

Decision of the European Ombudsman on complaint 75/2005/(PB)JF against the European Commission

Decision

Case 75/2005/(PB)JF - Opened on 31/01/2005 - Decision on 12/01/2006

Strasbourg, 12 January 2006

Dear Mr X.,

On 4 January 2005 you submitted a complaint, on behalf of U (hereafter "the complainant"), to the European Ombudsman against the European Commission. The complaint concerns the Commission's assessment of the V project in the framework of the ALTENER programme (EC ref. W).

On 31 January 2005, I forwarded the complaint to the President of the European Commission.

On 15 June 2005, the Commission sent its opinion, which I forwarded to you with an invitation to make observations, if you so wished. No observations appear to have been received from you.

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

THE COMPLAINT

The complainant attached to its complaint a list of correspondence and meetings between the complainant and the European Commission and copies of several communications exchanged between the complainant and the Commission. In the Ombudsman's view, the complaint can be summarised as follows.

The complainant acted as the co-ordinator for a consortium set up for the V project supported by the Commission. The consortium was composed of the complainant itself, a partner from Italy - Y, and a Polish partner - Z. It involved, among others, training sessions with local authorities as well as the production of a website and CD ROMs.

During the project's operation, the complainant sent to the Commission the progress report, the intermediate report and other feedback, which the Commission accepted without questions or remarks.



In August 2003, the complainant submitted to the Commission its final report on the project.

From September 2003 to November 2003, the complainant and the Commission exchanged e-mails and telephone calls concerning that report.

On 9 December 2003, the Commission sent its assessment of the final report to the complainant by e-mail. The complainant did not agree with this assessment.

On 17 December 2003, a meeting between a technical officer of the Commission and the complainant's Director took place in Brussels. During this meeting both parties agreed that the complainant should review the final report and re-send it to the Commission, at which point the latter would assess it again.

On 29 January 2004, the Commission sent to the complainant and the other two project partners an "Advance Notice of Recovery Order". The notice stated that the Commission had started the procedure for the recovery of payments amounting to EUR 74 619.53. In "Annex I, Reduction of eligible costs of the V project" to the Advance Notice, the Commission put forward its reasons for the recovery:

"Phase 1: Management Reporting - Website not complete and of a rather limited interest; No information provided on the "project management software"; Reporting: only 1 interim report has been provided (instead of 3); The final report has not been improved as requested by the Commission.

Phase 2: Develpt wider application - The Dutch concept and its improvements have not been provided; Regional strategies: +/- OK; The guide to specific financing instruments: +/- OK; No CD ROM with a section for consultants and municipalities.

Phase 3: € transfer knowledge - Only 2 real pilot municipalities (in Italy) instead of 6; Only 1 (or 2) cluster of municipalities (in Poland) instead of 6; No evidence of 2X2 days of follow up training by the coordinator; Very optimistic evaluation without feed back to the post development.

Phase 4: market expl. of experience - Limited investigations on financial solutions, with very classical conclusions; Poor results of the marketing campaign: no network has promoted the method; Sub network of quality municipal consultant: it has not really been set up.

Phase 5: Dissemination - Only workshops in Italy and Poland can be considered as eligible; Website not complete and not conform to the project; Very disappointing CD ROM presentation and networking."

The Commission also stated that "(...) this recovery order confirms the official closure of this contract". The recovery order was signed by the Head of the relevant Unit.

On 12 February 2004, a further meeting between the Commission's technical officer, the Head



of the relevant Unit and the complainant took place in Brussels.

On 23 February 2004, the complainant sent the modified version of the final report to the Commission (1) .

On 3 June 2004 (2) , the Commission informed the complainant of its assessment of the modified report and of its decision to increase eligible costs to EUR 60 000. In this context, the complainant pointed out in its complaint that the Commission took 13 weeks (from 23 February 2004 to 3 June 2004) to react to the revised final report, while according to the general conditions of the contract, a period of six weeks should not have been exceeded for such a reply. Although the complainant considered that the main reason for the delay appeared to be related to the fact that the technical officer who was dealing with the complainant's file moved to another unit within Directorate-General Energy and Transport of the European Commission, it stressed that it was up to the Commission to have resolved the situation. The complainant pointed out that, by exceeding the contractual six-week period, the report should have been automatically approved.

