

Decision of the European Ombudsman on complaint 2370/2003/GG against the European Commission

Decision

Case 2370/2003/GG - Opened on 17/12/2003 - Decision on 12/07/2004

Strasbourg, 12 July 2004

Dear Mr Z.,

On 5 December 2003, your company submitted, acting on behalf of Gemeinschaftskernkraftwerk Neckar GmbH, a complaint against the European Commission. This complaint concerns services provided to the nuclear power plant in Zaporozhye (Ukraine) on the basis of a contract with the European Commission.

On 17 December 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 29 March 2004, and I forwarded it to you on 31 March 2004 with an invitation to make observations, if you so wished, by 30 April 2004. In the absence of a reply, my services contacted you by telephone on 17 May 2004. At your request, my services accepted to grant you an extension of this deadline until 31 May 2004. However, no observations were received from you by that date.

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

THE COMPLAINT

The complainant, a German company, provided on-site assistance to the nuclear power plant in Zaporozhye (Ukraine). These services were covered by a service contract concluded between the complainant and the European Commission (Contract WW.94.06/02.01/B006) on 20 September 1995. On 19 December 1996, an Addendum to this contract was signed (Contract 95-1347.01). A further Addendum (Contract 95-1347.02) was entered into on 17 July 1997.

The complaint concerns two invoices concerning this contract (Invoice No 1-98 and Invoice No 2-98) that were both issued on 3 August 1998 and sent to the Commission.

Invoice No 1-98 concerned "Fees and Direct Expenses" and amounted to EUR 825 514.21. According to the complainant, an amount of EUR 9 569.82 still remained unpaid, corresponding to the cost of a trip to Moscow undertaken by the project manager, another expert and an



interpreter from 12 until 17 May 1997.

Invoice No 2-98 concerned "Reimbursables" and amounted to EUR 89 253.47. According to the complainant, an amount of EUR 33 929.47 had initially remained unpaid. This amount included costs under the headings "Travel Expenses Germany" (EUR 16 091.58), "Per Diem Ukrainian Experts" (EUR 7 104), "Travel Expenses Ukraine" (EUR 1 338.20) and "Translation" (EUR 9 395.69).

The complainant took the view that all the above-mentioned expenses were covered by the contract. As regards invoice 1/98, the complainant inter alia referred to a fax it received from the Commission on 20 November 1996 and to position C.2 of the "Breakdown of prices" annexed to the contract. As regards invoice 2/98, the complainant referred to positions C.6 ("Travel expenses Germany"), C.10 ("Per Diem Ukrainian Experts EU"), C.5 ("Travel expenses Ukraine") and C.11 ("Translation") of the breakdown of prices.

In November 2001, the Commission made a further payment of EUR 16 499.69 (covering the costs claimed under "Per Diem Ukrainian Experts" and "Translation"). According to the complainant, the amount still due under Invoice No 2-98 thus amounts to EUR 17 429.78.

According to the complainant, the Commission was reminded of its debt on numerous occasions, the last time by letter of 17 December 2001. However, this letter remained unanswered.

The complainant submitted that the problems it had experienced with the present contract might be influenced by the fact that it had differences of opinion with the Commission regarding another contract and the fact that it had submitted this dispute to the Court of First Instance where it was still pending. According to the complainant, the case before the Court was not related to the present complaint.

In its complaint to the Ombudsman, the complainant (represented by a Belgian company) made in substance the following allegations:

(1) The Commission had failed to pay the amounts still due to the complainant under invoice No 1-98 and invoice No 2-98.

(2) The Commission had often failed to reply to letters sent to it by the complainant and systematically refuses to negotiate with the complainant.

The complainant claimed that the Commission should pay the amount of EUR 26 999.60 which in its view was due to it.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:



The relevant contract had been signed in the framework of the Tacis Nuclear Safety Programme on 20 September 1995. The last addendum to the contract had been signed in July 1997 with an expiry date of 20 March 1998. The contract had stated that the contractor had to send cost statements on the basis of a fixed time schedule, foreseen in Article 6 of the addendum. Invoice 1/98 was for fees and direct expenses and invoice 2/98 for reimbursables. These invoices had been received almost five months after the expiry date of the contract.

Invoice 1/98

This invoice had been submitted to the Commission on 3 August 1998. In March 1999, the Commission had informed the complainant that the invoice had been processed but that the amount paid (EUR 815 944.39) would be different from the one that had been invoiced. An amount of EUR 9 569.82 claimed for fees and per diems in relation to a trip to Moscow had been rejected, since the trip in question had not been authorised by the Commission's task manager.

