

Päätös asiassa 2577/2004/OV - Korvauksen perusteeton takaisinperintä kehityshankkeen yhteydessä

Päätös

Kanteluasia 2577/2004/OV - Tutkittavaksi otetut kantelut, pvm 12/10/2004 - Päätökset, pvm 26/07/2007

Yhteenvedo päätöksestä kanteluun 2577/2004/OV (luottamuksellinen) Euroopan komissiota vastaan

Kantelija on konsortioon kuuluva yritys, joka osallistui alihankkijana komission hankkeeseen "EU:n tuki Libanonin hallinnon jälleenrakennusta varten". Se allekirjoitti elokuussa 1999 alihankintasopimuksen hankkeen hankintaviranomaisen, Libanonin hallinnonuudistuksesta vastaavan ministerin (OMSAR) kanssa. Komission Libanonin-edustuston tapa käsitellä hanketta aiheutti kuitenkin kantelijalle useita ongelmia. Edustusto ilmoitti kantelijalle 22. tammikuuta 2003 päivätyllä kirjeellä perivänsä takaisin 29 306,65 euron korvauksen, jonka konsortio oli laskuttanut taustaryhmän (yrityksen pääkonttorin asiantuntijoiden) päiväraha- ja lentomatkakuluista. Kantelijan mukaan komission epäoikeudenmukainen menettely sopimusasioiden hoitamisessa aiheutti sille raskaita taloudellisia tappioita ja vahingoitti lisäksi konsortion mainetta.

Kantelija valitti asiasta oikeusasiamiehelle elokuussa 2004. Kantelija katsoi, että (i) komission päätös periä takaisin 29 306,65 euron korvaus oli perusteeton ja että (ii) komissio oli suhtautunut päättämättömästi ja välinpitämättömästi suunnitelmiin, jotka konsortio oli toimittanut kesä- ja joulukuussa 2002 ja hankkeen toisesta vaiheesta maaliskuussa 2003. Huomautuksissaan kantelija ilmoitti vielä, että (iii) suunnitelma hankkeen toisen vaiheen toteuttamisesta oli hylätty antamatta OMSARille tai kantelijalle tilaisuutta tulla kuulluiksi.

Vastineeksi laatimassaan lausunnossa komissio katsoi ensimmäisen väitteen osalta, että sillä oli asianmukaiset oikeudelliset perusteet vaatia korvauksen palauttamista. Toisesta väitteestä komissio totesi, etteivät viivästykset olleet yksinomaan sen syytä, ja kiisti menetelleensä passiivisesti. Kantelijan kolmannen väitteen komissio torjui todeten, että se oli suhtautunut kantelijaan erittäin joustavasti.

Tutkittuaan huolellisesti asiaa koskevan aineiston oikeusasiamies katsoi, että hankkeen alussa (lokakuussa 1999) järjestetty 10 päivän käynnistysvaihe ja sopimuskauden loppuaika oli erotettava toisistaan. Oikeusasiamies totesi, että komission päätöksen periä takaisin taustaryhmän matka- ja päivärahakulut voidaan katsoa olevan hallinnollinen epäkohta



hankkeen käynnistysvaiheessa. Näin ollen oikeusasiamies esitti kantelijalle ja komissiolle sovintoratkaisua. Hän ehdotti, että komissio tarkistaisi päätöstään 29 306,65 euron korvauksen takaisinperimisestä.

Kahdessa muussa väitteessä ei oikeusasiamiehen mukaan ollut kyse hallinnollisesta epäkohdasta.

Sovintoratkaisuehdotukseen lähettämässään vastauksessa komissio ilmoitti harkinneensa päätöstään uudelleen ja hyväksyneensä oikeusasiamiehen ehdotuksen, jotta asiassa päästäisiin sovintoon. Komissio selitti, että 3 536,23 euroa kyseisistä päiväraha- ja lentomatkakuluista oli nyt hyväksytty tukikelpoiseksi ja vähennetty perittävästä summasta. Kantelijalta takaisin perittävä määrä aleni siten 25 770,42 euroon. Huomautuksissaan kantelija ilmoitti hyväksyvänsä sovintoratkaisun ja kiitti oikeusasiamiestä avusta.

Asiaa koskevassa päätöksessään oikeusasiamies totesi kantelijan ja komission päässeen keskenään sovintoratkaisuun. Näin ollen oikeusasiamies päätti asian käsittelyn.

Strasbourg, 26 July 2007

Dear Mr X,

On 24 August 2004, acting on behalf of a company, you submitted a complaint to the European Ombudsman against the Commission concerning an EU Project.

On 12 October 2004, I forwarded the complaint to the President of the Commission. On 6 December 2004, you sent an e-mail which contained your letter of 3 December 2004, written in reply to my letter of 12 October 2004, and in which you expressed your regret at the fact that some allegations of your complaint could not be investigated because of the "two-year time-limit". You also suggested that Article 2(4) of the Ombudsman's Statute should be reconsidered.

The Commission sent its opinion on 22 December 2004. I forwarded it to you on 12 January 2005 with an invitation to make observations which you sent on 26 February 2005. In your letter, you referred again to the "two-year time-limit" and recommended that Article 2(4) of the Ombudsman's Statute should be reconsidered.

In reply to your letter of 22 June 2005, in which you inquired about the status of your complaint, my Office contacted you by telephone and provided you with further information.

On 7 November 2005, you sent an e-mail enclosing a letter dated 1 November 2005 and containing a further request concerning the status of your complaint. On 16 November 2005, you had a telephone conversation with my Office on that subject. On 22 November 2005, I replied to your letter of 1 November 2005 and provided you with further information concerning the handling of your case and stated that I would inform you of the outcome of my inquiries, at the latest by the end of February 2006. In my letter, I also replied to your remarks concerning Article 2(4) of the Ombudsman's Statute.



On 1 March 2006, I wrote you an additional letter with regard to the ongoing inquiry.

On 15 March 2006, I wrote to the Commission with a request for further information and an additional opinion to be submitted by 30 April 2006. I informed you in a letter of the same day.

On 21 April 2006, the Commission asked for an extension of the deadline for its additional opinion until 31 May 2006, which I granted by letter of 3 May 2006.

On 9 June 2006, the Commission informed my Office that there would be an additional delay.

On 20 July 2006, the Commission sent its additional opinion. I sent it to you on 7 August 2006 with an invitation to submit additional observations, which you sent on 26 September 2006.

On 15 February 2007, I addressed a proposal for a friendly solution to the Commission, asking it to reply by 31 March 2007. You were informed accordingly the same day.

By letter of 2 March 2007, the Commission asked for an extension of the deadline for its reply until 31 May 2007. By letter of 12 March 2007, I accepted the Commission's request. You were informed accordingly the same day.

By letter of 5 April 2007, you informed me that your company had become member of another company group, and that, as a result of this change, the name of your company as well its address had changed.

The Commission sent its reply regarding the proposal for a friendly solution on 14 May 2007. I forwarded it to you with an invitation to make observations, which you sent on 15 June 2007.

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

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies, in the present case the European Commission. The Statute of the Ombudsman specifically provides that no action by any other authority or person, such as, in the present case, the national authorities, more particularly, the Minister of State for Administrative Reform, may be the subject of a complaint to the Ombudsman.

THE COMPLAINT

The complainant is a company of management consultants. According to the complainant, the relevant facts are, in summary, as follows:

The complainant, which formed a consortium together with another company, was a contractor in the implementation of a European Commission's development project in a third country. The



Contracting Authority for the project in question was the Minister of State for Administrative Reform of the country where the project took place ("OMSAR"). The contract for the project was signed in August/September 1999 (1) , and the consortium started to provide its services on 8 October 1999.

The complaint concerns the handling of this project by the Commission's Delegation in the country of the project ("the Delegation"). According to the complainant, the Commission's unfair handling of the contract resulted in serious financial losses for the complainant while also causing damage to the consortium's reputation.

An independent consortium contracted by the Commission made a mid-term review of the project in October 2001 and issued a monitoring report in April 2002.

Along with its complaint to the Ombudsman, the complainant enclosed a detailed 14-page note on tendering and implementation problems of the project. In that note, the complainant set out the following four allegations:

(1) There were infringements during the tender process: the tender process, leading to the signing of the contract (on 30 August 1999), was protracted, controversial and subject to much political manoeuvring. More than a year elapsed between the Request for Proposal ("RFP") in September 1998 and the commencement of services by the consortium in October 1999.

(2) There was an unfair interpretation of the contract with regard to (i) the home office support team, (ii) the office support staff, and (iii) the replacement of experts:

(i) By letter of 22 January 2003, the Delegation informed the complainant that an amount of EUR 29 306.65 representing per diem and ticket costs invoiced by the consortium over the years for the home office support team would be recovered. However, the complainant observed that it had followed this procedure for three and a half years and that it had always been reimbursed by the Commission. The complainant referred to a 30 September 1999 letter by OMSAR stating that the latter had reached an agreement with the Delegation on a number of issues, one of them being home office support. The letter, copied to the Delegation, provided that: " *Mr [X] [the complainant's Managing Director], Mr [P.] and Mr [B.] are considered as Head Office backstopping team (2) , and accordingly they are entitled only for [sic] the air ticket and per diem fees* " (complainant's emphasis). The complainant also referred to a letter of the Head of Delegation dated 10 December 1999, which, in its view, supported its position. The letter of the Head of Delegation stated that " *if you want to make use of members of the Backstopping Supervisory Team as short term experts, your proposal will have to be previously and formally approved by the Contracting Authority after previous information to the Commission* ". The same letter also provided that " *[a]s already discussed, the pre-inception mission of [the complainant's Managing Director] (...) has to be considered as backstopping by [the complainant] and no invoice of fees will be allowed* " (complainant's emphasis). If the procedure used by the complainant had been wrong all along, earlier notification and correction by the Commission would have been required and should have applied to future rather than past inputs of the home office support team.



(ii) Prior to the signing of the contract in August 1999, OMSAR informed the complainant that it would not be in a position to make office support staff available, and it was agreed that the issue should be raised with the Delegation during the start-up period. It was on the basis of this understanding that the contract was signed and endorsed by the Delegation. Later, during the start-up period (3), the complainant was informed by the Delegation that the consortium had misinterpreted the RFP and that it had to cover by itself the costs linked to office support staff.

(iii) Over time, the requirements concerning the replacement of experts became more stringent and led to considerable costs for the consortium. In this regard, the complainant referred to events that took place in 2000 and 2001, as well as to the monitoring report of April 2002.

(3) There was inconsistency in the Delegation's decision-making process. The complainant referred to five examples involving the beneficiary agencies of the project, namely, (i) the Ministry of Interior and Municipalities, (ii) the Ministry of Social Affairs, (iii) the Ministry of Finance, (iv) the Ministry of Trade and Economy, and (v) the Central Administration of Statistics. In this regard, the complainant referred to various incidents that occurred in the first two years of the project's implementation.

