



## Decision of the European Ombudsman on complaint 1968/2003/JMA against the European Commission

Decision

**Case** 1968/2003/JMA - **Opened on** 02/12/2003 - **Decision on** 11/11/2004

Strasbourg, 11 November 2004

Dear Mr O.,

On 30 September 2003, you lodged a complaint with the European Ombudsman against the European Commission on behalf of the Sligo Borough Council. Your complaint concerned the Commission's handling of an Altener contract (reference No XVII/4 1030/Z/98 - 464) which the institution had signed with the Sligo Borough Council.

You had submitted a previous complaint to the Ombudsman on 23 July 2003 (reference No 1399/2003/BB), which I declared inadmissible on 23 September 2003, since its object could not be determined from the available information.

On 2 December 2003, I forwarded your complaint to the President of the Commission with a request for comments. I received the Commission's opinion on 23 March 2004, which I forwarded to you with an invitation to make observations. I have received no observations from you.

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 23 July 2003, the complainant first lodged a complaint with the European Ombudsman against the European Commission. The complaint was registered under file number 1399/2003/BB. The information enclosed with the complaint included several exchanges with the Commission regarding the implementation of a contract for Community assistance through the Altener programme (reference No XVII/ 4 1030/Z/98 - 464) which had been signed between the Commission and the Sligo Borough Council. In view of the available information, the Ombudsman concluded that the object of the complaint could not be identified as required by Article 2 (3) of his Statute, and therefore he declared it inadmissible on 23 September 2003.

On 30 September 2003, the complainant forwarded additional information which included a duly completed standard complaint form. This new material was registered as a new complaint under file number 1968/2003/JMA. In his new complaint, the complainant explained that the Commission had granted Community financial assistance to the Sligo



Borough Council through the energy-related Altener programme (Altener proposal AL/98-464). This assistance was to be used for the development of a renewable energy scheme which ought to sustain a new local public transportation system. The estimated total cost of the project was 113 040 EUR. The Commission was to provide 28 260 EUR towards the completion of the project, corresponding to 50 % of the project's eligible costs (56 520 EUR). The contract entered into force on 1 March 1999. It established that the project should be completed in a thirteen-month period, namely by 30 April 2000. Invoking unforeseen circumstances, the complainant sought to have the length of the project extended. The Commission refused the complainant's request for an extension, notwithstanding the success of the work. Instead, the Commission issued a recovery order for the amount which had been advanced to the Sligo Borough Council under the contract. The complainant expressed his disagreement with the reasoning for the Commission's recovery order.

The complainant also referred to a number of arguments which showed that the Commission had not handled the contract properly. He argued that the Commission (i) mislaid a previous contract in November 1998; (ii) failed to make a 30% payment within sixty days of the contract's signature as required by Article 4; and (iii) acknowledged that the contract's core obligation had been fulfilled.

In summary, the complainant alleged that the Commission did not act properly by, (i) issuing a request dated January 2001 for the reimbursement of 8.478 EUR; and (ii) failing to pay the outstanding amounts due under the contract. He therefore claimed that the Commission should make full payment for the work carried out, and refrain from making further demands.

#### **THE INQUIRY The Commission's opinion**

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

The institution explained that, on 16 November 1999, it signed a contract with the Corporation of Sligo (reference No XVII/4.1030/A/98-464). Under the terms of the contract, the Corporation of Sligo was granted financial assistance through the Altener programme for the development of a project entitled "Renewable Energy Scheme for Local Public Transport System". The project had to be completed in a nine-month period effective from the date of signature (16 November 1999), namely by 16 August 2000. The aim of the contract was to improve the traffic problems in Sligo county by the development of a public transport system based on the use of renewable energy generated through a small hydro scheme.

The project's eligible costs were 56 520 EUR, of which the Commission would grant financial support of 50%, up to a maximum of 28 260 EUR. An advance payment corresponding to 30% of the Community's financial contribution (8 478 EUR) was paid to the complainant on 8 February 2000.

The Commission described how events unfolded once the contract had been signed. The most relevant dates mentioned by the institution were as follows:

- 09/II/1998 - The Commission informed the Corporation of Sligo that their proposal had been successful, and requested additional documents in view of the preparation of the



contract.