To request a prior authorisation for missions that were not explicitly mentioned in the contract was in line with the "Guidelines for administrative reporting on projects financed from the European Union programme of technical assistance to the new of [sic] independent states TACIS". It also concurred with Article 28 (1) of the General Conditions for service contracts financed from Phare/Tacis funds (the "General Conditions").

The fax of 20 November 1996 to which the complainant referred did not state that a mission to Russia was necessary but only suggested making contact with another company. This fax could not be regarded as an authorisation for the invoiced trip.

Furthermore, in a fax of 11 December 1998 the Commission's Task Manager had clearly stated that no authorisation had been requested and that a retroactive approval and the corresponding modifications necessary in the breakdown of costs were not possible in view of the fact that the contract had already expired. Changes during implementation were possible, but it was not possible to change elements of the contract, such as the breakdown of costs, after the contract had come to an end.

Contrary to what the complainant alleged, Annex B ("Organisation and Methods") of the contract to which the complainant had referred only foresaw an increase in the number of possible flights to Moscow. The fact that there was a budget earmarked for flights to Moscow did not automatically mean that these flights were authorised as such. Article 28.1 of the General Conditions stated: "The contractor is entitled to payment of the amount stated in the Contract as and when the services are provided and accepted." The services to which the complainant referred had been neither authorised nor accepted. Therefore, the contractor was not entitled to payment for these services.

This had been explained to the contractor on several occasions (letters of 11 December 1998, 4 August 1999 and 30 October 2001).

Invoice 2/98

This invoice had been submitted on 3 August 1998. The Commission had asked the



complainant to resubmit the invoice correctly. This had been done on 15 June 1999. On 30 June 1999, the Commission had informed the complainant that the invoice had been processed but that the amount paid would be different from the one that had been invoiced. An amount of EUR 35 409.76 had initially been rejected. The Commission had subsequently paid an amount of EUR 16 499.69 (per diems of Ukrainian experts and translation) that had not been paid due to an oversight of the Commission.

The items that had finally been rejected were travel expenses for a trip not foreseen in the contract (EUR 1 471.79, accepted by the complainant), VAT that was not reimbursable (EUR 5.20, accepted by the complainant) and travel expenses in Germany and Ukraine.

The expenses incurred in Germany and Ukraine claimed by the contractor as travel costs could not be reimbursed under the budget line “travel expenses Germany” and “travel expenses Ukraine” as requested. These budget lines were only linked to costs of train and airplane tickets, and these had been reimbursed. The rejected expenses referred to costs for items such as hotels, taxis and meals for experts and counterpart experts. These costs should, as far as experts were concerned, be covered by the specific budget line regarding per diems. However, this budget line (under the category “Direct expenses”) had been exhausted, so that the complainant had asked to exceed this budget line. The same costs for the counterpart experts should have been earmarked within the budget of the contractor, as specified in point 9 of the “Technical terms of reference” annexed to the contract. However, there was no budget line to cover such costs for the counterpart experts or other beneficiaries. These costs had been considered part and parcel of the tender.

For these two reasons, it had not been possible to pay the amount claimed within the existing budget. In order to do so, an amendment of the contract would have been necessary. This had been impossible since the contract had already ended several months earlier.

Failure to reply to letter sent by complainant and refusal to negotiate

At the end of 2001 (on 17, 19 and 20 December), the complainant had sent a set of three letters with regard to the claim for payment to the Commission. The first letter of 17 December 2001 had not provided any new elements compared to earlier letters.

The letters of 19 and 20 December 2001 had been sent to the financial officer in charge. The Commission had answered these letters on 14 January 2002.

The letter of 17 December 2001 had not been answered separately. The Commission had been of the opinion that it had been made clear in its letter of 30 October 2001 that the issue was considered as fully resolved, that the contract was closed and that no further claims would be taken into consideration. This had also been repeated in the letter of 14 January 2002.

Given that the complainant, in its letter of 17 December 2001, had introduced the same claim again without presenting new arguments, this letter had been considered to be repetitive. It had therefore been felt that no reply was necessary in accordance with Article 14.3 of the European Code of Good Administrative Behaviour.



As regards the refusal to negotiate, the Commission did not see in what way there had been a refusal on its part to negotiate.

The complainant's observations

No observations were received from the complainant.

