

Decision of the European Ombudsman closing the inquiry into complaint 1388/2013/(RT)JN against the European Commission

Decision

Case 1388/2013/JN - **Opened on** 07/08/2013 - **Decision on** 21/08/2014 - **Institution concerned** European Commission (No maladministration found) |

The case concerned the complainant's involvement as an expert in an EU funded project. The complainant claimed that his work had been rejected incorrectly and that his right to be heard was not respected by the EU Delegation to Guinea. The Ombudsman inquired into the issue and found that the complainant's allegations were not founded. His right to be heard was respected and a satisfactory explanation for the rejection of the complainant's work was provided.

The background to the complaint

1. The complainant participated as an expert in an EU funded project in Guinea in October and November 2012. [1] The project in question was regulated by a contract concluded between the EU Delegation to Guinea (the 'Delegation') and a company (the 'Contractor'). The complainant was recruited by the Contractor and had no contractual relationship with the Delegation.
2. On 5 November 2012, the Contractor submitted an interim report to the Delegation. On 7 November 2012, the complainant sent his output for the interim report directly to the Delegation.
3. On 8 November 2012, the Delegation informed the complainant of its serious concerns relating to his output for the interim report. The Delegation provided detailed reasons and explained that it could not accept the complainant's work. The Delegation further confirmed the meeting scheduled for the following day and stated that the complainant's contribution would be assessed also on the basis of that meeting.
4. The Delegation met with the complainant on the following day. Following the meeting, the Delegation informed the Contractor by email that the complainant had informed it earlier that week of his departure for Asia, due to other professional obligations, despite his declaration of availability made in the framework of the contract. In consequence, the Delegation organised a



meeting with the complainant in order to be able to assess his output before his departure. The complainant submitted several documents on the basis of which the Delegation considered that the complainant's output was totally unsatisfactory and could not be accepted. The Delegation further stated that, in these circumstances, it had no intention to pay the Contractor for the complainant's work.

5. On 11 November 2012, the complainant sent the Delegation a second (final) version of his deliverables.

6. On 19 November 2012, the Delegation issued an administrative order which was signed by the Contractor and which reassigned the complainant's tasks to his colleagues.

7. On 14 December 2012, the Contractor informed the complainant of its decision not to pay his fees. It referred to the contract with the complainant which provided that "[t]he payment of [the complainant's] fees is subject to the satisfactory performance of the services and the acceptance of same services by the Client ". The complainant challenged this decision following which, on 28 December 2012, the Contractor forwarded the Delegation's message of 9 November 2012 to the complainant.

8. On 21 January 2013, the complainant contacted the Delegation and challenged its position. On 22 January 2013, the Delegation replied that the complainant should contact the Contractor as it had no contractual relationship with the complainant and therefore could not address the complainant's concerns.

9. On 25 March 2013, the Delegation informed the Contractor that it could not pay the complainant's daily allowance as this could not be dissociated from the payment of his fees. The Contractor communicated this information to the complainant on 14 June 2013 and requested him to reimburse the advance payment. On 21 June 2013, it forwarded to him, upon his request, the Delegation's email concerning the rejection of his daily allowances. It however refused to forward to the complainant the Final Report.

The inquiry

10. The Ombudsman opened an inquiry into the following allegations and claim:

Allegation 1: The EU Delegation in Guinea failed to respect the complainant's right to be heard in relation to its decision to replace the complainant with another expert.

Allegation 2: The EU Delegation in Guinea wrongly rejected the complainant's individual work, because it approved at least twice the collective work put forward by the team of experts in which the complainant's work was included.

Claim: The Delegation should reimburse the complainant for his mission fees and daily allowances.



11. On 1 November 2013, the Ombudsman asked the Commission to submit an opinion by 28 February 2014. The Commission submitted its opinion on 23 and 29 April 2014. Subsequently, the complainant sent his comments in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

12. In his observations, the complainant stated that he wished to formulate a third allegation that the Delegation wrongly refused to pay his final invoice and forced the Contractor to submit an invoice omitting his fees and daily allowances. The Ombudsman is of the view that this allegation is already contained in the above claim. Therefore, there are no reasons to extend the scope of this inquiry in this way. The complainant further claimed interest for late payment. However, the Ombudsman does not consider it justified, at this stage, to extend the scope of the claim either.

Alleged breach of the complainant's right to be heard.

Arguments presented to the Ombudsman

13. The Commission provided assurances that it respects the right to be heard which constitutes " *one of the cornerstones of good administration* ". Following the Ombudsman's recommendations in case 2449/2007/VIK, the Commission amended its contract models in 2010 in order to ensure that experts could make comments in the event of a request for replacement.