On 29 June 2004, another meeting between the Commission and the complainant took place in Brussels.

On 1 July 2004, the complainant wrote to the Commission and summarised the statements of the meeting of 29 June 2004. In its letter, it also pledged that it would (i) re-submit some of the project's material (which, according to the complainant, had been sent but had "*disappeared somewhere in the handing over processes*"); (ii) supply additional information on the V proposal's implementation status in Italy and Poland; and (iii) provide a self-assessment (plus a proposal for a budget cut).

On the same day, the complainant sent to the Commission materials concerning a dissemination workshop in the Netherlands; a CD ROM with the V methodology software and training materials; a copy of project's interim and progress reports; and a copy of the note on financial solutions.

On 12 July 2004, the complainant sent the self-assessment of the project results to the Commission. In the complainant's view, it had been drafted in a very critical and detailed manner and as an ultimate attempt to reach an agreement with the Commission. This internal assessment included a "*Summary and proposal on reduction of eligible costs*" .

On 6 August 2004, the Commission informed the complainant that it had checked the above self-assessment and reconsidered phases 1, 2 and 5 of the project (management, development and dissemination, respectively). The Commission stated that, in addition, it had already taken into consideration all the materials the complainant had provided earlier (the progress reports, the interim report, the various versions of the final report, the materials sent on 23 February 2004 and a CD ROM, as well as the website corresponding to the project). The Commission also underlined that none of the materials the complainant supplied earlier had disappeared due to the handing over process, contrary to the complainant's submission. The Commission also



pointed out that deliverables (3) produced after the end of the contract could not be accepted. It concluded that the complainant had not managed to obtain all the foreseen deliverables within the contractual period. Finally, the Commission reiterated its original evaluation of the final report.

The complainant did not agree with the above-mentioned Commission's view. On 18 August 2004, it addressed the Commission by e-mail in this respect.

On 14 October 2004, another meeting between the Commission and the complainant took place in Brussels.

On 19 October 2004, the complainant sent to the Commission additional information on issues discussed during the meeting held on 14 October 2004. The complainant explained that the problems experienced with the V CD ROM and software resulted from the fact that they had been manufactured with an earlier version of MS Office. However in the meantime, these problems had been duly solved by the complainant's experts and the materials could thus be opened and run on any version of the operating system. The complainant indicated that a new CD ROM had been sent by post to the Commission and that the V website would be updated shortly. Regarding the distribution of CD ROMs and V marketing, the complainant informed the Commission that 1000 copies have been produced and distributed directly to "pilot" and "neighbouring" municipalities without fees and through regional authorities, and through major international meetings and existing networks. Important environmental NGOs had also been involved in promoting the V project through their websites. The complainant also stated that it had not been able to trace the copy of the note on the management software which he had sent previously to the Commission. The complainant further pointed out that the contract with the Commission was not clear in relation to the pilot municipalities.

On 22 November 2004, the Commission informed the complainant that the management software had been included in the project website only to be used by partners and that, therefore, this item had already been taken into account at the time of the evaluation. As regards the CD ROM, the Commission considered that it did not correspond to the specifications of the work programme. However, the Commission admitted that there was an inconsistency in its work programme as regards the pilot municipalities. The Commission also informed the complainant that, on the basis of the self-assessment of 12 July 2004, it decided to increase its contribution by EUR 15 000, to be distributed between the complainant's partners (Y and Z). The Commission concluded by considering the project as technically and definitively closed.

Once again, the complainant did not agree with the Commission's assessment. In the complainant's view, the quality of the results of the V project had not been poor in any way.

Therefore, on 26 November 2004, the complainant addressed the Commission expressing its disagreement with the way the project deliverables and project results had been assessed by the Commission and announcing its intention to take steps to start legal proceedings.



