have been addressed by the complainant to Planet Consultants BV and should be resolved by a competent court.

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

In his observations on the Commission's opinion, the complainant repeated the allegations made in his complaint.

He underlined that even if the delay for the signature of this type of contracts may not be unusual, he found it intolerable that this practice can be used in such a way as to affect the contract unilaterally, leaving the expert in a position in which he has no right to receive any



compensation for the period in question. The Commission's view was, he argued, insensitive to the circumstances of individuals who depend on such contracts for their living.

## THE DECISION

### 1 Preliminary question

1.1 In its opinion, the Commission points out that neither the complainant nor Planet Consultants BV contacted its services after the dispute between them concerning the complainant's outstanding fees for the period from 7 to 22 October 1998 arose. Only on 1 March 2003 did the complainant write to the institution about the problem.

The Commission takes the view that the Ombudsman should have declared the complaint inadmissible, because it had been lodged more than two years after the problem came to the attention of the complainant, and was therefore in breach of Article 2.4 of the Statute of the European Ombudsman.

1.2 The Treaty establishing the European Community and the Statute of the European Ombudsman set precise conditions as to the admissibility of a complaint. The Ombudsman can only start an inquiry if these conditions are met. One of these conditions is Article 2.4 of the Statute of the European Ombudsman (1) :

*"A complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint."*

1.3 The Ombudsman notes that the facts complained of are not the delay in the complainant's travel to Cambodia in 1998, but the subsequent failure to pay him for the period in question. The lack of payment constitutes a continuing fact and the Ombudsman is not aware of any evidence to show that the complainant has at any point ceased to pursue his claim for payment since 1998. In these circumstances, the Ombudsman considers that the conditions set out in Article 2.4 of his Statute are met in this case.

### 2 The Commission's alleged failure to ensure the full payment of the complainant's fees

2.1 The complainant alleges that despite the Commission's financial contribution to Planet Consultants BV, the institution refused to intervene in order to ensure proper compliance with the terms of his contract, in particular as regards the payment of the complainant's outstanding fees for the period from 7 to 22 October 1998.

The complainant argues that the Commission was directly responsible for the delay in beginning his work from 7 to 22 October 1998, because its services in the EC Delegation in Bangkok were unable to make the necessary arrangements on time.

2.2 The Commission argues that there was no contract between the complainant and the Commission, but instead its contractual relationship had been established with Nethconsult. The nature of this contract merely involved the provision of technical assistance, and it ruled out liability by the Commission for claims relating to damages caused to a third party.



The Commission argues that the dispute concerning the complainant's unpaid fees was to be governed by the relevant provisions of the contract concluded between the complainant and Planet Consultants BV, in which the institution has no right to interfere. The institution notes that on 10 March 1999 it had received and paid the invoice submitted by Planet Consultants BV for the services provided by the complainant between October and December 1998, in which no fees were requested for the disputed period.

As regards the timing of the action taken by its services, the Commission notes that the relevant rider of the contract had been signed on 6 October 1998, but its delegation did not receive it until 16 October 1998. The Commission explains that this type of setback is not unusual in the framework of development co-operation, as the communications between headquarters and the delegations can be slow due to unforeseen circumstances.

2.3 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 (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.

2.4 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.

2.5 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.

2.6 As part of the evidence furnished in the course of his inquiry, the Ombudsman has carefully examined the legal basis for the Commission's action in this case, namely the contract signed between the Commission and Nethconsult of 27 January 1998 (Contract n° KHM/B7-3000/97/0513-01) [henceforth, "the contract"], as well as the expert collaboration agreement signed between the complainant and the representative of Nethconsult (Planet Consultants BV) dated 6 October 1998 [henceforth, "the agreement"].