THE DECISION

1 Failure to pay amounts allegedly due

1.1 The complainant, a German company, provided on-site assistance to the nuclear power plant in Zaporozhye (Ukraine). These services were covered by a service contract concluded between the complainant and the European Commission. The complaint concerned two invoices relating to this contract (invoice No 1-98 and invoice No 2-98) that were both issued on 3 August 1998 and sent to the Commission. In its complaint to the Ombudsman, the complainant alleged that the Commission had failed to pay amounts that it claimed to be due to it under these two invoices. The complainant claimed that the Commission should pay the amount of EUR 26 999.60 which in its view was due to it.

1.2 Invoice No 1-98 concerned "Fees and Direct Expenses". According to the complainant, an amount of EUR 9 569.82 still remained unpaid, corresponding to the costs of a trip to Moscow undertaken by the project manager, another expert and an interpreter. Invoice No 2-98 concerned "Reimbursables". According to the complainant, an amount of EUR 17 429.78 was still outstanding under the headings "Travel Expenses Germany" (EUR 16 091.58) and "Travel Expenses Ukraine" (EUR 1 338.20).

1.3 In its opinion, the Commission took the view that the amount claimed under invoice 1/98 was not due to the complainant, given that the relevant trip had not been authorised by the Commission. The Commission further submitted that the costs still claimed under invoice 2/98 could not be reimbursed since they did not fall within the budget line indicated by the complainant. It also explained that the correct budget line had already been exhausted and that for certain items there never had been a budget line to which the relevant expenditure could have been charged.

1.4 The present allegation and claim concern the obligations arising under a contract concluded between the Commission and the complainant.

1.5 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 (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.

1.6 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.

1.7 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.

1.8 In the present case, the Ombudsman considers that the Commission has put forward a coherent and reasonable account of the reasons for which it believes that the amounts claimed by the complainant are not due.

1.9 In these circumstances, there appears to be no maladministration on the part of the Commission in so far as the first allegation and the complainant's claim for payment are concerned.

2 Failure to reply to letters

2.1 The complainant alleged that the Commission had often failed to reply to letters and systematically refused to negotiate with it.

2.2 The Commission referred to three letters it had addressed to the complainant with regard to the latter's claims (letters of 11 December 1998, 4 August 1999 and 30 October 2001). It added that at the end of 2001, the complainant had sent a set of three letters with regard to its claims for payment to the Commission on 17, 19 and 20 December the last two of which had been answered on 14 January 2002. According to the Commission, the letter of 17 December 2001 had not been answered separately since the Commission had been of the opinion that it had been made clear in its letter of 30 October 2001 that the issue was considered as fully resolved, that the contract was closed and that no further claims would be taken into consideration. The Commission further submitted that the letter of 17 December 2001 had contained no new elements and had been considered as being repetitive within the meaning of Article 14.3 of the European Code of Good Administrative Behaviour.

2.3 On the basis of the evidence submitted to the Ombudsman, it appears that the Commission replied to all the letters addressed to it by the complainant apart from the one sent on 17 December 2001. The Ombudsman considers that it would have been courteous to reply also to this letter. It is true that Article 14.3 of the European Code of Good Administrative Practice (2) provides that no reply needs to be sent in case of the repetitive character of a letter, and the Ombudsman is pleased to note that the Commission is referring to this Code which has been drafted by the Ombudsman and endorsed by the European Parliament. The Ombudsman is not able to ascertain whether this is the case here, since neither the complainant nor the Commission have submitted a copy of the complainant's letter of 9 August 2001 to which the Commission replied on 30 October 2001. The Ombudsman notes, however, that in its letter of



30 October 2001, the Commission clearly explained that the position it adopted in this letter was final. He further notes that the letter of 14 January 2002 (which replied to the complainant's letters of 19 and 20 December 2001) reiterated this position. (3) In these circumstances, the complainant cannot have had any reasonable doubt as to the Commission's position. The Ombudsman therefore does not consider that further inquiries are justified into this aspect of the complainant's second allegation.

2.4 As regards the complainant's allegation that the Commission systematically refused to negotiate with the complainant, the Ombudsman considers that the complainant has not submitted sufficient evidence to establish its case.

2.5 In these circumstances, there appears to be no maladministration on the part of the Commission in so far as the second allegation is concerned.

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 Annual Report 1997, pages 22 sequ.

(2) This Code is available on the Ombudsman's website (<http://www.ombudsman.europa.eu/>).

(3) Cf. the last sentence of this letter: "Please note that, as explained in our letter dated 30/10/2000, the contract is now closed and no further claims will be taken into consideration."