

Decision of the European Ombudsman on complaint 402/2004/GG against the European Commission

Decision

Case 402/2004/GG - Opened on 18/02/2004 - Decision on 12/08/2004

Strasbourg, 12 August 2004

Dear Dr. G.,

On 5 February 2004, you submitted, acting on behalf of GFI Umwelt – Gesellschaft für Infrastruktur und Umwelt mbH, a complaint against the European Commission which concerned technical assistance contract no. CHN/B7-300/97/4-env/liep/a1.

On 18 February 2004, I forwarded the complaint to the President of the European Commission.

On 19 March 2004, you requested that I extend my inquiry to an alleged refusal to grant you access to the Commission's file under Regulation 1049/2001. In my reply of 29 March 2004, I pointed out that it appeared that the period of time within which the Commission has to reply to confirmatory applications pursuant to Article 8 (1) of Regulation 1049/2001 had not yet expired when you sent your letter of 19 March 2004. I therefore informed you that I was unable to comply with your request. Your attention was however drawn to the possibility to make a further complaint if the Commission should reject your confirmatory application or fail to deal with it within the period foreseen.

The Commission sent its opinion on 30 April 2004. I forwarded it to you on 3 May 2004, with an invitation to make observations, if you so wished.

By letter of 3 May 2004, you informed me that you wished to submit a complaint concerning the Commission's refusal to grant you access to its file. This complaint was registered under reference 1368/2004/GG and is currently being examined by me.

On 10 May 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 complainant, a German company, was part of a consortium for the EU-China Liaoning Integrated Environment Programme under a technical assistance contract (no. CHN/B7-300/97/4-env/liep/a1) concluded with the European Commission. The relevant project concerned development co-operation between the EU and China. The long-term expert (referred to as the “European Deputy Co-Director”) employed by the complainant was Mr W.

On 15 September 2003, the Commission’s Delegation in Beijing (the “Delegation”) informed RRI (Rhein-Ruhr Ingenieur-Gesellschaft mbH, a German company), the project co-ordinator, by registered letter that it had decided immediately to put an end to the contract on the basis of Article 15 of the latter. The Commission explained that in two letters sent on 6 June 2002 and 30 January 2003, it had pointed out that the services delivered by the contractor were not performed to the satisfaction of the Commission and had warned that unless the Deputy Co-Director fulfilled his tasks as they had been modified in addendum no 2 (for example the procurement and the contracting responsibility), it would consider the consortium led by RRI to be in breach of contract. According to the Commission, further complaints had continued to arrive regarding the unsatisfactory services provided by the contractor, in spite of the answers received from RRI. The Commission concluded that it was left with no other choice than to put an end to the contract with immediate effect.

In a letter sent on 22 September 2003, RRI disputed this decision and asked the Commission to give precise information as to its reasons. According to RRI, the Commission’s letters of 4 April 2002 and 30 January 2003 did not prove the Commission’s allegations. RRI further pointed out that despite the complainant’s request of 11 April 2002, the Commission had refused to grant access to the mission reports that could possibly have confirmed or refuted the accusations. According to RRI, without further information it had in the past been unable to respond to allegations that there had been a breach regarding its obligations under the contract. In its reply of 26 September 2003, the Delegation pointed out that the Deputy Co-Director had, among other things, the “procurement and contracting responsibility”. According to the Delegation, the complainant’s expert had failed to fulfil this duty.

RRI addressed a further letter to the Delegation on 10 November 2003. In its reply of 18 November 2003, the Delegation did not provide any further details regarding the reasons for its decision to terminate the contract.

As a result of the termination of the technical assistance contract, the complainant considered it necessary to terminate its employment contract with Mr W. The latter appealed against this decision to the Arbeitsgericht (Employment Tribunal) in Bonn (Germany). The complainant submitted that in the course of these proceedings it will have to provide detailed information as regards Mr W.’s alleged refusal to carry out his duties.

In its complaint to the Ombudsman, the complainant basically alleged that the Commission had failed to provide sufficiently precise information concerning the reasons for terminating the technical assistance contract. The complainant pointed out that a request for access to documents on the basis of Regulation no 1049/2001 had been sent to the Commission on the same day.



