

## Decision of the European Ombudsman on complaint 94/98/(XD)ADB against the European Commission

Decision

**Case 94/98/ADB - Opened on 05/05/1998 - Decision on 20/05/1999**

Strasbourg, 20 May 1999 Dear Mr T., On 24 March 1998, you addressed a complaint to the European Ombudsman against the European Commission, concerning the non payment of your salary and allowances for your last month of work carried out in the framework of the renovation of a hospital in Mauritania funded by the European Development Fund (hereafter EDF). On 5 May 1998, I forwarded the complaint to the President of the European Commission. On 11 May 1998, you sent additional information, which my services transmitted to the European Commission on 26 May 1998. The European Commission sent its opinion on 12 August 1998. I forwarded it to you with an invitation to make observations, if you so wished. I received your observations on 2 October 1998. On 23 December 1998, the European Commission forwarded additional information to the Ombudsman. I forwarded it to you on 8 January 1999, with an invitation to make observations before the end of February, if you so wished. I did not receive any additional observations. 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: In 1996, the complainant worked as a foreman in the renovation of the national hospital of Nouakchott, in Mauritania, a project funded 100% by the European Development Fund (EDF). He worked for the successful tenderer for the project, the E.G.B. T.P. company, which allegedly paid neither for his last month of work (April 1996), nor his travel and housing allowance. The complainant based his complaint on Article 11 of the General Conditions for Works Contracts financed by the EDF (hereafter Article 11). According to the complainant, this text states that, in a situation of non payment of salaries by the local contractor, the European Union can, at the request of the contracting authority, directly pay the salaries owed. The complainant claims that his approaches to the European Commission were unsuccessful. The Commission did not act in accordance with the aforementioned article.

### THE INQUIRY

**The Commission's opinion** The opinion of the European Commission on the complaint is in summary the following: Article 11 states that, in case of a delay in the payment of the salaries



due to the employees by the successful tenderer (the E.G.B. T.P. company), the contracting authority (the Mauritanian authorities) has the possibility to directly pay the salaries, and to withdraw this amount from the sum owed to the successful tenderer. In this case, the Mauritanian authorities should have asked the Commission (the financier of the project), to pay the employees directly. However, this hypothesis postulates that the complainant was engaged by E.G.B. T.P. to work in the framework of a project funded by the EDF. Following the request of the complainant, the Commission had, through its delegation in Mauritania, contacted the E.G.B. T.P. in order to get further information. The company replied on 11 March 1998, and pointed out that the contract of employment with the complainant was not linked with a project funded by the EDF. In view of these findings, the Commission considered that the request made by the complainant was not within its competence of which it informed the complainant of on 24 April 1998. He replied on 11 May 1998, stating that the declaration of the E.G.B. T.P. was incorrect. The complainant based his allegation on an attestation from his employer, the manager of the E.G.B. T.P. In view of this document, the Commission decided to take contact with the Mauritanian authorities through its delegation in Mauritania. However, the Commission repeated that only the national authorities, as the contracting party, are able to undertake the procedure foreseen by Article 11. **The complainant's observations** The European Ombudsman forwarded the European Commission's opinion to the complainant with an invitation to make observations. In his reply of 2 October 1998, the complainant maintained his complaint and quoted a non-exhaustive list of persons likely to testify that he was continually present during the building which lasted 28 months.

## FURTHER INQUIRIES

**The Commission's second opinion** The Ombudsman asked the Commission to inform him of the outcome of its initiative to contact the Mauritanian authorities mentioned in its first opinion. The Commission informed the Ombudsman that the Mauritanian authorities had informed the European delegation that the building had formally been handed over on 13 January 1997. Therefore, since that date, the contracting authority was no longer able to act on the basis of Article 11. Eventually, the Commission repeated that in the framework of Article 11, the Commission could only have acted upon request of the contracting authority (the Mauritanian authorities). Moreover it mentioned that the dispute between the complainant and the E.G.B. T.P. seems to have arisen because of a remuneration unduly paid to the complainant's wife, which the employer tried to recover through the amounts owed to the complainant. The Commission considered that this dispute clearly does not fall within the scope of Article 11 but belongs to the competences of a court. As an exception to Article 27 (3), the Commission mentioned Regulation 626/95 which concerns recruitment of nationals from new Member States. **The complainant's second observations** The Ombudsman forwarded the Commission's second opinion to the complainant, who did not reply.

## THE DECISION

**1 Failure of the Commission to stand in for the successful tenderer.** 1.1. The complainant, who allegedly was not paid for his last month of work in the framework of a project funded by the European Development Fund (1) (EDF), claims that the European Commission should have acted in accordance with Article 11 of the General Conditions for Works Contracts financed by the European Development Fund (hereafter General Conditions), and paid him the amounts



owed by the successful tenderer (the E.G.B. T.P.) which carried out the project. The Commission stressed that it could only have acted on request of the Mauritanian authorities, and that the present dispute did not pertain to the General Conditions. 1.2. Pursuant to article 11 of the General Conditions : *" Where there is a delay in the payment to the contractor's employees of wages and salaries owing and of the allowances and contributions laid down by the law of the State in which the works are located, the contracting authority may give notice to the contractor that within 15 days of the notice he intends to pay such wages, salaries, allowances and contributions direct. Should the contractor contest that such payments are due, he shall make representation to the contracting authority with reasons, within the 15 days period. If the contracting authority, having considered such representations, is of the opinion that payment of the wages and salaries should be made, it may pay such wages, salaries, allowances and contributions out of amounts due to the contractor (...)"* 1.3 The evidence forwarded by the complainant to the European Ombudsman, appears to establish that he had worked on a project funded by the EDF under the aforementioned General Conditions. 1.4 According to the evidence forwarded by the complainant, the Commission, through its Representation in Paris, has contacted the Mauritanian authorities on 13 December 1996. The attention of the contracting authority has been drawn on the fact that it could solve the problem encountered by the complainant by acting pursuant to Article 11. 1.5 Actually, the contracting authorities did not apply this procedure, and did not request the Commission, as the financier of the project, to pay the complainant directly. As the project was definitely finished and the building handed over to the contracting authorities on 13 January 1997 this is no longer possible. 1.6 It appears that although the Commission made representations to assist the complainant, it could not have acted pursuant to the procedure of Article 11 without an initiative of the Mauritanian authorities. There is no evidence that the complainant has initiated this procedure with the relevant authorities. The Ombudsman has therefore concluded that there is no evidence of maladministration. **2 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman has therefore decided to close the case. The President of the European Commission will also be informed of this decision. Yours sincerely, Jacob SÖDERMAN

(1) Annex II, Council Decision, 92/97/EEC, 16/12/1991, OJ 1992 L 040