(4) There was lack of transparency and responsiveness by the Delegation in monitoring the project, namely, (i) unclear communication, (ii) confusion of roles and responsibilities, and (iii) indecisiveness and unresponsiveness with regard to the complainant's plan for a second phase of the project.

With regard to the lack of decisiveness and responsiveness, the complainant stated that the plan for a second phase of the project was submitted in June and December 2002 and again in March 2003. However, there was no substantial follow-up by the Commission. More particularly, the complainant pointed out that the plan was first submitted in June 2002, but a period of complete silence by the Delegation followed. In November 2002 and only after the consortium had exerted pressure on the Delegation, the latter issued a statement suggesting some minor changes. These were made and a revised plan was submitted in early December 2002. Again, a period of complete silence followed. The complainant had to exert pressure once again on the Delegation to provide guidance on the scope of a second phase. As on the first occasion, there was only minor feedback. A third proposal, which included a budget, was prepared in March 2003, addressing all the points made by the Delegation, but, after considerable additional delay, it was simply rejected by the Delegation on the grounds that it did not comply with available budgetary parameters.

The Ombudsman's reaction

In his letter of 12 October 2004 answering the complaint, the Ombudsman informed the complainant that, with the exception of allegations 2(i) and 4(iii), he was not entitled, by reason of Article 2(4) of his Statute, to deal with the complaint. This provision stipulates that " *a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint* ".

The Ombudsman thus asked the Commission to submit an opinion on allegations 2(i) and 4(iii),



namely, that:

(i) the Commission's decision of 22 January 2003 to recover the amount of EUR 29 306.65 representing per diem and ticket costs (related to the home office support team) invoiced by the consortium over the years is unjustified. The complainant claims reimbursement of this sum.

(ii) the Commission showed indecisiveness and unresponsiveness with regard to the plan for a second phase of the project, which the complainant submitted in June and December 2002, and again in March 2003.

The complainant's further correspondence

Reacting to the Ombudsman's letter of 12 October 2004, the complainant suggested, in a letter of 3 December 2004, that Article 2(4) of the Ombudsman's Statute could be reconsidered so that the two-year time bar would no longer apply to legitimate complaints.

THE INQUIRY

The Commission's opinion

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

The project was agreed in June 1998 between the Commission and OMSAR. The Project Monitoring Consultancy ("PMC") was awarded by OMSAR to the complainant's consortium. The objective of this 36-month service contract was to assist the Government of the country in the implementation of the National Administrative Rehabilitation Programme.

The contract was signed by OMSAR and the complainant (on behalf of the consortium) on 30 September 1999. On 30 September 2002, that is, before the expiry date, an addendum was signed extending the contract's duration for a further six months, from October 2002 to March 2003.

As regards the two allegations, the Commission made the following comments:

(1) Reimbursement of the sum of EUR 29 306.65 due to unfair interpretation of the contract concerning the home office support

With regard to the complainant's first allegation, the Commission stated that, upon verification of an invoice from the complainant received on 28 October 2002 and covering the period July-September 2002, the Delegation observed that costs for backstopping activities had been included under the heading "Remuneration of Staff". Given that such costs were not foreseen in the contractual provisions, the Delegation verified previous payments dating back to August 2000 and covering services provided between 30 September 1999 and 30 June 2002. As a result of this verification, the Delegation realised that a total amount of EUR 29 306.65 had been unduly paid to the complainant.

By letter of 22 January 2003, the Delegation informed the complainant that backstopping was considered to be part of the contractor's overheads, and that therefore, fees and related expenditure should not have been invoiced. The Commission therefore informed the complainant that an invoice correction was necessary and that the unduly paid amount would



be recovered by deducting it from the company's next invoice.

By letters of 5 March and 19 May 2003, the complainant alleged that OMSAR had made an offer " *to compensate (...) the costs of tickets and per diem for the backstopping missions* ", and that the complainant had acted in accordance with the instructions received. However, as the complainant was informed on 14 May 2003, the Delegation found no documents supporting the Commission's endorsement of such an agreement. Despite a request to that effect, no evidence was supplied in this regard.

In its complaint, the complainant referred to a letter sent by the Head of Delegation on 10 December 1999 which set out the conditions for payments requests, namely, formal approval by the Contracting Authority after previous information to the Commission concerning the employment of a member of the backstopping supervisory team as a short-term expert. The Commission observed that, in compliance with the contractual terms, these experts were authorised to carry out short-term missions during the first six months of the project, for which they were fully remunerated.

As regards backstopping activities, however, the contractual provisions did not specifically foresee any compensation or any reimbursement of costs (4) , which were considered part of the consultant's overheads. Indeed, this was admitted by the complainant when it stated in its complaint that " *earlier notification and correction by the Commission (...) should have been made applicable to future rather than past inputs of the home office support* ". The complainant seemed however to disregard the fact that, according to Article 90.3 of the General Conditions for Service Contracts financed by the European Community in the Mediterranean Countries and Territories (the "General Conditions"), " *the payment of interim payments does not have the character of final payment releasing the recipient from his obligation* ". In addition to this, the fact that previous payments had been released without detecting irregularities could not be considered as a valid modification of contractual terms. According to Article 105 of the contract's Special Conditions, such a modification could only have been made through an addendum. Consequently, in line with good financial management and in accordance with the relevant contractual provisions, the Commission had an obligation to ensure that Community funds were spent in accordance with the provisions of the contract and also had a legitimate right to contest the payment of the unduly paid amounts.

As regards the complainant's argument that its legitimate expectations had not been respected (5) , the Commission observed that, according to the Community Courts' case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. A person may only plead a breach of that principle in case the administration has given him "precise assurances". In the present case, the complainant provided no evidence to prove that the Commission endorsed the agreement whereby costs related to backstopping activities were to be reimbursed. The Commission was of the view that it had sufficient legal grounds to claim reimbursement of EUR 29 306.65. The Commission acknowledged, however, that there was a certain delay in detecting the irregularity of payments made for backstopping activities and, for that reason, it expressed its regrets to the



complainant.

(2) Indecisiveness and unresponsiveness with regard to the complainant's plan for a second phase of the project

With regard to the complainant's second allegation, the Commission stated that at the time the decision concerning a second phase of the project was scheduled to be taken, the Contracting Authority made critical remarks on the low quality of the technical assistance services provided by the complainant. Notwithstanding this context, the Commission took measures in order to guarantee the continuation of the project and its further implementation in a second phase. Four months before the contract's expiry, on 21 May 2002, the Commission defined the conditions in which such a second phase should be implemented and established a two-phase programme to do so. In the first phase until July 2002, OMSAR was to submit a proposal for a programme of administrative modernisation. If an agreement were reached, a new phase was foreseen, to begin in September 2002, in which the role of OMSAR, the needs for technical assistance and the service contracts to be prepared had to be identified.

Three successive proposals for the Framework for Future Intervention (the "FFAI") were submitted to the Commission by OMSAR.

The Commission pointed out that the dates mentioned in the complainant's allegation did not exactly coincide with those indicated by the Commission. The complainant stated that the plan was submitted for the first time in June 2002, but it was only on 18 July 2002, when OMSAR produced a provisional document of the FFAI with the help of the PMC, that weaknesses were detected.

Due to time constraints, an addendum signed on 30 September 2002 extended the contract with the consortium for another six months until March 2003. This addendum was approved by the Delegation on 11 October 2002 and endorsed by the Commission's Headquarters.

On 4 November 2002, the Commission submitted its comments on the proposal for the FFAI. It was not until 6 February 2003 - and not in early December 2002 as the complainant stated - that OMSAR provided the Commission with an updated version of the plan. In a meeting held on 24 February 2003, the Delegation informed both OMSAR and the PMC of its opinion on the new plan. On 10 March 2003, OMSAR again sent a new version of the plan, which was finally approved on 19 March 2003 with some comments.

Although, admittedly, the decision-taking process was long, the Commission was of the opinion that several factors explained the delays, which in any case were not exclusively attributable to the Commission. As had already been shown, the Commission did not remain passive and did its best to guarantee the continuation of the project. Much of the time that elapsed until the final approval of the FFAI could have been saved, if the requested document had fulfilled the expected quality requirements from the beginning. It was for the sake of sound financial and contractual management that the Commission was obliged to request the FFAI's revision.

The Commission further pointed out that, in spite of the fact that the project's implementation was behind schedule, it took appropriate measures and also extended the contract's duration



providing a sufficient budget to cover the six-month extension. These measures allowed the PMC to retain its personnel.

The Commission acknowledged that there was some divergence of opinion with OMSAR as to how to proceed with allowing the ongoing involvement of the complainant after the expiry of the contract on 31 March 2003. Whereas OMSAR envisaged signing a new contract according to the negotiated procedure, the Delegation considered it more appropriate to modify the contract through an addendum.

Due to time constraints, the Delegation changed its approach and by letter of 26 March 2003 informed OMSAR about the possibility of a negotiated procedure with the consortium. Accordingly, on 4 April 2003, OMSAR submitted the results of negotiations with the complainant, including the CVs of experts and price revision.

After the proposal's assessment, the Delegation informed OMSAR on 15 April 2003 that it could not submit the proposal to the Commission's Headquarters for approval because (i) the proposed CVs were substandard and often insufficient in quality and (ii) the Commission observed that the fees had increased considerably by comparison to those contained in the contract that had just expired. These increases in fees ranged from 25% to 30%, excluding international transport, and from 30% to 39%, including international transport. The latter increase implied fixing a daily amount of EUR 919 for fees of short-term international experts. This would have led to paying much higher wages than in other contracts of the same nature implemented in the framework of the project.

The Delegation referred to the Circular of 8 January 2003 concerning price revision, issued by the Commission's Directorate-General for Budget. The complainant had previously used the price index for calculating fee increases. As a result of applying the Circular's provisions, and excluding the ineligible costs for international transport, fee increases varied from 8.6% to 19%, instead of from 30% to 39% as requested by the consortium. In line with this calculation, the minutes of the meeting held on 24 February 2003, sent both to OMSAR and the project's team leader, stated that the envisaged fee increase was 10%.

Therefore, after the reassessment of the file, it was clear that the delays attributable to the Commission were justified. Furthermore, the initial decision to reject the proposal for the negotiated procedure was justified both for the sake of good financial management and by the Commission's obligation to ensure that the Community funds are spent in accordance with existing provisions.

The Commission concluded that its services had acted properly, respected the rules and principles binding upon it and that, therefore, no instance of maladministration had taken place.

