

Decision of the European Ombudsman on complaint 1532/2005/OV against the European Commission

Decision

Case 1532/2005/OV - Opened on 29/04/2005 - Decision on 14/11/2005

Strasbourg, 14 November 2005

Dear Mr X.,

On 6 April 2005, you made a complaint to the European Ombudsman against the European Commission concerning the termination of your technical assistance contract.

On 29 April 2005, I forwarded the complaint to the President of the Commission.

On 26 April 2005, you sent an e-mail concerning your case and my office replied to you on 27 April 2005. On 20 May 2005, you sent another e-mail with questions concerning the procedure of the Ombudsman, to which my office replied by e-mail of 23 May 2005. On 26 July 2005 and 7 September 2005, my office informed you by e-mail concerning the situation with regard to the receipt of the opinion of the Commission.

The Commission sent its opinion on 5 September 2005. I forwarded it to you on 21 September 2005 with an invitation to make observations, which you sent on 27 September 2005. On 4 October 2005, you had a telephone conversation with my office concerning your letter of 27 September 2005.

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

THE COMPLAINT

According to the complainant, the relevant facts are as follows:

On 17 March 2003, the complainant concluded a technical assistance contract with the Commission Delegation in a third country "Y" (the "Delegation") for the co-ordination of the "S" programme in that country.

By letter of 20 December 2004, the Head of Delegation informed the complainant that he intended to terminate the complainant's contract for restructuring reasons. By letter of 30



December 2004, the contract was effectively terminated (1) . All payments of outstanding bills were suspended.

By letter of 8 March 2005, the complainant requested a friendly solution to the dispute, claiming the payment of his bills of November and December 2004, as well as the payment for services which were not executed because of the termination of the contract (i.e., fees for 13 months and 21 days, for an amount of EUR 137 135.37).

On 6 April 2005, the complainant made the present complaint to the Ombudsman. He alleged that the termination of his contract was unjustified, and claimed payment of his bills of November 2004 (EUR 10 000 and "YYY" (2) 14 929 627) and December 2004 (EUR 7 424.51 and YYY 14 578 850), as well as payment for non-delivered services (EUR 137 135.37 equivalent to 13 months and 21 days of services).

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made, in summary, the following comments:

Facts of the case

On 17 March 2003, the Republic of country Y, on the one hand, and the complainant, on the other hand, concluded a technical assistance contract whereby the complainant would act as "Coordinator of the "S" programmes in country Y". The contract was financed from the 8 th European Development Fund (hereafter "8 th EDF") which is subject to the Framework of Mutual Obligations on the utilisation of "S" Transfers of the years 1996-1999 (hereafter "COM "S" 1996-1999"), concluded on 24 January 2003 between the Commission and the government of the Republic of country Y.

The award and the execution of the contract are, by consequence, governed by the Lomé IV Convention, as amended by the Agreement signed in Mauritius on 4 November 1995 (hereafter referred to as "the amended Lomé IV Convention" (3)), by the COM "S" 1996-1999, by the General Regulations on works, supply and service contracts financed by the EDF (4) (hereafter "the General Regulations") and by the General Terms of Reference applicable to contracts of services financed by the EDF (5) .

The Commission's financial control obligations concerning the 8 th EDF are laid down in the Financial Regulation of 16 June 1998 applicable to the cooperation for the financing of development under the Lomé IV Convention (6) (hereafter the "Financial Regulation 8 th EDF").

On the basis of Articles 302 and 312 of the amended Lomé IV Convention, the Minister of Economy, Finance and Budget of country Y, in his capacity of National Authorising Office (hereafter "NAO") of the EDF, delegated to the Commission the power to negotiate, conclude and manage in its name the contract with the complainant.

The execution period of the contract was 36 months after its signature, thus expiring on 17 May 2006.



The "S" programme concerned the stabilisation of export revenues of agricultural products subject to Articles 186 to 212 of the amended Lomé IV Convention. The complainant was engaged as coordinator of the "S" support cell.