- 15/12/1998 - A commitment was made for an amount of 28 260 EUR.
- 16/11/1999 - The European Commission sent a copy of the contract duly signed to the Corporation of Sligo.
- 16/11/1999 - Fax from the European Commission reminding the Corporation of Sligo that the starting date of the contract was the date of signature by the Commission, namely 16 November 1999, but offering to grant an addendum to the contract if the work had already started.
- 18/01/2000 - Letter from the Corporation of Sligo informing the European Commission that it expected to have the final report completed by 1 April 2000, and requesting an addendum to the contract to adjust its duration to 13 months, starting on 1 March 1999.
- 26/01/2000 - Letter from the Corporation of Sligo requesting that the approved contract period for eligibility extend from 1 March 1999 to 30 April 2000 in order to enable work carried out from 1 March 1999 to be eligible.
- 08/02/2000 - An advance payment corresponding to 30% of the Community's financial contribution (8 478 EUR) was paid.
- 12/12/2000 - Advance notice of termination of the contract sent to the Corporation of Sligo for non-compliance with the contractual provisions regarding the submission of reports.
- 04/01/2001 - Letter from the Corporation of Sligo justifying the delay in the completion of reports due to unforeseen circumstances, and requesting an extension until 28 February 2001 for the submission of the final report.
- 07/02/2001 - Letter from the European Commission turning down the request for an extension and confirming the termination of the contract as of 18 January 2001, due to the failure by the Corporation of Sligo to fulfil its contractual obligations.
- 14/05/2001 - Debit note No 3240303016 amounting to 8 797.83 EUR corresponding to the advance payment of 8 478 EUR plus the contractual interest of 319.83 EUR was sent to the Corporation of Sligo.
- 17/05/2001 - The Corporation of Sligo forwarded a single copy of the final report, but no summary, nor a cost statement.
- 28/09/2001 - Letter from the accounting officer of the European Commission to the Corporation of Sligo upholding the Commission's decision to recover the advance payment plus interest.
- 13/12/2002 - Meeting held in Brussels between the Commission services and



representatives of the Corporation of Sligo.

- 18/12/2002 - Letter from the Corporation of Sligo requesting a file review.
- 20/01/2003 - The Corporation of Sligo forwarded three additional copies of the final report, but still failed to submit any statement of expenditure.
- 12/02/2003 - Letter from the European Commission confirming the termination of the contract and its request for reimbursement.
- 17/04/2003 - Letter from the solicitors appointed by the Corporation of Sligo, stating that its client was prepared to leave matters as they were on the basis that neither party will make claims against the other.
- 26/06/2003 - Letter from the Legal Service of the European Commission refusing the proposition made by the Corporation of Sligo's solicitors, and giving formal notice to pay the outstanding amount within 14 days from the receipt of the notice.

The Commission explained in detail some of these developments. It pointed out that, under Article 7 of the contract, the complainant had to submit a number of reports for the Commission's approval. Accordingly, an intermediate report on the progress of the work and the results obtained as well as the financing plan had to be sent by 16 April 2000, namely five months after the commencement date. In addition, a final report as well as a publishable extended summary had to be received by 16 October 2000, namely within two months of the expiry of the contract. This final report had to be accompanied by a detailed statement of all expenditure incurred, certified true by the Contractor.

In a letter dated 18 January 2000, the Corporation of Sligo wrote to the Commission, stating that work was progressing, that the final stages of the work programme were being reached, and that it expected to have the final report completed by 1 April 2000. In addition, it requested the addition of a new contractual clause whereby the contract would run from 1 March 1999 until 30 April 2000. This letter was followed by a second communication dated 26 January 2000, restating the request and justifying it on the basis of the fact that work had been carried out from March 1999.

On the basis of Article 2 of the contract, the Commission rejected the request. The institution noted that a request for an extension of the project was not possible, since the contract ended on 16 August 2000. It added that no evidence that the work had in fact started in March 1999 had been provided.

The institution pointed out that despite the complainant's assurances, the intermediate report, the final report, the detailed statement of expenditure and the extended summary that should have accompanied it were not submitted by the deadlines set in the contract. The final report was only received on 7 June 2001, namely ten months after the expiry of the contract. The document, however, did not include a summary or the statement of expenditure. On 20 January 2003, the Corporation of Sligo submitted three additional copies



of the final report, as required by Article 7 (2) of the contract, but failed to submit any statement of expenditure.