The complainant's observations

In its observations, the complainant reiterated remarks it had made in its letter of 3 December 2004 to the Ombudsman. It stated that, although the Ombudsman's decision not to deal with its allegations on the basis of Article 2(4) of the Ombudsman's Statute, was formally correct, it might not achieve what was necessary in terms of providing feedback to the Commission, and



thus might deny it the opportunity to learn from the problems related to the project's implementation. In view of this, the complainant recommended that Article 2(4) should be reconsidered so that the two-year time bar would no longer apply to legitimate complaints.

As regards the *first allegation*, the complainant stated that, although acknowledging that there was indeed 'a certain delay' in detecting the irregularity of payments made for backstopping, the Commission maintained its view that it had sufficient legal grounds to claim reimbursement of EUR 29 306.65 from the consortium, as this amount was allegedly unduly paid to the complainant since the start of the project on 30 September 1999.

In this regard, the complainant recalled that a copy of a letter of 30 September 1999 written by OMSAR had been at the Delegation's disposal for more than five years. In this letter, the Minister brought to the complainant's attention a number of issues that had been discussed with and agreed to by the Delegation, including the costs of the backstopping team. More particularly, OMSAR stated that: "*Mr[X] [the complainant's Managing Director], Mr [P.] and Mr [B.] are considered as Head Office backstopping team, and accordingly they are entitled only for [sic] the air ticket and per diem fees*" (complainant's emphasis). In addition, the Delegation had in its possession supporting documents for each and every backstopping mission, all carrying authorised signatures of OMSAR and the formal endorsement by the Delegation itself. These documents demonstrated that the consortium had adhered to the relevant rules laid down by OMSAR and the Delegation, and hence it had invoiced for travel and per diem costs for backstopping only, and never for fees.

Instead, the Commission sought to substantiate the legitimacy of its efforts to claim, with retroactive effect, payments made during a period of more than three years. The complainant considered that the evidence referred to above gave sufficient support for its view that the Delegation's reimbursement claim should be considered 'irregular'.

As regards the *second allegation*, the complainant stated that the Commission's opinion was contextualised in a peculiar way, namely, by highlighting the view of the Contracting Authority on the allegedly low quality of the technical assistance services provided by the complainant. This was peculiar because the Delegation deliberately ignored the opinion of its own monitoring experts. These experts, who showed full awareness of the highly complicated and difficult polity within which the project was implemented by the consortium, considered at the time of the contract's expiry (report PC/M06 of 2 October 2002) that "achievement of outputs to date", "ability to achieve objectives" and "potential sustainability" were all "standard, according to plan". No particular "problems/need for action" were reported in their summary conclusion. The contextualisation of the Commission's opinion was arbitrary at best, and surely not relevant to the issue at hand.

The Delegation's arbitrariness and indecisiveness reached a very damaging state in connection with the decision-making process relating to a potential second stage. On this issue, the Commission's opinion itself provided ample proof for the complaint. For instance, references were made to the fact that the Delegation indeed took no less than four months to provide comments on the first proposal for the FFAI. The Commission's opinion conveyed, at different



points, evidence of 'arbitrariness', notably where diverging opinions arose between OMSAR and the Delegation, or on matters regarding budgeting, planning, and extension procedures. An impartial observer could hardly conclude anything other than that the decision-making process concerning the extension of the project was confused and riddled with diverging suggestions and false expectations.

The complainant also alleged arbitrariness by the Delegation. For example, the consortium repeatedly asked for guidance on the parameters that would govern any revision of rates, when entering a new phase. The Delegation's response was to ask the complainant to be more specific and to request that the consortium and OMSAR come forward with proposals on this issue, following mutual discussion and negotiation. After OMSAR staff and the consortium had spent much time on discussing and reviewing budget parameters, and had formulated a joint proposal for the next phase of the project, the latter was rejected by the same Delegation that had proposed this arrangement.

The complainant stated that, in order to arrive at a fair and balanced assessment of the complaint, the Ombudsman might also consider asking for OMSAR's opinion.

The complainant also made some more specific observations, since the assertions made by the Commission had some bearing on the complainant's technical abilities as a longstanding partner of the Commission. In this regard, the complainant stated that it was not true that the proposed fees were "much higher than in other contracts of the same nature". In fact, in some projects, fees twice the proposed amount were being paid by the Delegation. In addition, the fees that the complainant received in similar EU-funded projects in the region even went substantially beyond the proposed fees.

The remarks that the proposed CVs were substandard were equally inaccurate. The outright rejection of all the CVs reinforced the impression that the Delegation was merely looking for an excuse to reject the proposal.

Notwithstanding the noted ambiguity on, for example, fee issues, the Delegation never invited the consortium to discuss the proposal that had been submitted to it, let alone the proposed experts and fees. Instead of entering into a mature discussion that could possibly have led to a revision of specific elements, the entire proposal was simply rejected, without affording any opportunity to OMSAR or the complainant to be heard.

On the basis of the above, the consortium did not agree with the Commission's view that its services had acted properly and that there was no instance of maladministration.

Further inquiries

After an analysis of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore wrote to the Commission on 15 March 2006 with the following request for further information and for an opinion on a new allegation:

(I) Request for further information:

(1) In its complaint, the complainant indicated that " *the per diem and ticket costs were billed, the*



invoice[s] (approved by OMSAR) verified and endorsed by the Delegation , *and ultimately, and invariably, reimbursed by the Commission in Brussels* " (emphasis added). In its observations on the Commission's opinion, the complainant maintained that the Delegation disposes of a

"series of supporting documents to [sic] each and every backstopping mission, all carrying the legitimate signatures by [sic] OMSAR and the formal endorsement by the Delegation itself , to demonstrate that the consortium adhered to the concerned rules laid down by OMSAR and the Delegation, and hence merely invoiced travel and per diem costs for backstopping, and never any fees " (emphasis added).

Could the Commission therefore (i) please comment on the significance of the endorsement of the backstopping missions by the Delegation and (ii) send a copy of the documents by which it endorsed the invoices sent by the complainant?

(2) OMSAR's letter of 30 September 1999 to the complainant - which was copied to the Head of Delegation - referred, with regard to the pre-inception phase, to

" the following issues that were discussed and agreed to with the EU Delegation : (...) 2. Fees of the Head Office backstopping team for the Pre-inception Phase: Mr X. [the complainant's Managing Director], Mr P. and Mr B. are considered as Head Office backstopping team, and accordingly they are entitled only for [sic] the air ticket and per diem fees " (emphasis added).

The letter of 10 December 1999 from the Delegation to the complainant, which only states that no invoice of fees will be allowed, does not appear to contradict the statement in OMSAR's letter of 30 September 1999 with regard to the reimbursement of the travel expenses and the per diems during the pre-inception phase. Could the Commission please comment on this, as well as clarify what the "pre-inception phase" was and which period it covered?

(3) The Ombudsman also notes that, in its letter of 22 January 2003, the Commission informed the complainant that it would recover the amounts of the invoices covering the period from 30 September 1999 (that is, the beginning of the contract) until 30 June 2002. In its opinion, however, the Commission stated that, during the first six months of the project (that is, from 30 September 1999 until 31 March 2000) experts from the backstopping team were authorised to carry out short-term missions, and were fully remunerated for these missions. It is difficult to reconcile the above two statements at first sight. Could the Commission please comment on this?

(4) In its opinion, the Commission indicated that the contractual provisions did not specifically foresee any compensation or any reimbursement of the costs of the backstopping activities. In these circumstances, could the Commission please explain when exactly it detected that these costs should not have been reimbursed and why it took so long, namely, more than three years after the first invoices were sent, for it to become aware that these costs should not have been invoiced?

(5) In its observations, the complainant stated that the contextualisation of the Commission's



opinion, namely, the reference to the allegedly low quality of the technical assistance services provided by the complainant, was arbitrary and not relevant to the issue. Could the Commission please comment on this?

(6) In its observations, the complainant stated that it was not true that the fees proposed were "*much higher than in other contracts of the same nature*" (page 4 of the Commission's opinion). The complainant also stated that the Commission's opinion that the proposed CVs were substandard was also inaccurate. Could the Commission please comment on this?

(II) Request for an opinion on a new allegation:

(7) In its observations, the complainant alleged that the proposal for a second phase of the project was simply rejected, without affording any opportunity to OMSAR or the complainant to be heard. In that context, the complainant also alleged arbitrariness since, on the one hand, it was invited by the Delegation to come forward, jointly with OMSAR, with proposals concerning the budget parameters, and, on the other, the joint proposal was rejected by the very Delegation that had proposed this arrangement. Could the Commission comment on this new allegation?

The Commission's additional opinion

In its additional opinion, the Commission made the following comments:

(1) As regards the endorsement of the invoices, the Commission pointed out that the complainant's statement according to which attendance sheets of backstopping missions attached to invoices were formally endorsed by the Delegation is not accurate. The supporting documents transmitted by OMSAR to the Delegation only carried the signatures of OMSAR's representatives. It is not standard practice for the Delegation to endorse invoices and supporting documents and this was not done in the present case either.

As proof of this, sample copies of both a request for an invoice and an attendance sheet were annexed to the Commission's additional opinion. The Ombudsman will therefore have the opportunity to evaluate whether these documents were or were not endorsed by the Commission.

(2) As regards the second question, the Commission does not consider the Delegation's letter of 10 December 1999 to be inconsistent with OMSAR's letter of 30 September 1999. Indeed, both letters contest the invoicing and payment of fees for backstopping activities.

Besides, the parties to this contract, that is, OMSAR and the complainant and its partner, have the obligation to act according to the terms of the contract they have signed. The Commission, in its capacity as public financing entity, has the obligation to ensure the compliance of the payments with the terms of the contract.

The Commission does not exclude the possibility that one or both contractual parties may not have understood that the remuneration and expenses regarding the services rendered by the member of the backstopping team were included in the overall overhead fees paid quarterly by OMSAR to the complainant. However, even this situation would not require the Commission to agree to payments that were not permitted according to the contract and that, in accordance with Article 105 of the Special Conditions, were not formally authorised.



Mr B. and Mr C. had a meeting with the Commission's Head of Delegation about this subject and were duly informed that their pre-inception mission had to be considered a backstopping action of the Consultant. The Commission's letter of 10 December 1999 was meant to clarify this subject.

As regards the Ombudsman's question about the pre-inception phase, the Commission explained that this phase, a pre-commencement phase, although not foreseen in the Terms of Reference, was included upon the complainant's request. Therefore a ten-day period was added to the sixty-day inception period provided for in the Terms of Reference in order to allow the complainant more time to update the content of the project.

