

Decision Decision in case 797/2014/PL concerning the dismissal of a team leader in an EU-funded project in Central America by the EU Delegation to Nicaragua, Costa Rica and Panamá

Decision

Case 797/2014/PL - Opened on 11/06/2014 - Decision on 20/04/2016 - Institution concerned European External Action Service (No maladministration found) |

The case concerned the dismissal of a team leader in an EU-funded project in Central America.

The Ombudsman inquired into the issue and found that the Commission had acted reasonably by allowing the beneficiary of the project to dismiss the team leader after the contract was signed. The Ombudsman, therefore, closed the case.

The background to the complaint

1. The complainant is an international consultancy that led a consortium that carried out an EU-financed project in Nicaragua to support the Central American Integration System (hereinafter, the "beneficiary"). The tender offer for this project included the names and CVs of two experts (hereinafter the "team leader" and the "second expert"). The contract to carry out the project was signed on 27 December 2012.

2. On 15 January 2013, the EU Delegation to Nicaragua, Costa Rica and Panamá (hereinafter the "Delegation") informed the complainant that, according to the beneficiary, the team leader had been involved in illegal activities and had thus requested the Delegation to remove him from the project. The Delegation told the consortium that if it did not appoint a new expert, the contract would be terminated. [1] The Delegation suggested that the consortium contact the beneficiary for further information.

3. The consortium then, with the agreement of the Delegation and the beneficiary, replaced the team leader.

4. In the meantime, the complainant was informed that the reason the beneficiary had requested the replacement of the team leader was because he had been dismissed from a previous project for serious negligence in the performance of his duties. That dismissal had



been confirmed by a court judgment.

5. On 18 November 2013, after the successful completion of the project, the complainant complained to the Delegation that the Delegation had failed to comply with the established procedures. In addition, by not giving the team leader the chance to be heard, the Delegation had not complied with Article 41 of the Charter of Fundamental Rights. The complainant therefore requested compensation for the daily allowances paid to the second expert until the kick-off meeting finally took place, [2] and (ii) the travelling costs, the daily allowances and the fees that had been paid in advance to the team leader, which the team leader had refused to pay back.

6. The Delegation replied on 29 April 2014, arguing that its request to replace the team leader was within its discretionary power. [3] It also stated that it would be willing to consider covering some of the costs incurred. It refused, however, to compensate the complainant for the amounts that the team leader refused to pay back to the consortium.

7. Dissatisfied with the reply, the complainant turned to the Ombudsman.

The inquiry

8. The Ombudsman opened an inquiry into the complaint and identified the following allegation and related claims:

Allegation

The Delegation failed properly to follow the contract procedures set out for EU External Actions, and unfairly insisted on the removal of the team leader that it had initially accepted.

Claims

1) The Commission should compensate the complainant for the financial losses incurred due to the Delegation's decision to reject the team leader initially proposed and accepted.

2) The Commission should acknowledge that the team leader initially proposed was treated unfairly.

9. In the course of the inquiry, the Ombudsman received the opinion of the European Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman's decision takes into account the arguments and opinions put forward by the parties.

Alleged failure by the EU Delegation to follow the contract procedures set out for EU External Actions,



the alleged unfair removal of the team leader, and the related claims for compensation

Arguments presented to the Ombudsman

10. The complainant argued that the EU Delegation had not acted in line with the applicable procedural rules when it required the team leader to be replaced.

11. The complainant also argued that the EU Delegation had raised unfounded allegations about the team leader's professional ability and that the accusations were not supported by any evidence. In addition, contrary to Article 41 of the Charter of Fundamental Rights, the EU Delegation did not respect the team leader's right to be heard.

12. Finally the complainant pointed out that it had acted in good faith and had made a proposal for the replacement of the team leader. In its view the Commission should compensate it for the financial losses it suffered as a result of its decision to ask for the replacement of the team leader.

13. In its opinion, the Commission stated that the beneficiary had objected to the team leader after the contract was signed. It argued, however, that the beneficiary was not aware, at the time of the evaluation of the offer, of the court's judgment against the team leader.

14. According to the Commission, it is a well-established principle of law that a contract may be considered void if the consent for the contract was given in the absence of knowledge of relevant facts that could have influenced the will of a party to sign. The Commission added that, once the beneficiary became aware of the court judgement against the team leader, it immediately informed the EU Delegation about its concerns and requested that the team leader be replaced. [4] The Commission also pointed out that, according to the Financial Regulation, the existence of a judgment confirming professional misconduct would have led to the exclusion of the team leader from the procurement procedure in the first place. [5]

15. The Commission acknowledged that, in general, requests to replace personnel are based on the inefficiency of the personnel or the non-performance of duties [6] . However, the General Rules also state that the contracting authority may terminate the contract where, after the award of the contract, the award procedure proves to have been subject to a substantial error. [7]

16. The Commission then stated that it was willing to reimburse certain expenses, such as extra travel expenses and daily allowances claimed by the complainant. However, it insisted that it would not cover the costs incurred by the complainant due to the refusal of the team leader to pay back the advance payments he had received for a task he never carried out.