The Commission noted that, so far, its services have not received a financial report which could substantiate the advance payment made and make possible an appropriate assessment of the work performed. In the absence of the reports, the Commission considered that the complainant had breached its contractual obligations. Having formally given notice, the institution decided to terminate the contract, and therefore requested the reimbursement of the advance payment.

The institution also addressed in detail each of the additional arguments made by the complainant to demonstrate that its services had not handled the contract properly:

(a) Mislaying of a previous contract : The Commission explained that, on 30 December 1998, it sent the contractor two unsigned copies of the contract, accompanied by a diskette, which had to be returned. Pursuant to Article 2 of the contract, the commencement date of the project was the date of signature by the Commission. In other words, the contract had to be signed by the contractor first, then returned to the Commission, who in turn signed it and sent it back to the contractor with a cover letter clearly indicating the commencement date of the project.

In the present case, the Corporation of Sligo alleged to have signed and returned the contract in January 1999. The Commission, however, noted that there is no evidence of such correspondence in its files, and that the complainant never raised this issue before January 2000, when the work had already started.

The Commission acknowledged, however, that its letter informing the complainant that the proposal had been successful was dated 9 November 1998, and that the contract was only sent on 30 December 1998.

In the Commission's view, the Corporation of Sligo has been unable to demonstrate that the contract had been mislaid or that the late signature of the contract had given rise to any damage. The institution also pointed out that no tangible evidence has been provided to prove that the work started on 1 March 1999.

(b) Failure to make the advance payment on time : The institution noted that, according to Article 4.1 of the contract, an advance corresponding to 30% of the Community's financial contribution had to be paid within 60 days of the conclusion of the contract. Since the contract had been concluded on 16 November 1999, the advance payment should have been made by 14 January 2000 at the latest. This payment took place only on 8 February 2000. The Commission admitted that there had been a slight delay. It noted, however, that the complainant had never raised this issue before and only mentioned it in its letter of 22 February 2001, contesting the decision to terminate the contract.

(c) Acknowledgement that the project's core obligation had been fulfilled : The Commission argued that the complainant had failed to carry out a major contractual obligation, namely to



submit an intermediate report, a final report, a detailed statement of expenditure and an extended summary. Notwithstanding the fact that the Corporation of Sligo finally submitted three additional copies of the final report on 20 January 2003, it had failed to submit any statement of expenditure. The Commission noted that the financial report had still not been received. Therefore, the institution disputed that it had acknowledged the fulfilment of the project's core obligation. On the contrary, its services decided to terminate the contract because the necessary reports had not been submitted by the dates set out in the contract.

The Commission stressed that the complainant has failed to bring forward any evidence that the alleged delay in signing the contract caused him any difficulties in carrying out the project. In the Commission's view, the Corporation of Sligo has also remained unable to provide evidence that work on the project started on 1 March 1999, and that it was completed according to the work programme. The institution noted that the delays in signing the contract and making the first payment had both been largely compensated for by the delay in performing the work programme and in fulfilling the contractual requirements. In view of the above, the Commission confirmed the decision to recover the full amount of its financial contribution granted to the project plus interest.

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

The Ombudsman has not received any observations from the complainant.

#### **THE DECISION 1 The Commission's allegedly improper request for reimbursement of part of the assistance**

1.1 The complainant alleges that the Commission did not act properly by issuing a request dated January 2001 for the reimbursement of 8 478 EUR which the institution had already advanced. He disagrees with the reasoning given by the Commission for its recovery order.

1.2 The Commission argues that despite the complainant's assurances, the intermediate report, the final report, the detailed statement of expenditure and the extended summary were not submitted by the deadlines established in the contract. The final report was only received on 7 June 2001, namely ten months after the expiry of the contract. The document, however, did not include a summary or the statement of expenditure.

The institution notes that, in the absence of these reports, it considered that the complainant had breached its contractual obligations. Having formally given notice, the institution decided to terminate the contract, and therefore requested the reimbursement of the advance payment.

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 legal basis for the Commission's action in this case, namely the contract signed between the Commission and the Corporation of Sligo (reference No XVII/4.1030/A/98-464) on 16 November 1999.

The Ombudsman notes that, under Article 2 of the contract, the project had to be completed in a nine-month period effective from the so-called commencement date, namely the date on which the Commission signed the contract (16 November 1999). Accordingly, the project was due to be completed by 18 August 2000.