This proved necessary given, on the one hand, the relatively long time which elapsed between the preparation of the Terms of Reference and the launching of the project and, on the other, the complexity of the project that involved all the administrations. The inception period could last for a maximum of 60 days starting from the date of the signing of the contract. As a matter of fact, Article 7 of the Terms of Reference foresees " *that the draft Inception Report shall be submitted in 5 (five) copies no later than 60 (sixty) days after the signature of the contract* ". Indeed, by letter of 23 September 1999, the complainant suggested to OMSAR that a pre-inception period of ten days be added to this period, allowing for the identification of the changes in the circumstances, and, if possible, for the proposal of relevant actions aimed at improving the project's implementation strategy. The approval of this pre-inception phase was given by OMSAR in the letter of 30 September 1999. The pre-inception report was approved during a meeting that took place on 14 October 1999.

(3) As regards the third question, the Commission stated that it saw no contradiction between the two statements, but recognised that the subject is confusing and may be misleading. In its letter of 22 January 2003, the Commission informed the complainant that an invoice correction was necessary and that the unduly paid amounts would be reimbursed by way of a set-off in the next invoice, but its remarks referred exclusively to costs related to backstopping activities. In its second statement, the Commission intended to explain to the Ombudsman that, even though the members of the backstopping team have carried out short-term assignments, they were already remunerated as backstoppers and therefore could not receive other remuneration unless proper permission had been sought (Article 105 of the Special Conditions).

The status under which an expert performs a mission is not irrelevant. If the expert's assignment is considered a backstopping mission, no invoicing of fees is permitted. On the contrary, if the expert member of the backstopping supervisory team performs a mission as a short-term expert, remuneration for this mission is allowed. This different treatment is clearly mentioned in OMSAR's letter of 4 July 2000. Only upon previous authorisation could members of the backstopping supervisory team be used as short-term experts.

(4) As regards the fourth question, the Commission stated that the contract's execution took place at a time when the follow-up of operations was constrained by the limited number of staff employed at the Delegation. This lack of human resources accounted for a certain delay in



detecting payments unduly made for backstopping activities, for which the Commission already presented its regrets to the complainant in its opinion of 22 December 2004.

It was only as of January 2003, when the devolution process became fully operational, that the Delegation received a reinforcement of human resources and that these problems were detected. As soon as the Commission became aware of this situation, it addressed the disputed issue by letter of 22 January 2003. This took place during the contract's implementation period. In this regard, the Commission is mindful of the fact that, as provided for in Article 90.3 of the General Conditions applicable to the contract, payments effected before the contract's expiry date are interim payments, and do not have the character of final payments releasing the recipient from its obligation.

Although the time taken to detect the problems was admittedly long, the Commission reiterates its view that the fact that previous payments had been released could not be considered as a valid modification of the contractual terms. This could only have been made according to Article 105 of the Special Conditions by an addendum " *signed by the Consultant and the Contracting Authority and approved by the European Commission* ". The delay could not be claimed to regularise amounts unduly paid during contract execution, and did not entitle the complainant to consider that these sums were duly paid and could not be recovered by the Commission.

(5) As regards the fifth question, the Commission stated that its assessment on the quality of the services provided by the complainant was corroborated by the beneficiary of the technical assistance itself. Indeed, on 16 May 2002, OMSAR sent a letter to the Delegation in which it made the following critical remarks with regard to the complainant: professional incompetence of some experts, lack of dynamism and flexibility in the team, unresponsiveness by the project leader, insufficient co-ordination, and excess of bureaucracy.

As regards the complainant's argument that the contested assessment was not relevant to the issue, the complainant seems to disregard the fact that the decision either to continue the project through a second phase or to reorient the funds allocated to it could only be taken by the Commission in agreement with OMSAR. In this regard, it was the Commission's obligation to keep close contact with OMSAR in order to analyse and to remedy the specific problems encountered in the implementation of the project. This contested decision was thus made in accordance with requirements of sound administration.

(6) As regards the sixth question, the Commission stated that this point referred to the complainant's request for an extension of its contract.

Before addressing this question, the Commission wanted to make it clear that it falls under the Commission's discretionary power both to decide whether or not the contract award can proceed, and to approve the terms of the contract to be awarded through a negotiated procedure by the Contracting Authority. Given that the conditions proposed by the complainant were not acceptable, approval was not possible. This obliged the Commission to take the decision to reject the proposal for the negotiated procedure. The rejection was justified in the interests of good financial management and by the Commission's obligation to ensure that



Community funds are spent in accordance with the existing provisions.

As regards the question about the Commission's assessment of the fees proposed, these were indeed higher than in other contracts of the same nature signed within the project. The price revision presented increases ranging from 30% to 39%, including international transport, and would have implied fixing a daily amount of EUR 919 for fees of short-term international experts, including international transport. Contrary to the complainant's unsubstantiated opinion, this price revision implied a higher amount than those applicable to other similar contracts signed in the framework of the project. For confidentiality purposes and in order not to prejudice the commercial interests of the companies in question, the Commission will refrain from giving further details about these contracts. The Commission keeps however copies of such contracts which are at the Ombudsman's disposal, should he consider that an inspection of the file is required.

With regard to the quality of the CVs, the Commission reiterated the view it previously conveyed on 22 December 2004. From a table included as an annex to the Delegation's letter to the OMSAR of 15 April 2003, the Commission inferred that most of the proposed CVs did not match the requested profiles for the project in question. Only three out of ten profiles could be considered suitable. However, the rejection of these CVs for the project does not imply that the Team Leader or other proposed experts may never subsequently serve in other EU-funded projects.

(7) As regards the complainant's new allegation, the Commission stated that it could not agree with it. Discussions between the Delegation and the OMSAR on the project's second phase started on 18 July 2002 and were supposed to end by 30 September 2002. However, since it was not possible to obtain an acceptable work plan by the fixed deadline, the Commission showed utmost flexibility towards the complainant by extending the contract until March 2003. The company as well as OMSAR had therefore an extra six months to prepare the work plan.

Despite the fact that the Commission had submitted its comments on the rejected work plan, as well as some guidelines for the elaboration of this document as early as 4 November 2002, an acceptable work plan was provided only on 10 March 2003 and approved on 19 March 2003 with some comments.

As of 6 March 2003, the Delegation had organised a meeting with OMSAR and the complainant to clarify how the technical assistance contract could be extended. Despite an initial disagreement with OMSAR as to how to proceed in order to facilitate the continued involvement of the complainant after the expiry of the contract, the Commission showed utmost flexibility once again by changing its approach. Indeed, the Commission agreed with OMSAR that a new contract should be signed further to a negotiated procedure with the complainant, although it was of the opinion that it was more appropriate to modify the contract through an addendum.

As regards the fee adjustment, dialogue with the complainant was continuously assured by the Delegation. On 17 February 2003, the complainant sent a letter to the Delegation which was duly replied to on 26 February 2003. In reaction to this reply, the complainant sent a further



letter to the Delegation on 5 March 2003. On the other hand, various informal meetings were held between OMSAR, the complainant and the Delegation, in which the latter informed the complainant that, within limits, a certain degree of flexibility was possible. Indeed, one of these meetings took place on 24 February 2003. Its minutes, which were duly forwarded to the complainant's team leader by e-mail, clearly stated that the possible increase would amount to 10%.

Consequently, if negotiations failed, this was due to the company's reluctance to take into consideration the Delegation's guidelines. It was the Commission's obligation to propose and decide on the financing and implementation of the project's second phase, in line with good financial management and in accordance with the relevant existing provisions. The Commission had an obligation to ensure that Community funds were spent in accordance with the requirements of sound administration and it had the legitimate right to reject the financial conditions demanded by the complainant.

The complainant's additional observations

(1) As regards the Commission's reply to the Ombudsman's first question, the complainant observed that the Commission's comment did not address the basic problem raised by the Ombudsman. The complainant suggested that the Delegation "verified and endorsed our invoices". The complainant merely invoiced for travel and per diem costs in the case of backstopping missions, and over a three-year period the Delegation had decided to pay these invoices without any reservation. The Ombudsman's question therefore remains to be answered by the Commission.

(2) As regards the Commission's reply to the Ombudsman's second question, the complainant, unlike the Commission, considered the letters of 30 September 1999 (from OMSAR) and of 10 December 1999 (from the Delegation) to be quite consistent, and concluded that, therefore, only the non-fee components of backstopping activities, that is, travel and per diem, would qualify for payment.

(3) As regards the Commission's reply to the Ombudsman's third question, the complainant concurred with the Commission's qualification of its handling of short-term inputs by members of the backstopping team as "confusing" and "misleading".

(4) As regards the Commission's reply to the Ombudsman's fourth question, the complainant noted that it could not but agree with the statement that the supervision and management of the project by the Delegation was hindered by a lack of resources. There was, on the Commission's side, a noticeable absence of professional guidance on serious issues while there was an excess of unpredictable interventions that seemed to be governed by moods and personalities only.

(5) As regards the Commission's reply to the Ombudsman's fifth question, the complainant stated that it was aware of the letter of 16 May 2002 from OMSAR to the Delegation and might agree that some of the experts were sometimes insufficiently dynamic and flexible to address the daily challenges. The complainant observed, however, that virtually all experts who worked on this project had a positive record before they joined it and have successfully worked on



subsequent projects, including EC-funded ones. More specifically, some of the very same experts who had been proposed by the complainant were subsequently hired through direct arrangements, supported by both OMSAR and the Delegation, to execute the work that they were previously requested to do on behalf of the complainant.

(6) As regards the Commission's reply to the Ombudsman's sixth question, the complainant observed that the fees paid during the first phase of the project were substantially lower than the fees paid in a number of other EC-funded projects in the country. The complainant stated that it was misleading to state that the proposed increases would come to 30% or 38%. The proposed increase of fee levels, calculated after careful and protracted discussions with OMSAR, were 26% and 28% for international experts and 30% for national experts. This should be judged in the context of the very low fee level at the start of the project in 1999 and the fact that this increase would apply over a seven-year period.

The complainant also stated that the rating of the CVs of proposed experts presented by the Commission (which had never been shown to the complainant), was biased and factually wrong. The Delegation did not take a fair and professional look at the proposed team of experts. Moreover, no opportunity had ever been given to discuss, review and, if really appropriate, replace proposed experts.

(7) As regards the Commission's opinion on the new allegation, the complainant stated that it took the Commission half a year to respond to the initial draft. It was submitted in early July 2002 and minor comments were received by late November 2002, after much urging by the consortium and OMSAR. The second draft was submitted in December 2002 and no serious comments were ever received. However, a number of new directives and suggestions were made by the Delegation staff, and after some time, changed again.

The work plan was prepared in close and continued co-operation with OMSAR and the final version was a fully joint product, reflecting the views and commitment of OMSAR itself.