By letter of 20 December 2004, the complainant transmitted to the Delegation a list with the situation of the dossiers within the "S" support cell. According to the date mentioned, this list had already been drawn up on 17 December 2004. On 21 December 2004, the complainant handed over to the Delegation the car and mobile telephone which had been put at his disposal (a report of the hand-over was drawn up). Afterwards, the complainant left for Europe.

On 30 December 2004, the Delegation wrote to the complainant stating that, on the basis of the information it had obtained, he had abandoned his post and left the country definitively, and that if that were the case, the Delegation would have to terminate the contract and suspend all payments.

By letter of 13 January 2005, the complainant's lawyer wrote to the Delegation stating that the complainant asked for a friendly solution to the dispute. This demand was reiterated in a letter of 27 January 2005. By letter of 8 March 2005, the complainant asked for the payment of his bills of November and December 2004, as well as the payment of bills for non-delivered services. In his complaint to the Ombudsman, the complainant estimated his total claim of EUR 158 890.88 as follows:

- EUR 10 000 - bill November 2004
- YYY 14 929 627 - bill November 2004 (i.e., EUR 2 191)
- EUR 7 424.51 - bill December 2004
- YYY 14 578 850 - bill December 2004 (i.e., EUR 2 140)
- EUR 137 135.37 - non-delivered services.

By letter of 3 June 2005, the complainant's lawyer wrote that his client could agree to claim a diminished amount and accept the bills and costs of the period November-December 2004 on condition that no damages would be charged to him.

By letter of 13 June 2005, the Delegation informed the complainant of the termination of his contract on the basis of Article 41(2)(b) of the General Terms of Reference, because of the non-execution of the contract. In that letter, the Delegation informed the complainant that the amount still due to him was EUR 17 421.51 and YYY 5 901 695 (i.e., EUR 2 387), but that the payment of these amounts remained suspended awaiting the final evaluation of the damages that could be charged to him.

Opinion on the complaint

In the last semester of 2004, the NAO noticed serious problems in the management of the "S" programmes for which the complainant was the coordinator, and informed the Delegation. For instance, in letters of 2 and 5 August 2004, the authorities of country Y asked for clarifications from the complainant with regard to non justified claims for advances of YYY 1 056 978.431 (i.e., EUR 155 141) made under the Specific Protocol ("SP") 07/2001. Also, by letter of 29 November 2004, concerning the SP 05/2003, the NAO requested the agreement of the



Delegation for an exceptional re-crediting of YYY 736 794 746 (i.e., EUR 108 145) in order to pay the "Centre Technique Horticole de T." ("CTHT").

In the framework of SP 05/2003, the re-crediting demand introduced by CTHT within the normal deadline remained suspended for months in the "S" support cell before arriving at the NAO with considerable delay. During this waiting period, the CTHT was obliged to use the remaining amount of advances, which left CTHT without funds. For this reason the request was made for the exceptional re-crediting.

The activities report n° 2/2004 for the period March-August 2004, sent by the complainant on 6 October 2004, also showed the difficulties which the "S" support cell faced. In that report, the complainant himself proposed that the support cell *"withdraw from the daily management of the projects"* and that his role be re-oriented.

It is in this context that, on 1 December 2004, the Delegation sent a letter to the NAO stating that, on the basis of the activities report from the "S" support cell and of the general progress of the programme, it had to conclude that the complainant did not fulfil the tasks which were assigned to him according to his contract, and that a restructuring of the management of the "S" programme was envisaged with a shorter termination date for the complainant's contract.

A draft addendum to the contract was prepared. It foresaw the reduction of the contract period from 17 May 2006 to 31 January 2005.

Proposal of 20 December 2004

By letter of 20 December 2004, the Delegation sent the draft addendum to the complainant inviting him to sign it. Immediately after the letter of 20 December 2004 had been dispatched, the complainant abandoned his post. However, as the complainant did not sign the proposed addendum, the original contract remained valid in its entirety. By leaving, the complainant seriously infringed his contractual obligations.

On the basis of Article 41(2)(b) of the General Terms of Reference, the contract can be terminated with a notice of seven days in case the technical assistant does not execute the services in accordance with the contract or continues not to execute the contract 14 days after he was notified of the suspension of the payments on the basis of Article 35 (11).