Article 4 of the contract required the beneficiary to submit a number of reports to the Commission, the deadlines for submission being laid down in Article 7 as follows: (i) an intermediate report had to be submitted five months after the commencement date, namely by 16 June 2000; and, (ii) the final report, jointly with a publishable extended summary and a detailed statement of all expenditure, had to be submitted within two months after the expiry of the period referred to in Article 2, namely by not later than 16 October 2000.

In the event that the contractor did not fulfil his contractual obligations, and after having given formal notice, Article 9 enabled the Commission to terminate the contract. The consequences of such action were spelled out in Article 9 (3):

*"In case of termination, the Commission may require the reimbursement of all or part of its financial assistance. Interest may be added to any amount to be reimbursed [...]"*.

1.7 In view of the available evidence, it appears undisputed that the complainant failed to submit the intermediate report; that he also failed to submit a statement of expenditure; and that he sent his final report on 17 May 2001, when the contractual deadline had been 16 October 2000.

The Ombudsman notes that the Commission took the view that those actions constituted a breach of the complainant's obligations under Articles 4 and 7 of the contract, and therefore that the institution had the right to trigger the application of Article 9 and terminate the



contract. Accordingly, the Commission considered it was entitled to request that the complainant reimburse the financial contribution already paid.

1.8 In view of the above legal provisions, the Ombudsman believes that the Commission has been able to provide a coherent and reasonable account of why it was entitled to terminate the contract and to ask for the reimbursement of the sums already paid.

The Ombudsman also notes that the Commission gave the complainant a proper warning of its intentions to terminate the contract by letter of 12 December 2000, and informed it of the reasons for its position on 7 February 2001 and in its further correspondence. 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 the termination of the contract and the reimbursement of the sums already paid does not appear to be unreasonable, and that the Commission appears to have informed the complainant adequately of the reasons for its position.

1.9 In reaching this conclusion, the Ombudsman is mindful of the fact that the complainant has also argued that the Commission did not handle the contract properly, since its services allegedly mislaid a previous contract, failed to make the first advance payment by the time set in the contract, and did not take into account the successful results of the project.

Having carefully examined these arguments in the light of the available information, the Ombudsman finds that the complainant's grievances might not be, in all cases, deprived of merit. Thus, the Ombudsman notes that the Commission has not put forward any clear explanation to account for the long delay between the date when its services first sent a copy of the contract to the complainant (30 December 1998) and that at which they signed the document (18 November 1999). The Ombudsman also notes that the Commission has acknowledged that whilst the first advance payment to the complainant was due by 14 January 2000, its services only made the payment on 8 February 2000. As regards the project's output, the Ombudsman has found no evidence, however, which might indicate that the Commission gave a positive assessment of the work accomplished by the complainant.

Although the delays in sending the contract and making the first payment are regrettable, they do not appear to have contributed to the problems that subsequently arose, nor do they deprive the Commission of its contractual rights in respect of subsequent non-performance by the complainant.

1.10 In view of the above, and bearing in mind that the scope of the Ombudsman's review is limited in such cases, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

## **2 The Commission's alleged failure to pay the outstanding amounts**

2.1 The complainant alleges that the Commission did not act properly by failing to pay the outstanding amounts due under the contract.

2.2 The Commission argues that the complainant did not submit the necessary reports by





the deadlines set in the contract, and therefore the institution considers that the complainant did not comply with his contractual obligations. On that basis, the institution decided to terminate the contract.

2.3 In view of the conclusions reached above, in Part 1 of the Decision, the Ombudsman considers that the Commission has been able to provide a coherent and reasonable account of why it was entitled to terminate the contract, and therefore not to provide any further financial assistance to the complainant.

On the basis of the information supplied by the complainant and the Commission during the inquiry, the Ombudsman has concluded 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 view of the above, and bearing in mind that the scope of the Ombudsman's review is limited in such cases, the Ombudsman has concluded that the inquiry has not revealed an instance of maladministration as regards this aspect of the case.

### **3 Request for a full payment of the work carried out**

3.1 The complainant claims that the Commission should make a full payment for the work carried out, and refrain from making further demands.

3.2 In view of the above findings, the Ombudsman does not consider that the complainant's claim can be sustained.

### **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.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

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