It is true that a number of informal meetings were held in the context of preparing the new work plan in which Commission staff made wide-ranging suggestions on the extent of a possible or allowable increase of fees, but in the end it was explicitly decided by the Commission that OMSAR and the Consortium should resolve this issue and come to a mutually agreeable approach. In this regard, a Committee was appointed by OMSAR to look into this matter and to present a reasonable and practical proposal. The Commission indicated that such a joint proposal would be likely to be accepted. In the end, this Committee produced conclusions (increases between 20% and 28% for international experts and 30% for local experts) that were acceptable to both parties, namely, OMSAR and the Consortium. When these conclusions were presented to the Commission, the Delegation rejected them. This throws a strange light on the Commission's decision to establish this arrangement at all and again suggests that the Commission was not seriously committed to reaching a constructive solution.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A



FRIENDLY SOLUTION

The Ombudsman's proposal for a friendly solution

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman was not satisfied that the Commission has responded adequately to the complainant's first allegation.

This view was based on the following considerations:

1 Preliminary remarks concerning the two-year time limit and the scope of the inquiry

1.1 The complainant is a company of management consultants, which, in a consortium formed together with another company, was a contractor in the implementation of a Commission's development project in a third country. According to the complainant, the contract for the Project Monitoring Consultancy ("PMC"), which was signed in August/September 1999, was unfairly operated by the Commission Delegation in the country of the project ("the Delegation"). In its complaint to the European Ombudsman, the complainant made four allegations and sub-allegations. In his reply of 12 October 2004, the Ombudsman informed the complainant that, with the exception of allegations 2(i) and 4(iii), he was not entitled, by reason of Article 2(4) of his Statute, to deal with the complaint. This provision provides that "*a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint*".

1.2 In its letters of 3 December 2004, 26 February 2005 and 22 June 2005, the complainant suggested that the Ombudsman consider revising the above-mentioned two-year time-limit, provided for in Article 2(4) of his Statute.

1.3 In a letter of 22 November 2005, the Ombudsman informed the complainant that, in his speech to the European Parliament of 27 October 2005, delivered on the occasion of the presentation of his Annual Report for 2004, he had pointed out that he intended to revisit the question of the Ombudsman's Statute. The Ombudsman added that the complainant's suggestion would be taken into account in that context.

1.4 The Ombudsman notes that, in its observations, the complainant suggested that the Ombudsman should ask for the opinion of the Minister of State for Administrative Reform ("OMSAR"). In this regard, the Ombudsman would like to point out that the information contained in the complaint and in the Commission's opinion, as well as the information obtained as a result of his further inquiries, appear to be sufficient for him to arrive at a fair and balanced assessment of the complaint. The Ombudsman would moreover like to emphasise that Article 3(3) of the Ombudsman's Statute foresees the possibility for the Ombudsman to request information from the authorities of the Member States only and not from those of third countries.

1.5 Considering that the complainant's allegations concern a contractual dispute, it is useful to recall that, according to Article 195 of the EC Treaty, the Ombudsman is empowered to receive complaints "*concerning instances of maladministration in the activities of the Community institutions or bodies*". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it (6). Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by



the institutions or bodies of the Communities is concerned.

1.6 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. In particular, the Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

1.7 The Ombudsman therefore takes the view that, in cases concerning contractual disputes, he is justified in limiting his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction. In the present case, Articles 50 and 51 of the General Conditions applicable to the contract foresee, respectively, a friendly solution of disputes and, in case no friendly solution is possible, a contentious remedy according to the Conciliation and Arbitrage Regulation of the International Chamber of Commerce of Paris or according to local legislation.

2 The allegedly unjustified recovery and the claim for reimbursement

2.1 The complainant alleges that there has been an unfair interpretation of the contract. More particularly, the complainant alleges that the Commission's decision of 22 January 2003 to recover the amount of EUR 29 306.65 representing per diem and ticket costs for the home office support team, invoiced by the consortium over the years, is unjustified. The complainant claims reimbursement of this sum. To support its allegation, the complainant referred to a letter of 30 September 1999 of OMSAR stating that it had reached an agreement with the Delegation on a number of issues, one of them being the home office support. The letter, copied to the Delegation, provided that: "*Mr [X] [the complainant's Managing Director], Mr [P] and Mr [B] are considered as Head Office backstopping team, and accordingly they are entitled only for [sic] the air ticket and per diem fees*" (complainant's emphasis). The complainant also referred to a letter of the Head of Delegation of 10 December 1999 that, in its view, supported its position.

2.2 In its opinion, the Commission stated that, upon verification of an invoice covering the period July-September 2002, which it received from the complainant on 28 October 2002, the Delegation observed that costs for backstopping activities had been included under the heading "Remuneration of Staff". Given that such costs were not foreseen in the contractual provisions, the Delegation verified previous payments dating back to August 2000 and covering services provided between 30 September 1999 and 30 June 2002. As a consequence of this verification, the Delegation realised that a total amount of EUR 29 306.65 had been unduly paid to the complainant. The Delegation informed the complainant that backstopping was considered to be part of the contractor's overheads, and that, therefore, fees and related expenditure should not have been invoiced. The Delegation thus informed the complainant that an invoice correction was necessary and that the unduly paid amount would be recovered by deducting it from the company's next invoice. The Commission also referred to Article 90.3 of the General Conditions



applicable to the present contract, according to which " *the payment of interim payments does not have the character of final payment releasing the recipient from his obligation* ". It further stated that the fact that previous payments had been authorised without detecting irregularities could not be considered as a valid modification of contractual terms. As regards the complainant's argument that its legitimate expectations had not been respected, the Commission observed that a person may only plead a breach of that principle when the administration has given him "precise assurances". In the present case, however, the complainant had provided no evidence proving that the Delegation endorsed an agreement whereby costs related to backstopping activities were to be reimbursed. The Commission was of the view that it had sufficient legal grounds to claim reimbursement of EUR 29 306.65. The Commission however acknowledged that there had been a certain delay in detecting the irregularity of payments made for backstopping activities and, for that reason, it expressed its regrets to the complainant.

2.3 In its observations, the complainant recalled that a copy of the letter of 30 September 1999 from OMSAR had been at the Delegation's disposal for more than five years. In this letter, OMSAR brought to the complainant's attention a number of issues that had been discussed and agreed with the Delegation, including the costs of the backstopping team. The complainant also stated that the Delegation had in its possession supporting documents for each and every backstopping mission, all carrying the legitimate signatures of OMSAR and the formal endorsement by the Delegation itself. These demonstrated that the consortium adhered to the relevant rules laid down by OMSAR and the Delegation, and hence merely invoiced travel and per diem costs for backstopping, and never any fees.

2.4 In reply to the Ombudsman's request for further information and with regard to the first question concerning the endorsement of invoices, the Commission pointed out that the complainant's statement, according to which attendance sheets of backstopping missions attached to invoices were formally endorsed by the Delegation, was not accurate. The supporting documents transmitted by OMSAR to the Delegation only carried the signatures of OMSAR's representatives. It is not standard practice for the Delegation to endorse invoices and supporting documents and this was not done in the present case either.

With regard to the Ombudsman's second question, the Commission stated that it did not consider the Delegation's letter of 10 December 1999 to be inconsistent with OMSAR's letter of 30 September 1999 and expressed the view that both letters contest the invoicing and payment of fees for backstopping activities. Mr B. and Mr C. had had a meeting with the Commission's Head of Delegation about this subject and were duly informed that their pre-inception mission had to be considered a backstopping action of the Consultant. The Commission's letter of 10 December 1999 was meant to clarify this subject. The Commission also explained that, although not foreseen in the Terms of Reference, the pre-inception phase, that is, a pre-commencement phase, was included upon the complainant's request. Therefore a ten-day period was added to the sixty-day inception period provided for in the Terms of Reference in order to allow the complainant more time to update the content of the project. The approval of this pre-inception phase was given by OMSAR in the letter of 30 September 1999 and the pre-inception report was approved during a meeting that took place on 14 October 1999.



In reply to the Ombudsman's third question, the Commission stated that it saw no contradiction between the statements made, on the one hand, in its letter of 22 January 2003 and, on the other hand, in its opinion. In its letter of 22 January 2003, the Commission informed the complainant that an invoice correction was necessary and that the unduly paid amounts would be reimbursed by set-off with the next invoice, but it exclusively referred to costs related to backstopping activities. In its opinion, the Commission explained to the Ombudsman that, even though the members of the backstopping team had carried out short-term assignments, they were already remunerated as backstoppers and therefore could not receive other remuneration unless proper permission had been sought (Article 105 of the Special Conditions). The status under which an expert performs a mission is not irrelevant. If the expert's assignment is considered a backstopping mission, no invoicing of fees is permitted. On the contrary, if the expert member of the backstopping supervisory team performs a mission as a short-term expert, remuneration for this mission is allowed. This different treatment is clearly mentioned in OMSAR's letter of 4 July 2000. Only upon previous authorisation could members of the backstopping supervisory team be used as short-term experts.

In reply to the Ombudsman's fourth question, the Commission stated that the contract's execution took place at a time when the follow-up of operations was constrained by the limited number of staff employed at the Delegation. This lack of human resources explained a certain delay in detecting payments unduly made for backstopping activities, for which the Commission already presented its regrets to the complainant in its opinion of 22 December 2004. It was only as of January 2003, when the devolution process became fully operational, that the Delegation received a reinforcement of human resources and these problems were detected. As soon as the Commission became aware of the situation, it addressed the disputed issue by letter of 22 January 2003. Although the time taken to detect the problems was admittedly long, the Commission reiterated that the delay could not be claimed to have legitimated the amounts unduly paid during contract execution, and did not entitle the complainant to consider that these sums were duly paid and could not be recovered by the Commission.

2.5 In its additional observations, the complainant stated that the Commission had not answered the first question of the Ombudsman. As regards the second question, the complainant, unlike the Commission, considered the letters of 30 September 1999 (from the OMSAR) and of 10 December 1999 (from the Delegation) to be quite consistent, and concluded that, as a result, only the non-fee components of backstopping activities, that is, travel and per diem, would qualify for payment. As regards the Commission's reply to the Ombudsman's third question, the complainant concurred with the Commission's qualification of its handling of short-term inputs by members of the backstopping team as "confusing" and "misleading". As regards the Commission's reply to the Ombudsman's fourth question, the complainant noted that it could not but agree with the statement that the supervision and management of the project by the Delegation was hindered by a lack of resources. There was, on the Commission's side, a noticeable absence of professional guidance on serious issues while there was an excess of unpredictable interventions that seemed to be governed by moods and personalities only.



2.6 In order to deal with the complainant's allegation, the Ombudsman has to determine (i) whether, on the basis of the contract, the complainant was entitled to the payment of EUR 29 306.65 for the per diem and ticket costs for the home office support (or "backstopping" (7)) team, and (ii) whether the Commission's decision to recover the amount was fair.