Article 41(3) of the General Terms of Reference states that the termination of the contract is without prejudice to the other rights or competences of the principal of the works, who has the right to execute the services himself. According to Article 41(7) of the General Terms of Reference, the principal of the works has the right to obtain damages from the contractor for the loss suffered.

Notification of contractual failure of 30 December 2004

On 30 December 2004, the Delegation sent a letter to the complainant confronting him with the information that he appeared to have left his post definitively. This letter constituted a notification in the sense of Article 41(2)(b) of the General Terms of Reference, offering the complainant the possibility to abide by the contractual obligations.

Termination of the contract and determination of the amounts due (13 June 2005)



By letter of 13 June 2005, the Delegation notified the complainant of the termination of his contract on the basis of Article 41(2)(b) of the General Terms of Reference. In the same letter, the Delegation informed the complainant that the amount due for bills and reimbursable costs for the months of November and December 2004 was EUR 17 421.51 and YYY 5 901 695. However, the letter stated that the payment of these amounts was suspended awaiting the final evaluation of the damages which could be asked by the principal of the works because of the abandonment of the post without notice and because of failures in the management of the various projects for which the complainant was responsible.

By letter of 3 June 2005, the NAO asked the Delegation to finance, with the budget of the EDF, an audit on the financial regularity of the projects managed by the complainant until his departure. The conclusions of this audit ought to allow the authorities of country Y to determine the amount of the eventual damages to recuperate from the complainant. The costs of the audit could also be charged to him. In case the amount of the damages would be lower than the amount of the suspended sums, the difference will be paid to the complainant. In the opposite case, an amount will have to be recovered from the complainant.

The complainant's candidature of 29 November 2004 for country Z

The firm T. executes a technical assistance contract in country Z, also financed by the 8th EDF. In the framework of that contract, by letter of 29 November 2004 addressed to the Commission Delegation in country Z., T. proposed the complainant as a replacement for one of its experts. According to the letter "*the complainant is actually terminating a similar mission at the Delegation in country Y*" so that "*he is available from 2 January 2005 onwards*". The complainant "*would have taken the engagement to be exclusively available until 15 December 2004*" for the new post in country Z.

As of 2 January 2005, the complainant already works in country Z, in the framework of that contract, and it is foreseen that he is to remain in that post until the end of the contract concluded with T. (i.e., until 28 March 2006). It was thus before the letter of 20 December 2004 had been issued that the complainant declared that he was available for another post, by indicating that his mission in country Y was terminating. His candidature for the post in country Z, transmitted by T. already on 29 November 2004, is not compatible with the period of execution of his contract in country Y which ran until 17 May 2006.

Request for a friendly solution

The complainant asked for a friendly solution of the dispute. In its letter of 22 March 2005, the Delegation invited the NAO to take a position on the complainant's request for a friendly solution. The latter can only decide about an eventual friendly solution after knowing the results of the audit.

Conclusion

The Commission considers that the suspension of the payment of the bills of November and December 2004 was made in accordance with the rules applicable to the contracts financed by the 8th EDF. This suspension was necessary in order to allow for compensation of the eventual damages to be determined by the principal of the works. The Commission has acted in accordance with the rules and no maladministration took place.

The complainant's observations

The complainant observed that, during the execution of his contract, no serious failures were



communicated to him. The sudden decision to terminate his contract was taken without discussion and without listening to his observations.

The complainant stated however that, in order to bring the case to a close, he was withdrawing his complaint and that he would be prepared to accept the arguments of the Commission, upon the reception of an "*attestation de service*".

The complainant also accepted that any damages - to be determined by an audit - for any shortcomings in the management of the accounts for which he was responsible until his departure, could be deducted from his bills for November and December 2004 (EUR 17 421.51 and YYY 5 901 695).

In a telephone conversation with the Ombudsman's office on 4 October 2005, the complainant confirmed that he wanted to drop his complaint and that he was ready to have his bills for November and December 2004 reduced in order to cover any damages charged to him. He also stated that he was waiting for the results of the audit. The complainant furthermore clarified that, by "*attestation de service*", he meant the deliverance of a certificate concerning the period during which he worked for the project.