The complainant asked the Ombudsman to deal with the matter rapidly, given that the oral hearing before the Employment Tribunal was due to be held soon.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

Background

On 3 August 1999, the Commission had concluded a service contract with RRI as the leader of a consortium including the complainant. The contract was for the provision of two EU experts, a Co-director and a financial/administrative manager for technical assistance to the EU-China Liaoning Integrated Environment Project (LIEP), lot a: Management of the Programme Office and Environmental Awareness Project.

On 8 September 2000, RRI had announced that due to family reasons the EU financial/administrative manager had to resign at the end of October 2000 and proposed Mr W. as his replacement. The Commission had agreed to this replacement.

Due to the replacement of the Co-director, the Commission had, in its letter of 10 August 2001 to RRI, proposed that Mr W.'s "status and responsibilities for the remainder of the LIEP implementing period will be upgraded, in order both to take advantage of his skills and to allow the other long term expert [the new Co-director still to be recruited] to best concentrate on cross sectoral and co-ordination issues, as well as strategic and technical issues." According to this letter, the new position foreseen for Mr W. was that of "Deputy Co-director for Financial and Administrative matters".

RRI had accepted this which had led to an addendum (addendum no. 2) to the service contract that was concluded on 3 September 2001. In this addendum, the terms of reference of the financial/administrative manager had been increased in a very detailed way, including in Article 1.2.2 the stipulation that "he will share the signing responsibility (regarding e.g. procurement aspects, requests for transfers, management of accounts and contracts) with the Chinese Director". Among the responsibilities and functions entrusted to him were "procurement and contracting responsibility" (Article 4.1). Another important function was "replacing, ad interim, the EC Co-director, Team leader". Mr W., the financial/administrative manager, had thus become Deputy Co-director and his fee rate had been increased.

On 2 April 2002, the Commission had written to RRI to complain about the fact that Mr W. was not fulfilling his new responsibilities and functions as stated in the amended terms of reference and asked for confirmation that the contract between Mr W. and the consortium had been adapted to the new terms of reference. On 6 June 2002, the Commission had again asked for this confirmation.

It seemed that Mr W. had not been aware of any change in his responsibilities and he had systematically refused to fulfil his new duties and functions.



On 30 January 2003, the Commission had again warned RRI that it would be held in breach of contract and had again asked for confirmation that the contract of Mr W. had been adjusted to the new situation.

The Commission's suspicion that the contract with Mr W. had not been amended had been amplified by the fact that no explicit confirmation as to this amendment had ever been received.

By letter of 5 February 2003, RRI had promised to clarify the matter as soon as Mr W. had returned from his holidays.

The situation had however not changed, and Mr W. had kept putting off all new responsibilities. Complaints about this had kept coming to the Delegation from all parties concerned (the Chinese Co-director and the EU Co-director), who had been forced to take over this extra workload.

On 15 September 2003, the Delegation had thus terminated the contract in accordance with Article 15 (2) and (3) of the latter (breach of contract).

The complaint

According to Article 6 of the contract, the Commission's only contact point with regard to communications in this contract was RRI, which had signed the contract on behalf of the consortium including the complainant. All communications had therefore taken place between RRI and the Commission, as contractually agreed.

After several other communications on the subject, RRI had officially been warned on 30 January 2003 that it would be held in breach of contract if it was unable to make Mr W. take up his new functions and responsibilities. However, nothing had changed.

Conclusion

The Commission considered that it had acted in accordance with the contractual provisions. It pointed out that it had provided sufficient explanation to RRI as to why the consortium had been considered to be in breach of contract. An official warning had been given six months prior to the termination of the contract.

The termination of the contract of Mr W. and the reasons given to him were issues of a contractual nature between the consortium and Mr W. The Commission was not a party to that contract and could thus not interfere in their dispute.

The complainant's observations

In its observations, the complainant maintained its complaint and made inter alia the following further comments:

The Commission's assessment was in clear contradiction to the mid-term evaluation of 1 September 2002 which certified that Mr W. had performed well. Furthermore, the Commission and its Delegation had tried to influence the contractual relations of Mr W.

The Ombudsman should therefore try and make the Commission submit documents to support



its decision to terminate the contract.