The question whether, on the basis of the contract, the complainant was entitled to the payment of EUR 29 306.65

2.7 As regards the first question, that is, whether the complainant was entitled to the payment of the costs for the home office support team, the Ombudsman notes that the provisions applicable to the project are contained in (i) the letter of Contract (the contracting parties being the complainant and OMSAR) (8) ; (ii) the General Conditions for Service Contracts financed by the European Community in the Mediterranean Countries and Territories (the "General Conditions"); (iii) the "Special Conditions"; and (iv) the "Terms of Reference". As regards the financial aspect of the project, the Special Conditions contain an Annex D entitled 'Schedule of Fees and Expenses (Financial Proposal of [the complainant])'.

2.8 The Ombudsman notes that neither the General Conditions (namely, Chapter VI "Payments") nor the Special Conditions contain provisions specific to the costs of the home office support team. Nor does the complainant's own Financial Proposal (9) , which contains an overview of the price breakdown (10) , envisage that the costs of the home office support team should be reimbursable. The Ombudsman in fact notes that Point I.1.5 of the complainant's Financial Proposal clearly mentions under " *Excluded costs: (...) office supporting staff* ". The only document which contains an explicit reference to the home office support team is the complainant's Technical Proposal (11) , namely, its point 7.3 'Support from Head Office'. However, this document does not refer to costs of the home office support team, but only describes the principles applied by the complainant in all its projects.

2.9 The Ombudsman concludes from the above that, on the basis of the contractual and other provisions applicable to the project, the complainant was not entitled, under the Contract, to the reimbursement of the per diem and ticket costs of the home office support.

The question whether the Commission's decision to recover the amount of EUR 29 306.65 was fair

2.10 The Ombudsman has therefore to analyse whether the Commission's decision to recover the amount of EUR 29 306.65 was fair. It is important in this context to analyse the relevant documents, other than the contract, namely, (i) OMSAR's letter of 30 September 1999 to the complainant, which was copied to the Head of Delegation, and (ii) the Head of Delegation's letter of 10 December 1999 to the complainant:

OMSAR's letter of 30 September 1999 to the complainant informed the latter that the contract had been endorsed by the Head of Delegation and invited it to proceed with the pre-inception phase. The letter further stated that

" (...) However, I would like to bring to your attention the following issues that were discussed and agreed to [sic] with the EU Delegation: (...)

2. Fees of the Head Office backstopping team for the Pre-inception Phase :



Mr X. [the complainant's Managing Director], Mr [P] and Mr [B] are considered as Head Office backstopping team, and accordingly they are entitled only for [sic] the air ticket and per diem fees . The rate of the per diem should be at maximum equivalent to the rate adopted by the UNDP. (...) " (emphasis added).

The letter of the Head of Delegation of 10 December 1999 to the complainant stated that:

" [w]e remind you that the backstopping services that you have offered with our present contract are included in your overall overhead fees. Consequently, in case you want to use members of the Back-Stopping Supervisory Team as short-term experts, your proposal will have to be previously and formally approved by the contracting authority after previous information to the Commission.

As already discussed during the latest visit of Mr [B] and Mr [C] in my office, the pre-inception mission of [the complainant's Managing Director] and Mr [B] has to be considered as a back-stopping action of [the complainant] and no invoice of fees will be allowed (...) " (emphasis added).

2.11 It appears therefore from the above that a distinction needs to be made between the pre-inception period, on the one hand, and the remainder of the contract period, on the other hand.

(i) As regards the pre-inception period

2.12 As regards the pre-inception period, the following comments should be made. First, the Ombudsman notes that a "pre-inception phase" is not foreseen in the Terms of Reference, which only refer to the inception phase. However, the Commission explained in its reply to the Ombudsman's request for further information that the pre-inception phase was a ten-day pre-commencement phase which was included upon the complainant's request of 23 September 1999, and that this phase was added to the sixty-day inception period. According to Article 7.1 of the Terms of Reference, the draft inception report was to be submitted no later than 60 days after the signing of the contract (which, in effect, was signed on 30 September 1999). Given that the Commission referred to a "pre-commencement phase", one might assume that the pre-inception phase relates to the ten days preceding the signing of the contract. However, the complainant's letter of 23 September 1999 to OMSAR referred to the period from 27 September to 6 October 1999 as constituting the pre-inception phase. On the other hand, in its letter of 30 September 1999 to the complainant, OMSAR stated that the contract had been signed and that " *[a]ccordingly, you are invited to proceed with the pre-inception phase* ". From this letter it would appear that the pre-inception phase was a period of ten days at the very beginning of the contract, although it is not clear whether this period covered exactly the first ten days (30 September to 9 October 1999) of the contract. It is however clear that the pre-inception phase had ceased by 14 October 1999, as the Commission stated in its reply that the pre-inception report had been approved on that day.

2.13 The parties agree that no fees were eligible as regards the services of the backstopping team, either during the pre-inception period or during the rest of the duration of the contract. It



thus remains to be examined whether the same holds true as regards the per diems and travel expenses of the home office support team relating to the pre-inception phase. The Ombudsman notes that OMSAR's letter of 30 September 1999 explicitly stated that, as agreed with the Delegation, the home office support team is entitled " *to the air ticket and per diem fees* " during the pre-inception period. The Delegation received a copy of the letter and must therefore be presumed to have been aware of its contents. It would therefore be logical to assume that the Delegation would have corrected OMSAR on this point, had it considered that the latter had misrepresented the results of its discussions with the Delegation concerning this issue. The Ombudsman notes, however, that the Delegation did not, in its letter of 10 December 1999, make any such correction but merely pointed out that *no* invoice of *fees* would be allowed for the pre-inception mission. In view of the above, it appears that both the OMSAR and the Delegation accepted that the complainant should be entitled to per diems and the reimbursement of travel costs as regards missions of the backstopping team during the pre-inception period. The Ombudsman notes that the Commission has argued that the delay in detecting payments unduly made for backstopping activities was due to a lack of human resources at its Delegation. However, since the Delegation had, as its letter of 10 December 1999 shows, looked into the issue, the Ombudsman considers that the said argument cannot explain the Delegation's behaviour.

2.14 The Ombudsman notes that the information that has been provided to him does not allow him to ascertain how many missions of the backstopping team took place during the pre-inception period. As a result, the Ombudsman is also unable to ascertain the exact amount of travel expenses and per diems in relation to these missions. What is clear, however, is that such missions did take place. The Ombudsman notes that OMSAR's letter to the Commission of 4 July 2000 mentions at least one mission during the pre-inception period by a member of the backstopping team, namely, Mr B. (mission from 2 to 17 October 1999).

2.15 On the basis of the above, the Ombudsman arrives at the conclusion that the Commission has not provided him with a coherent and reasonable account for the legal basis for its decision as regards the recovery of amounts that had been paid by it for travel expenses and per diems in relation to missions of the backstopping team during the ten-day pre-inception period. The Ombudsman's provisional conclusion is thus that the Commission's decision to recover these amounts could constitute an instance of maladministration. He will therefore make a proposal for a friendly solution concerning this aspect of the case.

(ii) As regards the remainder of the contract period

2.16 As regards the remainder of the contract period following the pre-inception phase, the Ombudsman notes that the Delegation's letter of 10 December 1999 stated that members of the backstopping team could be used as short-term experts, on condition that (i) the proposal had been previously and formally approved by the contracting authority, that is, OMSAR, and (ii) the Commission had been previously informed. In its opinion, the Commission repeated that, during the first six months of the project, that is, from 30 September 1999 until 31 March 2000, experts from the backstopping team were authorised to carry out short-term missions and were fully remunerated for them.

2.17 On the basis of evidence in the file, the Ombudsman comes to the following conclusions:



The only document in the file that shows that a mission of a member of the backstopping team as a short-term expert was approved by OMSAR was OMSAR's letter of 4 July 2000 to the Delegation. This letter refers to the mission of a Mr B. from the backstopping team as a short-term expert, from 27 November to 14 December 1999. The letter indicates that the mission was approved by OMSAR on 6 December 1999. However, there is no document in the file which would prove that the Commission was informed accordingly before the mission took place. The said letter of 4 July 2000 itself was sent six months after the mission had been approved by OMSAR. The Ombudsman has not found any other documents in the file that state that the missions of backstoppers as short-term experts had been approved by OMSAR and previously communicated to the Delegation. In its observations, the complainant referred to a formal endorsement of the invoices by the Delegation. However, the Commission stated in its reply that there had been no general practice to endorse the invoices and that this had not been done in the present case either. In this regard, the Ombudsman notes that Article 100 of the Special Conditions ("*Procedure for Payment*") did indeed not foresee an endorsement of the invoices by the Delegation, but stated that the payment documents had to be submitted to OMSAR, and "for information" to the Delegation. Therefore, on the basis of the above considerations, it appears that it could not be established that the complainant was entitled to the reimbursement for the services of the backstoppers in their capacity as short-term experts in the period following the pre-inception period.

2.18 On the basis of the above, the Ombudsman concludes that the Commission has provided a coherent and reasonable account of the legal basis for its position that the complainant was not entitled to any travel expenses or per diems in relation to missions of the backstopping team that took place after the pre-inception period.

2.19 However, the Ombudsman nevertheless needs to verify whether the Commission's decision to recover the corresponding amount (i) respected the complainant's legitimate expectations and (ii) was fair. The Ombudsman notes that the Commission's recovery decision concerns payments that had been made over a period of more than two and a half years and that this decision was taken more than three years after the first of these payments had been made.

2.20 As regards legitimate expectations, the Ombudsman notes that, even though it made no explicit reference to the principle of legitimate expectations, the complainant's main argument in claiming reimbursement of the sum can be considered as such. In this regard, the complainant argued that it had presented the said invoices for three and a half years, and had always been paid during that period by the Commission. In this regard, the Ombudsman notes that "*the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain justified expectations*" (12). In the present case, the Ombudsman notes that the complainant has not produced any document or other element on the basis of which it could have reasonably established justified expectations from the Delegation that the costs of the backstopping team after the pre-inception period were reimbursable. The Ombudsman found no such document in the file either. Furthermore, the Ombudsman is of the view that the mere fact that the invoices were paid cannot, in itself, give rise to legitimate expectations. On the basis of



the above, the Ombudsman considers that the principle of the protection of legitimate expectations has not been infringed by the Commission with regard to the period after the pre-inception phase.

2.21 Finally, the Ombudsman has to analyse whether the fact that the Commission decided to recover the amount concerned three years after the first invoices were submitted and paid constitutes unfairness. In this regard, the Ombudsman notes that a period of three years to detect that payments were unduly made is indeed a long period. However, and as mentioned before, there was clearly no contractual basis for these payments. The Commission has submitted that the fact that the relevant invoices were paid could not be considered as a valid modification of the contractual terms and that such a modification would, in accordance with Article 105 of the Special Conditions, have required an addendum "*signed by the Consultant and the Contracting Authority and approved by the European Commission*". The Ombudsman considers this argument convincing. It should further be noted that, in his letter of 10 December 1999, the Head of the Delegation clearly set out the conditions that had to be fulfilled if payments were nevertheless to be made in relation to missions of the backstopping team after the pre-inception phase. As mentioned above, the complainant has not established that these conditions were complied with in the present case. On the basis of these considerations, the Ombudsman considers that the fact that three years lapsed before the Commission decided to recover the relevant sums is not sufficient to establish the complainant's allegation that the Commission acted unfairly as regards the period after the pre-inception phase. Besides, the Ombudsman notes that the complainant had benefited from the sums unduly paid and that the Commission refrained from claiming interest on the sums it recovered.