14. However, the Commission submitted that, contrary to the complainant's statements, the present case does not concern a replacement decision. The complainant had already left when it became necessary to supplement the outputs. Following this departure and given that his work was seriously inadequate, the team still on location took over the tasks of the complainant. The Delegation and the Contractor thus agreed on a reorganisation of the mission's timetable to enable the Head of Mission to mitigate the impact of the complainant's departure and to handle the management of the complainant's tasks. This was done in accordance with the provisions relating to the amendment of the contract (Article 20 of the General Conditions [2]), not the provisions relating to the replacement of the expert (Article 17 of the General Conditions [3]).

15. In his observations, the complainant maintained that his right to be heard was not respected. He submitted that in light of the time-schedule established at the beginning of the mission, his involvement in the contract stopped on 9 November 2012. He further suggested that the Commission's administrative order, although formally taken on the basis of Article 20 of the General Conditions, constitutes a replacement decision in his respect. He pointed to the fact that it was never communicated to him. Had he not been replaced, he would still have had one home-based working day to review the final report.



The Ombudsman's assessment

16. Article 41(2)(a) of the EU Charter of Fundamental Rights guarantees the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

17. The Ombudsman accepts the explanation provided by the Commission that there was no decision on replacement of the complainant by another expert (see point 14 above). This being said, the key issue raised by this case is whether the complainant was given an adequate opportunity to present his position with respect to the Delegation's refusal to pay his fees and daily allowances.

18. In this respect, taking into account all facts established in the course of the inquiry, it is clear that the Delegation decided to reject the complainant's output and consequently not to pay his fees and daily allowances. That decision is to be regarded as an individual measure adversely affecting the complainant.

19. The Ombudsman is however of the view, on the basis of evidence obtained during this inquiry, that the complainant's right to be heard was respected. This is so because the Delegation informed him in a detailed way, in its email of 8 November 2012, of the reasons for its dissatisfaction with his output and of its intention not to accept it. Nothing indicates that the complainant would not have received an adequate opportunity to express his views either in writing in reply to this email or orally during the meeting on 9 November 2012. In fact, the complainant submitted a revised version on 11 November 2012 which could have been taken into account by the Delegation had it regarded it as being better than the previous one. The Delegation's administrative order was issued only on 19 November 2012.

20. Therefore, the Ombudsman concludes that the complainant received an adequate opportunity to react to the Delegation's criticism before the adoption of any adverse measure. There is therefore no instance of maladministration as regards this aspect of the case.

Alleged wrongful rejection of the complainant's work

Arguments presented to the Ombudsman

21. The complainant submitted that the Delegation wrongly rejected his individual work, because it approved at least twice the collective work put forward by the team of experts in which the complainant's work was included.

22. The Commission stated that if the complainant had seen the final report, he would be aware that it does not contain any output from him. As regards the interim report, it did not contain anything relating to the complainant's work either. This had been confirmed by the



complainant in his letter of 7 November 2012. Given its mediocre quality, the Contractor had decided not to include it at that stage. Therefore, it cannot be said that any of the complainant's work was approved by the Delegation. As regards the interim report - which did not contain the complainant's contribution - it was approved by tacit agreement on 5 December 2012. Only the reports submitted by the Contractor can be approved by the Commission, not other reports such as the complainant's interim report.

23. In his observations, the complainant submitted that the interim report represented the collective work and did treat *in full*, on pages 4, 8 and 9, the complainant's part of work. The interim report was submitted on 5 November 2012 and tacitly approved on 5 December 2012.

The Ombudsman's assessment

24. Although the Commission did not reveal to the Ombudsman the content of the final report, she sees no valid reason not to accept the Commission's explanation (summarised in point 22 above) that it did not contain any output from the complainant. As regards the interim report, the Ombudsman examined its content. It is true that it refers to the complainant's tasks. However, this is done in a very restrictive way. Therefore, the Commission's statement that the interim report actually does not contain any of the complainant's work, which could thus not have been approved together with the interim report, can be accepted. The Ombudsman concludes that there is no instance of maladministration as regards this allegation.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There has been no instance of maladministration. Therefore, the complainant's claim cannot be sustained.

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 21 August 2014

[1] The project concerned the definition of a support programme for the Reform of the Security Sector in Guinea.

[2] Article 20 of the General Conditions governs the amendment of the contract and Article 27 thereof the approval of outputs. In accordance with Article 20, substantial modifications of the contract require an addendum. Exceptionally, the Project Manager may order a variation to a part of the services necessary for the proper implementation of the tasks. Prior to any



administrative order for variation, the Project Manager shall notify the framework contractor of the nature and form of such variation.

[3] Article 17 of the General Conditions governs the replacement of personnel. Pursuant to Article 17.2 *"(...) in the course of performance, and on the basis of a written and justified request, the Contracting Authority can ask for a replacement if it considers that a member of staff is inefficient or does not perform its duties under the contract. "*