THE DECISION

1 The allegedly unjustified termination of the technical assistance contract

1.1 In his complaint to the Ombudsman, the complainant alleged that the termination of his contract was unjustified. He also claimed payment of his bills of November 2004 (EUR 10 000 and YYY 14 929 627) and December 2004 (EUR 7424.51 and YYY 14 578 850), as well as payment for non-delivered services (EUR 137 135.37 equivalent to 13 months and 21 days of services).

1.2 In its opinion, the Commission described in detail the facts of the case. The Commission stated that the dispute in question arises from a contract concluded between the Republic of country Y and the complainant on 17 March 2003. The Commission had a mandate to manage the complainant's contract in the name and on behalf of the government of country Y. In the last semester of 2004, the National Authorising Officer ("NAO") informed the Commission of serious problems in the management of the "S" programme for which the complainant was the coordinator. The Commission pointed out that those problems also appeared from the activities report n° 2/2004 sent by the complainant. On the basis of that information, the Delegation informed the NAO that the complainant did not fulfil his tasks and that a restructuring of the management of the "S" programme was envisaged, which would foresee a shorter expiry date for the complainant's contract. By letter of 20 December 2004, the Delegation invited the complainant to sign an addendum to his contract. The Commission stated that the complainant abandoned his post and left country Y. By letter of 30 December 2004, the Delegation informed the complainant of the possibility to terminate the contract and suspend the outstanding payments. This was finally done by letter of 13 June 2005 from the Delegation. In that letter, the Delegation also informed the complainant that the payment of the bills and reimbursable costs for the months of November and December 2004 would be suspended awaiting the final



evaluation of the damages that could be claimed from the complainant by the principal of the works on account of the fact that the former had abandoned his post and failures in the management of the programme had occurred. The Commission stated that those damages would be determined by an audit commissioned by the NAO. It added that it was up to the NAO to take a position on the complainant's request for a friendly solution. The Commission concluded that the suspension of the payment of the complainant's bills of November and December 2004 was made in accordance with the applicable rules and that there was no instance of maladministration.

1.3 In his observations, the complainant stated that, in order to bring the case to a close, he withdrew his complaint and was prepared to accept the arguments of the Commission, upon receipt of an "*attestation de service*". The complainant also accepted that any damages - to be determined by an audit - for any shortcomings in the management of the accounts for which he was responsible until his departure could be deducted from his bills for November and December 2004 (EUR 17 421.51 and YYY 5 901 695).

1.4 In a telephone conversation with the Ombudsman's office on 4 October 2005, the complainant confirmed that he wanted to drop his complaint and clarified that, by "*attestation de service*", he meant the issuance of a certificate concerning the period during which he worked for the project. As regards the *attestation de service*, the complainant was informed that the Ombudsman has no power to issue such a certificate and that he should address himself directly to his employer. In that conversation, the complainant was also informed that the fact that he withdraws his complaint at this stage, and considering that the results of the audit are not yet known, does not affect his right to submit a new complaint with the Ombudsman in the future.

1.5 The Ombudsman notes that the complainant withdraws his complaint. The inquiry is therefore closed.

1.6 As regards the issuance of an "*attestation de service*", the Ombudsman notes that he has no power to issue such a certificate. The complainant should address his request directly to his employer, namely the Head of the Delegation who had a mandate from the Minister of Finance and Economy of country Y to conclude and manage the contract on the basis of Articles 302 and 312 of the amended Lomé IV Convention, and with whom the complainant concluded the technical assistance contract on 17 March 2003.

2 Conclusion

It appears from the information supplied to the Ombudsman by the complainant that he wishes to drop the complaint. 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 letter of 30 December 2004 of the Delegation which was annexed to the complaint states that the contract was terminated because the complainant had abandoned his post of Co-ordinator of the "S" programme in country Y and had definitively left that country without informing the Delegation.

(2) currency of the country in question.

(3) OJ 1998 L 156.

(4) OJ 1990 L 382.

(5) OJ 1990 L 382.

(6) OJ 1998 L 191.