3 The alleged indecisiveness and unresponsiveness with regard to the plan for a second phase of the project

3.1 The complainant alleged that the Commission showed indecisiveness and unresponsiveness with regard to the plan which the consortium submitted in June and December 2002 and again in March 2003 for a second phase of the project.

More particularly, the complainant pointed out that the plan was first submitted in June 2002, but that a period of complete silence by the Delegation followed. A statement suggesting some minor changes was issued by the Delegation in November 2002 but only after the consortium had exerted pressure on the Delegation. These changes were implemented and a revised plan was submitted in early December 2002. Again, a period of complete silence followed. According to the complainant, pressure had to be exerted once again on the Delegation to provide guidance on the scope of a second phase. As on the first occasion, there was only minor feedback. A third proposal, which included a budget, was prepared in March 2003, addressing all points made by the Delegation, but after considerable additional delay, it was simply rejected by the Delegation since it did not comply with available budgetary means.

3.2 In its opinion, the Commission described the various steps in the assessment of the complainant's plan for a second phase of the project. The Commission stated that three successive proposals of the Framework for Future Intervention (the "FFAI") were submitted to it by OMSAR. The dates mentioned by the complainant did not coincide exactly with those held by the Commission. It was only on 18 July 2002, that OMSAR, with the help of the PMC,



produced a provisional document of the FFAI, which, however, showed some weaknesses. On 4 November 2002, the Commission submitted its comments on the proposal for the FFAI. It was not until 6 February 2003, and not in early December 2002 as the complainant stated, that OMSAR provided the Commission with an updated version of the plan. In a meeting held on 24 February 2003, the Delegation informed both OMSAR and the PMC of its opinion on the new plan. On 10 March 2003, OMSAR again sent a new version of the plan, which was finally approved on 19 March 2003 with some comments.

Although the decision-taking process admittedly had been long, the Commission stated that several factors explained the delays, which in any case were not exclusively attributable to the Commission. The Commission did not remain passive but rather did its best to guarantee the continuation of the project. Much of the time that elapsed until the final approval of the FFAI could have been saved if the requested document had from the outset fulfilled the expected quality requirements.

The Commission further acknowledged that there was some divergence of opinion between itself and OMSAR as to how to proceed in trying to allow for the complainant's ongoing involvement after the expiry of the contract on 31 March 2003. Whereas OMSAR envisaged signing a new contract according to the negotiated procedure, the Delegation considered it more appropriate to modify the contract through an addendum. However, due to time constraints, the Delegation changed its approach and by letter of 26 March 2003 informed OMSAR about the possibility of a negotiated procedure with the consortium. After the proposal's assessment, on 15 April 2003, the Delegation informed OMSAR that it could not, for several reasons, submit the proposal to the Commission's Headquarters for approval. The Delegation referred to the Circular of 8 January 2003 issued by the Commission's Directorate-General for Budget concerning price revision.

The Commission concluded that, after the reassessment of the file, it was clear that the delays attributable to it were justified. The initial decision to reject the proposal for the negotiated procedure had been justified on the grounds of good financial management.

3.3 In its observations, the complainant stated that the Commission's opinion in itself provided ample proof of delays. For instance, references were made in the Commission's opinion to the fact that the Delegation took indeed no less than four months before finally providing comments on the first proposal for the FFAI. An impartial observer could hardly conclude anything other than that the decision making on the extension of the project was confused and riddled with diverging suggestions and false expectations.

In its observations, the complainant also stated that the contextualisation of the Commission's opinion, namely, the reference to the allegedly low quality of the technical assistance services provided by the complainant, was arbitrary and not relevant to the issue. The complainant also stated that it was not true that the fees proposed were "*much higher than in other contracts of the same nature*". The complainant also stated that the Commission's opinion that the proposed CVs were substandard was also inaccurate.



3.4 In reply to the Ombudsman's fifth question of the further inquiries concerning the Commission's reference to the allegedly low quality of the technical assistance services provided by the complainant, the Commission stated that its assessment of the quality of the services provided by the complainant was corroborated by the beneficiary of the technical assistance itself. Indeed, on 16 May 2002, OMSAR had addressed a letter to the Delegation in which it made the following critical remarks with regard to the complainant: professional incompetence of some experts, lack of dynamism and flexibility in the team, unresponsiveness by the project leader, insufficient co-ordination and excessive bureaucracy.

In reply to the Ombudsman's sixth question concerning the level of the fees proposed in comparison with other contracts, the Commission stated that the fees proposed were indeed higher than in other contracts of the same nature signed within the project. The price revision presented increases ranging from 30% to 39%, including international transport, and would have implied fixing a daily amount of EUR 919 for fees of short-term international experts, including international transport. Contrary to the complainant's unsubstantiated views, this price revision implied a higher amount than those applicable to other similar contracts signed in the framework of the project. For confidentiality purposes and in order not to prejudice the commercial interests of the companies in question, the Commission noted that it would refrain from giving further details about these contracts. The Commission however stressed that it kept copies of such contracts which were at the Ombudsman's disposal, should he consider that an inspection of the file is required. With regard to the quality of the CVs, the Commission reiterated the view it had expressed in its opinion of 22 December 2004. From a table included as an annex to the Delegation's letter to OMSAR of 15 April 2003, the Commission inferred that most of the proposed CVs did not match the requested profiles for the project in question. Only three out of ten profiles could be considered suitable.

3.5 In its additional observations, the complainant stated, with regard to the Commission's reply to the Ombudsman's fifth question, that it was aware of the letter from OMSAR to the Delegation of 16 May 2002 and might agree that some of the experts were sometimes insufficiently dynamic and flexible to address the daily challenges. However, virtually all experts who worked in this project had a positive record before they joined this project and have subsequently again successfully worked in other projects, including EC-funded ones.

As regards the Commission's reply to the Ombudsman's sixth question, the complainant observed that the fees paid during the first phase of the project were substantially lower than the fees paid in a number of other EC-funded projects in the country. The complainant stated that it was misleading to state that the proposed increases would come to 30% or 38%. The proposed increase of fee levels, after careful and protracted discussions with the OMSAR, was between 26% and 28% for international experts and 30% for national experts. This should be judged in the context of the very low fee level at the start of the project in 1999 and the fact that this increase would apply over a seven-year period. The complainant also stated that the rating of the CVs of proposed experts presented by the Commission, which has never been shown to the complainant, was biased and factually wrong.

3.6 The Ombudsman notes that the plan for a second phase of the project was entitled



"Framework for Future Intervention". The different proposals for the second phase were submitted by OMSAR. From the documents in the file, it appears that the chronology of the proposals submitted by OMSAR and of the Commission's reactions was as follows:

On 18 July 2002, OMSAR sent a letter to the Head of Delegation enclosing a document entitled 'General Framework for the Future Interventions', which contained OMSAR's priorities for the coming years. On 4 November 2002, the Delegation replied with detailed comments to OMSAR's letter of 18 July 2002. The Delegation stated that the document had to be carefully revised by the parties involved. On 6 February 2003, OMSAR submitted to the Delegation the "*OMSAR project for the (...) phase II Global Work Plan (2003-2005)*" (13) which had been prepared jointly with the complainant and which took into account the comments made by the Delegation in its letter of 4 November 2002. On 24 February 2003, a meeting was held between the Delegation, OMSAR and staff from the complainant, in which the Delegation expressed its views on the proposal. Another meeting was held on 6 March 2003. Further to these meetings, on 10 March 2003, OMSAR sent to the Delegation a modified version of the Global Work Plan (2003-2005). By letter of 19 March 2003 to OMSAR, the Delegation approved the Global Work Plan (2003-2005), subject to certain remarks. By letter of 26 March 2003, the Delegation invited OMSAR to pursue its discussions with the complainant on human resources and financial aspects, and to send a full contract dossier. By letter of 4 April 2003, OMSAR submitted to the Delegation the negotiation report and the contract dossier. By letter of 15 April 2003, the Delegation made detailed comments on the proposal and stated that it could not submit the proposal to Headquarters in Brussels for approval.

3.7 It appears from the above chronology that, with the exception of the period between 18 July and 4 November 2002 where there was no reaction on the proposal, the Commission has not been indecisive or unresponsive to the several proposals submitted. With regard to the period between 18 July and 4 November 2002, the Ombudsman would, first, like to point out that the proposal submitted by OMSAR on 18 July 2002 was, according to its own terms, "*a provisional document that needs to be reviewed more carefully by all the stakeholders including [OMSAR itself]*". It appears that, by the end of September 2002, that is, the deadline indicated by the Commission in its opinion for the second phase of the programme, the Commission had indeed not reacted to that proposal, but instead had decided to finance the extension of the existing contract for another six months, that is, from 30 September 2002 until 31 March 2003 (14). The Commission's reaction to the initial proposal came on 4 November 2002. After the submission of the second proposal by OMSAR, on 6 February 2003, it appears that the Delegation responded in substance to the proposals submitted. The different letters sent by the Delegation to OMSAR, in particular those of 4 November 2002 and 15 April 2003, contained detailed evaluations of the proposals.

3.8 On the basis of the above, the Ombudsman concludes that there has not been indecisiveness or unresponsiveness on behalf of the Commission. Since the other arguments presented by the complainant in its observations do not have a direct relevance for the complainant's allegation, the Ombudsman does not consider it necessary to further analyse them.



3.9 On the basis of the above considerations, the Ombudsman finds no instance of maladministration by the Commission with regard to these aspects of the case.

4 The allegation that the proposal was rejected in an arbitrary manner and without providing an opportunity to be heard

4.1 In its observations, the complainant made a new allegation, namely, that the proposal for a second phase of the project was simply rejected, without affording any opportunity to OMSAR or the complainant to be heard. In that context, the complainant also alleged arbitrariness on the grounds that it was invited by the Delegation to make, jointly with OMSAR, proposals concerning the budget parameters, but that the joint proposal was then rejected by the very Delegation that had proposed this arrangement.