THE DECISION

1 Alleged failure to provide sufficiently precise information concerning the reasons for terminating the technical assistance contract

1.1 On 3 August 1999, the Commission had concluded a service contract with RRI (a German company) as the leader of a consortium including the complainant (another German company). The contract was for the provision of two EU experts, a Co-director and a financial/administrative manager for technical assistance to the EU-China Liaoning Integrated Environment Project (LIEP), lot a: Management of the Programme Office and Environmental Awareness Project. Mr W., an expert employed by the complainant, had become financial/administrative manager in September 2000. Further to an addendum to the contract signed in September 2001, Mr W. had become Deputy Co-Director. On 15 September 2003, the Commission's Delegation in Beijing informed RRI by registered letter that it had decided immediately to put an end to the contract on the basis of Article 15 of the latter and on the grounds that the Deputy Co-Director had failed to fulfil his tasks as they had been modified in addendum no 2 (for example the procurement and the contracting responsibility). In its complaint to the Ombudsman lodged in February 2004, the complainant alleged that the Commission had failed to provide sufficiently precise information concerning the reasons for terminating the technical assistance contract.

1.2 The Commission observed that according to Article 6 of the contract, its only contact point with regard to communications in this contract was RRI, which had signed the contract on behalf of the consortium including the complainant. All communications had therefore taken place between RRI and the Commission, as contractually agreed. The Commission further submitted that after several other communications on the subject (letters of 2 April 2002 and 6 June 2002), it had officially warned RRI on 30 January 2003 that it would be held in breach of contract if it was unable to make Mr W. take up his new functions and responsibilities. It therefore considered that it had acted in accordance with the contractual provisions and that it had provided sufficient explanation to RRI as to why the consortium had been considered to be in breach of contract.

1.3 The Commission based its decision to terminate the contract on Article 15 (2) thereof which provides that where the contractor "is found by the Commission to be in breach of contract, the contract may be terminated by the Commission at any time by registered letter, without previous notice and with no compensation on the part of the Commission". It should be noted in this context that the present complaint does not concern the question as to whether the Commission's decision to terminate the contract was well founded, but only the issue as to whether the Commission provided sufficiently precise information as to its reasons for doing so.

1.4 The Ombudsman notes that Article 6 of the contract stipulates that with the exception of payment requests, communications made in the performance of the contract were to be addressed to the Commission and, in so far as the contracting consortium was concerned, to RRI. The Commission's view that RRI was its only contact point with regard to communications



concerning the contract would thus appear to be reasonable.

1.5 In its letters to RRI, the Commission explained that in its view Mr W. had failed to carry out the duties that had been assigned to him through the addendum that had been agreed upon in September 2001. It is true that the Commission's letters of 2 April 2002, 6 June 2002 and 30 January 2003 only refer in general to these new duties of Mr W. It should however be noted that in these letters, the Commission asked RRI to confirm that Mr W.'s contract with the consortium had been adjusted so as to provide for these new duties and that RRI does not appear to have provided such confirmation. Account should further be taken of the fact that in its reply of 5 February 2003, RRI promised to respond to the Commission's "reproach at short notice in order to prevent any further dissension". No such reply appears to have been made. In these circumstances, the Ombudsman considers that there was no need for the Commission to describe its allegations in more detail or to submit documentary evidence for them. Finally, the Commission's letter of 15 September 2003 terminating the contract refers to the "procurement and the contracting responsibility" as examples of the duties that in its view had been neglected by Mr W.

1.6 In these circumstances, the Ombudsman considers that the Commission has provided sufficiently precise information as to its reasons for terminating the contract. It should be noted that the view expressed by the Commission is not contradicted by the mid-term evaluation to which the complainant refers. The relevant passage of this document pays tribute to Mr W.'s work, but also makes a clear reference to the problems affecting the latter's position (1) . Attention should also be paid to the fact that the mid-term evaluation was made in September 2002, more than a year before the termination of the contract.

2 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) The passage reads as follows: "The current situation demonstrates a good working relationship between the EU Director and the Finance and Administration Director. This is however more the result of personal goodwill and understanding of each for the role of the other. The latter had made substantial and invaluable contributions to LIEP but has suffered from a problematic contractual situation which does not cover his perceived level of responsibility, little support from his contracting company and has been placed in a difficult position during the directorship changes. He has however throughout maintained a high level of professionalism and personal interest in LIEP. Given his experience and the absolute necessity to supply this function to the programme, it is the evaluator's strong opinion that a final attempt



be made to clarify his contractual position in order to minimise the disruptive impact of a change. (...) While there is a degree of understanding, on the part of the evaluators, for the current contractual dispute, it nevertheless remains disruptive to the Programme and a final solution found rapidly (sic). (...).”