On 4 January 2005, the complainant lodged a complaint with the Ombudsman in which it made the following allegations and claim:

- The complainant alleged that the Commission's assessment of the project results was unfair.
- The complainant also alleged that there were unnecessary delays in the Commission's assessment of the project.
- Finally, the complainant alleged that the Commission wrongly failed to give signs of dissatisfaction with the project during the contract period.
- The complainant claimed that the project results should be fully approved and that this should lead to a better financial result for the partners in the consortium.

THE INQUIRY

The Commission's opinion

The Commission's opinion on the complaint, which included a chronological list of "reporting and payments", was complex. In the Ombudsman's view, it can be summarised as follows.

ALTENER Contract N° W, V took effect on 1 January 2002 and expired on 30 June 2003. The total cost of the project amounted to EUR 698 943 and the maximum EC contribution was set at EUR 349 457. The Commission pointed out that the V project's work programme had very ambitious objectives to be achieved in a relatively short period (18 months) and that this was one of the reasons that influenced its selection for a Community grant. The work programme of this project aimed at conventional energy savings, over a five-year period, of around 20 million tons of oil (which is equivalent to the total annual energy consumption of Denmark) in municipalities in Italy, Poland and other Member States.

The Commission identified the complainant as the coordinator of the project and Y as the partner. The Commission further pointed out that a first amendment to the contract was registered on 3 October 2003 (4) , in view of the admission of a new partner, Z to the consortium. A modified Annex I - Work programme - and a revised budget allocation had also been approved in this amendment.

On 21 December 2001, shortly before the starting date of the contract, the Commission proceeded with an advance payment of EUR 104 837.

On 14 November 2002, the Commission received the interim progress report with a request for an interim payment of EUR 139 782.80. On 29 November 2002, the Commission proceeded to pay the remainder of the grant.

On 16 September 2003, the complainant submitted its Final Technical Report.

On 10 October 2003, the Commission requested clarifications and additional information on the Final Technical Report from the complainant, to be provided within one month.

On 13 October 2003, the complainant submitted the Final Cost Statement.



On 7 November 2003, it added a first erratum to the Final Technical Report.

On 18 November 2003, the Commission made negative remarks on the work reported and requested further explanations, within one week.

On 19 November 2003, the complainant sent to the Commission a second erratum to the Final Technical Report.

On 9 December 2003, the Commission informed the complainant, by e-mail, of the reduction of total accepted eligible costs and, consequently, of the EC contribution.

On 26 January 2004, the Commission confirmed the substantial reduction of the EC contribution (it accepted the total of EUR 340 000 as eligible costs).

On 29 January 2004, the Commission addressed the complainant with the advance notice of recovery order for an amount of EUR 74 619.53 and with a detailed explanatory note on Final Cost Statements.

On 2 February 2004, the Commission received a revised version of the Final Technical Report from the complainant.

On 13 February 2004, a meeting with the complainant was held at the Commission's premises.

On 24 February 2004, the complainant sent further supplementary documents to the Commission.

On 8 June 2004, the Commission sent to the complainant an e-mail in which it agreed to pay an additional amount of EUR 60 000, which would bring the total amount of eligible costs for all contractors to EUR 400 000, out of which EUR 196 000 was for the complainant.

On 29 June 2004, another meeting took place at the Commission's premises, between the Commission and the complainant.

On 1 July and 27 July 2004, the complainant provided the Commission with additional documents (among them, documents detailing the results of the project in Italy).

The Commission's final opinion on the project results was addressed to the complainant on 6 August 2004.

On 18 August 2004, the complainant informed the Commission, by e-mail, of its disagreement with the Commission's assessment.

On 14 October 2004, another meeting, at Director level, took place at the Commission's premises.



On 20 October 2004, the complainant submitted a new version of the CD ROM.

On 22 November 2004, the Commission informed the complainant that (i) it accepted EUR 15 000 as additional eligible costs for Y and Z (the total amount of eligible costs then stood at EUR 415 000) and (ii) it considered the project definitively closed.