As regards the contract, it appears that the only parties to it were the Commission, as the principal, and Nethconsult, as the consultant. The latter was required, on the basis of Article 1 of



the contract, to provide European expertise on democratic electoral process to the government of Cambodia through a number of experts. Article 12 of the contract provides that:

*"The Commission shall in no case, and under no circumstances, be held responsible for claims arising out of the present contract and relating to damages caused to the consultant, its employees or a third party. No request for indemnity or re-instatement relating to such claims may be addressed to the Commission".*

2.7 As regards the nature of the contract, it appears that it is characterized in its title as a "Services Contract". Accordingly, Article 7 of the contract concerning the method of payment, states that,

*"Payments shall be made upon acceptance of the reports [...] with duly established invoices covering work effectively done and costs incurred. Fees will only be payable for days of effective work and travel."*

2.8 Having reviewed the clauses of the agreement as well, the Ombudsman notes that the Commission was given legal authority to vet the experts proposed by the consultant. Thus, Item 3 of the agreement states that,

*"The collaboration agreement comes into force from the date of signature [...] unless the expert's candidacy is not approved by the Principal".*

Furthermore, even if Item 3 of the agreement states that the Principal's approval should be communicated to the expert as soon as possible, the specific duration of the services of the expert are left to the discretion of the Principal, as set out in Item 5 (3) .

2.9 In view of the above legal provisions, the Ombudsman considers that the Commission has been able to provide a coherent and reasonable account of why it was entitled, (i) not to intervene in any dispute between the complainant and Planet Consultants BV, and (ii) to reimburse Planet Consultants BV on the basis only of the time effectively worked by the complainant. Moreover, the Ombudsman notes that the complainant has not contested the Commission's argument that the invoice submitted by Planet Consultants BV did not include any fees for the disputed period.

2.10 As regards the delay in confirming the complainant's selection once the contract rider had been signed, the Ombudsman considers that, in the absence of any evidence that the Commission was obliged to respect a specific earlier deadline, the 10 day period of delay which elapsed between the signing of the contract by the complainant and the approval by the Commission Delegation in Bangkok (6 to 16 October 1998) does not seem unreasonable.

2.11 The Ombudsman also notes that the Commission informed the complainant of the reasons for its position, both in its letter of 1 July 2003 and in its opinion. On the basis of the information supplied by the complainant and the Commission during the inquiry, the Ombudsman considers that the position taken by the Commission in relation to this issue does not appear to be





unreasonable and that the Commission appears to have informed the complainant adequately of the reasons for its position.

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

2.12 However, the Ombudsman notes that the possibility of persons in the position of the complainant suffering loss through no fault of their own appears to be an inherent feature of the current system through which the Commission obtains expert services. As the Commission itself has recognised, the type of setback that occurred in this case does not appear to be unusual in the framework of projects concerning development co-operation. The Ombudsman therefore suggests that it would be in the interests of good administration and good relations with citizens in the future for the Commission to examine the feasibility of revising the system to provide greater protection for the experts affected.

The Ombudsman will address a further remark to the Commission to this effect below.

### **3 Payment of the complainant's outstanding fees plus interest**

3.1 The complainant claims that his fees for the period from 7 to 22 October 1998, which amount to 4 800 EUR, plus the accruing interest be paid to him.

3.2 Taking into consideration the above findings, the Ombudsman does not consider it necessary to deal with the complainant's claim.

### **4 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.

## **FURTHER REMARK**

The Ombudsman notes that the possibility of persons in the position of the complainant suffering loss through no fault of their own appears to be an inherent feature of the current system through which the Commission obtains expert services. As the Commission itself has recognised, the type of setback that occurred in this case does not appear to be unusual in the framework of projects concerning development co-operation. The Ombudsman therefore suggests that it would be in the interests of good administration and good relations with citizens in the future for the Commission to examine the feasibility of revising the system to provide greater protection for the experts affected.

Yours sincerely,

P. Nikiforos DIAMANDOUROS





(1) OJ 1994, L 113, p. 15.

(2) See the European Ombudsman's Annual Report 1997, p. 22.

(3) *"The duration of the services of the Expert is defined by the existence of the position of the Expert as defined by the Principal".*