17. As regards the complainant's allegation that the team leader's right to be heard under Article 41 of the Charter of Human Rights was breached, the Commission underlined that the complainant had been given the possibility to express its views, which it did on a number of



occasions. In addition, the complainant regularly informed the Commission about the views of the team leader. Therefore there was nothing to support the complainants' allegation and claim that the team leader had been treated unfairly.

18. In its observations, the complainant stated that it had lost money as a result of the Delegation's actions. In particular, it stated that the Delegation had refused to pay certain expenses of the second expert. It added that the original team leader's flight tickets had been purchased by the time the complainant was informed of the beneficiary's request to replace the team leader.

The Ombudsman's assessment

19. The Ombudsman points out that in cases involving contractual disputes, it is not her role to determine precisely what the limits of contractual rights and obligations are. Rather, her role is to determine if the EU institution, body, office or agency concerned has acted reasonably when invoking contractual rights and obligations.

20. It is a general principle of law that the validity of a contract may be challenged if the consent of a party to enter the contract is affected by a substantial error. This general principle of law is reflected in the General Conditions of the Framework Contract applicable in this case, which allow the contracting authority to terminate a contract if there are substantial errors. [8]

21. An error is considered to be "substantial" when it refers to a fundamental aspect of the contract that, had it been discovered prior to the signature of the contract, it would have led the contracting party to withhold its consent. In this context, experts are an integral aspect of tender offers. Their profiles and expertise must be identified in the specific Terms of Reference and must form part of the initial contract. [9] Thus, any serious error as to the credentials of an expert, even one that was not known to the consortium, or the omission of important relevant information, such as a judgement confirming grave professional misconduct, could be considered a substantial error. If an expert is a team leader, as was the case here,, such errors are even more relevant.

22. The Ombudsman considers that it was reasonable for the Commission to have taken the view that, had the beneficiary known about the judgement during the evaluation of the tender offer, the beneficiary would have withheld its approval. Consequently, the Delegation would not have awarded the contract to the complainant.

23. The Ombudsman notes that the Commission has accepted that the complainant was unaware of the team leader's past legal difficulties. Under these circumstances, the Ombudsman considers that the Delegation's decision to replace the team leader, rather than terminate the entire contract, was reasonable and fair.

24. As to the complainant's claim for compensation, the Ombudsman notes, that the Commission has offered on several occasions to compensate the complainant for **part** of the



financial losses that resulted from the late replacement of the team leader. The Ombudsman welcomes this approach. She trusts that the Commission will, in recognition of the complainant's good faith, compensate it for the travel expenses incurred by the consortium for the replaced team leader and the extra daily allowances of the second expert.

25. As to the other expenses claimed by the complainant, the Ombudsman considers reasonable the Commission's view that it should not pay the consortium the amounts that the replaced team leader received in advance for work he did not perform and the daily allowances for expenses he did not incur. The Ombudsman notes that the replaced expert refused to pay back this money to the consortium. The dispute over these payments concerns the consortium and the expert. It should, as the PRAG [10] explains, be addressed to the competent jurisdiction.

26. In light of the above, the Ombudsman concludes that the Commission acted fairly, reasonably and proportionately.

Conclusion

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

There has been no maladministration by the Commission.

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

Emily O'Reilly

Strasbourg, 20/04/2016

[1] Article 36.3(h) of the General Conditions of the framework contract: "the Framework contractor has been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the financial interests of the EU".

[2] The team leader initially proposed had the plane ticket to the kick-off meeting but never got to travel. The second expert, however, travelled for the kick-off meeting initially planned for the 15 January 2013, and had to wait until the new team leader was approved and for the works to start on 24 January 2013.



[3] Article 16(1) of the General Conditions of framework contract: "The Framework contractor must inform the contracting authority of all personnel which the Framework contractor intends to use for the implementation of the tasks, other than the experts whose CVs are included in Annex IV. Annex II and/or Annex III shall specify the minimum level of training, qualifications and experience of the personnel and, where appropriate, the specialisation required. The contracting authority shall have the right to oppose the Framework contractor's choice of personnel."

[4] Article 36(3)(m) of the General Conditions of FWC

[5] Article 106(1)(c) of the Financial Regulations provides that: *"Candidates or tenderers shall be excluded from participation in procurement procedures if: (c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify including by decisions of the EIB and international organisations"*.

[6] Article 17 (2) of the General Conditions

[7] Article 36 (3) m) of the General Conditions

[8] Article 116(1) of Regulation No 966/2012 (Financial Regulation)

[9] 2.2.3.3 Experts' profile or description of the expertise, Guidelines of the Framework Contract COM 2011

[10] Practical Guide to Contract procedures for EU external actions, 2012