On 30 November 2004, the Commission communicated to the complainant its final notice of recovery order for an amount of EUR 37 119.90.

On 13 December 2004, the Commission sent a debit note for the above amount to be paid by 27 January 2005.

On 4 March 2005, the repayment was made.

The Commission's position on the complainant's allegations and claim *As regards the allegation that the Commission's assessment of the project results was unfair*

The Commission pointed out that: (i) it asked for supplementary clarifications and additional information, on 10 October 2003 and for further explanations, on 18 November 2003; (ii) it accepted the further information sent by the complainant on 24 February 2004 (5) ; (iii) it accepted and analysed the additional documents sent by the complainant on its own initiative; (iv) it employed substantial resources in its assessment; (v) it met the complainant on four occasions to discuss the results; and (vi) it decreased its request for recovery (from EUR 74 619.53 to EUR 37 119.90).

As regards the allegation that there were unnecessary delays in the Commission's assessment of the project

With regard to the Final Technical Report (submitted on 16 September 2003), the Commission stated that it replied to it on 10 October 2003. The Commission pointed out in this regard that, in accordance with the contract, it had two months to react. The Commission underlined that Article 4.3 of Annex II to the contract, specified that in the absence of observations by the Commission, all reports, costs statements and any other project deliverables should be deemed to be approved within two months of their receipt. Therefore, the binding reaction period of two months, and not six weeks as had been suggested by the complainant, had been respected by the Commission services.

With regard to the supplementary documents submitted on 24 February 2004 by the complainant, the Commission admitted its delay in replying. It stated, however, that the complainant had no grounds to criticise it for a delayed reply since (i) the documents in question should have been submitted with the final report and (ii) these documents had only been submitted as a result of specific requests from the Commission. Moreover, the Commission explained its delay by stating that (i) since the complainant performed very poorly as regards certain contractual terms and (ii) addressed the Commission with persistent and strong objections, the Commission had to (iii) employ substantial resources to evaluate, in addition to the final report, these supplementary documents and to re-assess the results of the project. The Commission recalled that this evaluation and re-assessment ultimately led to (iv) an increase of the accepted eligible costs and therefore to a reduction of the amount of the recovery order.

As regards the allegation that the Commission wrongly failed to give signs of dissatisfaction with



the project during the contract period

The Commission stated that it had only been in a position to carry out a detailed analysis of the project after the final technical report had been sent (that is, on 16 September 2003). Before that date, the Commission had not been able to express any reaction (positive or negative). On 10 October 2003, the Commission requested clarifications and additional information on the Final Technical Report from the complainant, to be provided within one month. The Commission also pointed out that, even if the complainant did send one preliminary report, 11 months after the beginning of the project (which was supposed to take 18 months), that is, on 14 November 2002, this report did not provide all the information necessary for a thorough analysis of the project's performance and served exclusively as the basis for the Commission to make an advance payment, in accordance with the contract requirements. The Commission concluded that, in any event and in accordance with the contract's rules, it was not required to express any dissatisfaction or to indicate any expected level of performance during the execution of the project.

As regards the complainant's claim that the project results should be fully approved and that this should lead to a better financial project result for the partners in the consortium

The Commission states, in summary, that it reduced its request for recovery, from EUR 74 619.53 to EUR 37 119.90, after the complainant's submission of additional information and its own self-assessment of the project results. The Commission states that it assessed the quality and the quantity of deliverables submitted by the complainant in a just, impartial and objective manner and also took into consideration a series of adjusted additional information. However, the results were still not satisfactory. The Commission gave reasons for its negative assessment in the recovery order dated 29 January 2004. The Commission also stated that the deliverables submitted after the contract had expired could not be taken into consideration. The Commission therefore concluded that, given its responsibility to manage public funds in a sound way, a corresponding reduction of the accepted eligible costs and, consequently, of the EC contribution had to be implemented. Furthermore, the Commission pointed out that it had not been aware of any complaint from the other partners of the consortium that were affected by the recovery order.

The complainant's observations

No observations have been received from the complainant.

THE DECISION

1 Alleged unfairness in the Commission's assessment of the project results

1.1 The complainant alleged that the Commission's assessment of the project results was unfair.

The Ombudsman understands the factual background of the complainant's allegation to be as follows.

The complainant was a member and coordinator of the consortium that developed the V project, supported by the European Commission under its ALTENER programme (EC ref. W). The complainant submitted the final report on the project in August 2003 (6). On 10 October 2003, the Commission requested clarifications and additional information, which the complainant



provided. On 18 November 2003, the Commission informed the complainant of its negative assessment of the work realised by the complainant as detailed in the report. On 9 December 2003, the Commission informed the complainant of its intention to reduce total eligible costs. On 29 January 2004, the Commission issued an "Advance Notice of Recovery Order" for the recovery of payments amounting to EUR 74 619.53. The complainant challenged the Commission's assessment and, on 24 February 2004, the complainant provided the Commission with additional information. The complainant also met with the Commission several times. In June 2004, the Commission informed the complainant that it accepted an addition of EUR 60 000 to the EC contribution to the project. In July 2004, the complainant further submitted its own detailed self-assessment of the project results. On 22 November 2004, the Commission informed the complainant that it agreed to another EUR 15 000 rise in the total amount of eligible costs. The initial request for the recovery of EUR 74 619.53 had been reduced to EUR 37 119.90. On 13 December 2004, the Commission issued a debit note for the latter amount, which was paid to the Commission on 4 March 2005.

1.2 The Commission pointed out that: (i) on 10 October 2003, it asked for supplementary clarifications and additional information, and on 18 November 2003, it asked for further explanations; (ii) it accepted the further information sent by the complainant on 23 February 2004; (iii) it accepted and analysed the additional documents sent by the complainant on its own initiative; (iv) it employed substantial resources in its assessment; (v) it met the complainant on four occasions to discuss the results; and (vi) it decreased its request for recovery (from EUR 74 619.53 to EUR 37 119.90).

1.3 The Ombudsman notes that the Commission responded positively to the initiatives (meetings and self-assessment) proposed by the complainant in order to improve its results. Moreover, the Commission itself appears to have taken the initiative to promote improvement of results and asked the complainant for clarifications and additional information on at least two occasions (10 October 2003 and 18 November 2003) and met the complainant on another four occasions (17 December 2002, 13 February 2004, 29 June 2004 and 14 October 2004). Finally, the Commission appears to have taken into consideration the complainant's clarifications and decreased the amount of the recovery order.

1.4 In these circumstances, and on the basis of the evidence available to him, the Ombudsman is of the view that there is no evidence that the Commission acted unfairly. Therefore the Ombudsman finds no maladministration by the Commission as regards this aspect of the complaint.

2 Alleged unnecessary delays in the Commission's assessment of the project

The complainant alleged that there were unnecessary delays in the Commission's assessment of the project. In support of this allegation the complainant pointed out that it took the Commission 13 weeks (from 23 February 2004 (7) to 3 June 2004) to react to the documents with its new submission concerning the results of the project, whereas, according to the general conditions of the contract, a reaction period of six weeks should not have been exceeded.

2.2 With regard to the supplementary documents submitted on 24 February 2004 by the complainant, the Commission admitted its delay in replying. It stated, however, that the



complainant had no grounds to criticise it for a delayed reply since (i) the documents in question should have been submitted with the final report and (ii) these documents had only been submitted as a result of specific requests from the Commission.

2.3 Moreover, the Commission explained its delay by stating that (i) since the complainant performed very poorly as regards certain contractual terms and (ii) addressed the Commission with persistent and strong objections, the Commission had to (iii) employ substantial resources to evaluate, in addition to the final report, these supplementary documents and to re-assess the results of the project. The Commission recalled that this evaluation and re-assessment ultimately led to (iv) an increase of the accepted eligible costs and therefore to a reduction of the amount of the recovery order.

2.4 As regards the complainant's statement in its complaint, that by exceeding the contractual six-week period, the report should have been automatically approved, the Ombudsman notes that the documents in question were sent by the complainant after the contract had expired and the Commission's recovery order had been issued. Therefore, the Ombudsman takes the view that the contractual provision, establishing that after six weeks the documents should be deemed as approved, does not apply.

2.5 The Ombudsman notes that the Commission took three months to reply to the complainant and to take a position on the documents sent by the latter. The Ombudsman considers however, that the Commission gave a coherent and reasonable explanation (see point 2.3 above) as to why it had not been able to take a stance earlier on the new submissions concerning the results of the project.

2.6 The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

3 Alleged failure to give signs of dissatisfaction with the project during the contract period

3.1 The complainant alleged that the Commission wrongly failed to give signs of dissatisfaction with the project during the contract period. In support of this allegation the complainant pointed out that the progress reports, intermediate reports and other feedback on the project had been accepted and approved by the Commission without any questions or remarks.

3.2 The Commission stated that it had only been in a position to carry out a detailed analysis of the project after the final technical report had been sent (that is, on 16 September 2003). Before that date, the Commission was not able to give any reaction (positive or negative). On 10 October 2003, the Commission requested clarifications and additional information on the Final Technical Report from the complainant, to be provided within one month. The Commission also pointed out that although the complainant sent a preliminary report, 11 months after the beginning of the project, this report did not provide all the information necessary for a thorough analysis of the project's performance and served exclusively as the basis for the Commission to make an advance payment, in accordance with the contract requirements. The Commission concluded that, in any event and in accordance with the contract's rules, it was not required to express any dissatisfaction or to indicate any expected level of performance during the



execution of the project.

3.3 The Ombudsman understands the contract period, to which the relevant allegation refers, to have been from 1 January 2002 to 30 June 2003. The Ombudsman notes that the Commission's first reaction as regards the complainant's performance, which took the form of a request to the complainant to submit clarifications and additional information concerning its Final Technical Report of 16 September 2003, came after the end of the contract period, on 10 October 2003.

3.4 The Ombudsman considers that the Commission's position that an earlier reaction from it was not required by the rules of the contract and that it had only been in a position to carry out a detailed analysis of the project after the Final Technical Report had been sent and the contract period had expired appears to be reasonable. Furthermore, the Ombudsman notes that the Commission did not treat its first (negative) assessment of the project results as definitive and that it gave the complainant the opportunity to provide additional information, which led to a significant reduction in the amount to be recovered. The Ombudsman therefore considers that the Commission appears to have taken appropriate action to ensure that the complainant was not disadvantaged by the fact that the Commission gave no signs of dissatisfaction with the project during the contract period.

3.5 The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

4 The claim that the project results should be fully approved and that this should lead to a better financial project result for the partners in the consortium

4.1 The complainant claimed that the project results should be fully approved and that this should lead to a better financial result for the partners in the consortium.

4.2 On the basis of his findings of no maladministration in points 1.4, 2.6 and 3.5 above, the Ombudsman considers that the complainant's claim cannot be sustained.

5 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, no instance of maladministration has been found. The Ombudsman therefore closes the case.

The President of the European Commission will be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) According to the Commission, on 23 February 2004, it received a letter from the complainant in response to the Commission's advance recovery order. On 24 February 2004, the Commission received "supplementary documents" from the complainant.



- (2) There is a discrepancy as to the relevant date. The Commission contends that the correct date is 8 June 2004.
- (3) The Ombudsman understands "deliverables" as being materials produced by the complainant on the basis of the contract.
- (4) The Ombudsman understands the Commission to mean 3 October 2002.
- (5) The Ombudsman notes that the complainant refers to 23 February 2004.
- (6) According to the Commission, the relevant date is 16 September 2003.
- (7) The Ombudsman notes that the Commission refers to 24 February 2004 as the date on which the complainant sent documents with its new submission concerning the results of the project.