4.2 In its additional opinion, the Commission stated that it could not agree with the complainant's allegations. Discussions between the Delegation and OMSAR on the project's second phase started on 18 July 2002 and were supposed to end by 30 September 2002. However, since it was not possible to obtain an acceptable work plan by the fixed deadline, the Commission showed utmost flexibility towards the complainant by extending the contract until March 2003. The complainant as well as OMSAR had therefore an extra six months to prepare the work plan. Despite the fact that the Commission had, as early as 4 November 2002, submitted its comments on the rejected work plan, as well as some guidelines for the elaboration of this document, an acceptable work plan was only provided on 10 March 2003 and approved on 19 March 2003 with some comments. On 6 March 2003, the Delegation organised a meeting with OMSAR and the complainant to clarify how the technical assistance contract could be extended. Despite the initial divergence of views between OMSAR and the complainant as to how to proceed with an eye to allowing the ongoing involvement of the complainant after the expiry of the contract, the Commission showed utmost flexibility once again by changing its approach. Indeed, the Commission agreed with OMSAR that a new contract should be signed further to a negotiated procedure with the complainant, although the Commission was of the opinion that it was more appropriate to modify the contract through an addendum.

As regards the fee adjustment, dialogue with the complainant was continuously assured by the Delegation. On 17 February 2003, the complainant sent a letter to the Delegation which was duly replied to on 26 February 2003. In reaction to this reply, the complainant sent a further letter to the Delegation on 5 March 2003. In addition, various informal meetings were held between OMSAR, the complainant and the Delegation, in which the latter informed the complainant that some flexibility was possible, albeit within certain limits. Indeed, one of these meetings took place on 24 February 2003, the minutes of which clearly stated that the possible increase would amount to 10%. These minutes were duly sent to the complainant's team leader by e-mail. Consequently, if negotiations failed it was due to the complainant's reluctance to take into consideration the Delegation's guidelines.

4.3 In its additional observations, the complainant stated that it took the Commission half a year to respond to the initial draft, which was submitted in early July 2002, while minor comments were received by late November 2002 after much urging by the consortium and OMSAR. The second draft was submitted in December 2002 and no serious comments were ever received.



However, a number of new directives and suggestions were made by the Delegation staff, and after some time, were changed again. It was true that a number of informal meetings were held in the context of preparing the new work plan in which Commission staff made wide-ranging suggestions on the extent of a possible or allowable increase of fees, but in the end it was explicitly decided by the Commission that OMSAR and the Consortium should resolve this issue and come to a mutually agreeable approach. To that effect, a Committee was appointed by OMSAR to look into this matter and to present a reasonable and practical proposal. The Commission indicated that such a joint proposal would be likely to be accepted. In the end, this Committee arrived at conclusions, entailing increases between 20% and 28% for international experts and 30% for local experts, which were acceptable to both parties, namely, OMSAR and the Consortium. When these conclusions were presented to the Commission, however, the Delegation nevertheless rejected them.

4.4 The Ombudsman notes, from the chronology of events presented in point 3.6 above, that the Commission and OMSAR were in dialogue with each other with regard to the proposal for the second phase of the project and that several meetings were also held between the Commission, OMSAR and the complainant. The complainant's allegation that the proposal was rejected without giving the interested parties the right to be heard cannot therefore be upheld.

As regards the alleged arbitrariness, the Ombudsman notes that, in its letter of 26 March 2003 to OMSAR, the Commission indeed indicated that OMSAR should pursue its discussions with the complainant concerning human resources and financial aspects. This letter also stated that the file would have to be sent to the Delegation which would then evaluate whether it was appropriate to ask for the approval of the Commission in order to start the negotiated procedure. The letter pointed out that, if such a request were made by the Delegation and approved by the Commission, OMSAR would be authorised to engage in the negotiated procedure in order to formalise the draft contract. The Ombudsman notes that, contrary to what was implied by the complainant, nothing in the above letter to OMSAR indicated that there was an arrangement which the Delegation had proposed or that the proposal would be accepted in its entirety by the Delegation. This could in fact not have been the case, as the detailed financial aspects of the proposal had not yet been submitted to the Delegation (15). By letter of 15 April 2003, the Delegation informed OMSAR that its proposal of 4 April 2003 could not be approved for the reasons that were explained in the detailed evaluation of the proposal, which was attached to the letter and concerned mainly the financial aspects of the proposal, that is, the increase in fees, as well as the quality of the CVs. Considering this outcome, the Delegation invited OMSAR to launch an international call for tenders in order to select the technical assistance provider. The Ombudsman notes that there was nothing in the evaluation of the Delegation from which it would appear that the latter acted arbitrarily when rejecting OMSAR's proposal of 4 April 2003.

4.5 On the basis of the above considerations, no instance of maladministration was therefore found with regard to the complainant's additional allegation.

The possibility of a friendly solution

Article 3(5) of his Statute directs the Ombudsman to seek, as far as possible, a friendly solution with the institution concerned to eliminate the instance of maladministration and satisfy the



complainant.

The Ombudsman therefore made the following proposal for a friendly solution to the Commission:

The Commission could review its decision to recover the amount of EUR 29 306.65 from the complainant with regard to the backstopping team, in so far as it concerns those parts of the amount which correspond to the air tickets purchased and per diems paid during the ten-day pre-inception period.

The Commission's reply to the Ombudsman's proposal

The Commission stated that, further to the Ombudsman's proposal and in the interest of taking steps to settle the matter, it had reassessed the file and accepted the Ombudsman's proposal for a friendly solution.

The Commission therefore recalculated the costs related to the air tickets purchased and per diems paid during the ten-day pre-inception period on the following basis:

In his decision (16) , the Ombudsman stated that "*[i]t would appear that the pre-inception phase was a period of ten days at the very beginning of the contract, although it is not clear whether this period covered exactly the first ten days (30 September to 9 October 1999) of the contract. It is however clear that the pre-inception phase had ceased by 14 October 1999, as the Commission stated in its reply that the pre-inception report had been approved on that day*".

The Commission has considered the first day worked by the backstoppers (as declared in their timesheets) as the start of the pre-inception period, which thus extended from 2 October to 11 October 1999 (17) . Hence, expenses totalling EUR 3 536.23 (18) , corresponding to per diems and air tickets, have now been deemed eligible.

The Commission concluded that it accepted the Ombudsman's proposal for a friendly solution. In accordance with this proposal, the amount of EUR 3 536.23 for air tickets and per diems during the pre-inception period has been deducted from the amount to be recovered. Therefore, the amount to be recovered would be EUR 25 770.42 instead of the initial amount of EUR 29 306.65. The Commission however stressed that, were the complainant reluctant to accept this proposal, it would not be willing to forego any further claim.

The complainant's observations

The complainant stated that, after some three years, it cannot deny that the final outcome of the complaint procedure was far from satisfactory. As the complainant however recognised that the Ombudsman's Statute does not allow him to go much beyond the proposed friendly solution, it decided to refrain from any further observations and accepted the proposal. The complainant thanked the Ombudsman for his efforts and wanted to know to whom in the Commission it should address its "settlement invoice".

THE DECISION

1 The allegedly unjustified recovery and the claim for reimbursement and the two other



allegations

1.1 The complainant is a company of management consultants, which, in a consortium formed together with another company, was a contractor in the implementation of a European Commission's development project in a third country. According to the complainant, the contract for the Project Monitoring Consultancy, which was signed in August/September 1999, was unfairly operated by the Commission Delegation in the country ("the Delegation"). In its complaint to the European Ombudsman as well as in its observations, the complainant made three allegations, namely, that (i) the Commission's decision of 22 January 2003 to recover the amount of EUR 29 306.65 representing per diem and ticket costs for the home office support team, invoiced by the consortium over the years, was unjustified; (ii) the Commission showed indecisiveness and unresponsiveness with regard to the plan which the consortium submitted in June and December 2002 and again in March 2003 for a second phase of the project; and (iii) the proposal for a second phase of the project was simply rejected, without affording any opportunity to OMSAR or the complainant to be heard.

1.2 On the basis of his analysis of the file in his proposal for a friendly solution of 15 February 2007, the Ombudsman found no instance of maladministration with regard to the allegations (ii) and (iii) above.

1.3 With regard to the first allegation, the Commission in its opinion stated that it had sufficient legal grounds to claim the reimbursement of EUR 29 306.65. In its observations, the complainant recalled that a copy of the letter of 30 September 1999 from OMSAR had been at the Delegation's disposal for more than five years. In this letter, OMSAR brought to the complainant's attention a number of issues that had been discussed and agreed with the Delegation, including the costs of the backstopping team. The Ombudsman conducted further inquiries with regard to this point on 15 March 2006 to which the Commission replied on 20 July 2006, maintaining its position to claim the reimbursement of EUR 29 306.65.

1.4 On 15 February 2007, the Ombudsman addressed a proposal for a friendly solution to the Commission, suggesting that the Commission could review its decision to recover the amount of EUR 29 306.65 from the complainant with regard to the backstopping team, in so far as it concerned those parts of the amount which correspond to the air tickets purchased and per diems paid during the ten-day pre-inception period.

1.5 In its reply of 14 May 2007, the Commission stated that, in the interest of taking steps to settle the matter, it had reassessed the file and had accepted the Ombudsman's proposal for a friendly solution. The Commission explained that, on the basis of that reassessment, expenses totalling EUR 3 536.23 (19), corresponding to per diems and air tickets, have now been deemed eligible. The Commission concluded that, in accordance with the Ombudsman's proposal for a friendly solution, the amount of EUR 3 536.23 for air tickets and per diems during the pre-inception period had been deducted from the amount to be recovered. Therefore, the amount to be recovered would be EUR 25 770.42 instead of the initial amount of EUR 29 306.65.

1.6 In its observations, the complainant accepted the friendly solution. The complainant stated



however that, after some three years, it could not deny that the final outcome of the complaint procedure was far from satisfactory. As the complainant however recognised that the Ombudsman's Statute does not allow him to go much beyond the proposed friendly solution, it decided to refrain from any further observations. The complainant thanked the Ombudsman for his efforts and wanted to know to whom in the Commission it should address its "settlement invoice".

1.7 The Ombudsman notes that the complainant, although not entirely happy with the overall outcome, has accepted the friendly solution. With regard to the complainant's question regarding to whom it should address as regards the settlement invoice, the Ombudsman trusts that the Commission will contact the complainant forthwith as regards the final recovery.

2 Conclusion

Following the Ombudsman's initiative, it appears that a friendly solution to the complaint has been agreed between the Commission and the complainant. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) From the contract it appears that the complainant signed it on 30 August 1999, and the OMSAR signed it on 30 September 1999.

(2) By "backstopping", the complainant refers to the support team in its main office in the Netherlands.

(3) The Delegation's letter of 10 December 1999 stated that the inception report was due 60 days after the signature of the contract.

(4) In this regard, the Commission enclosed Annex D of the Special Conditions, entitled 'Schedule of Fees and Expenses (Financial Proposal of [the complainant])'.

(5) The Ombudsman notes that the complainant only implicitly referred to the principle of legitimate expectations, by stating that it had followed the procedure for three and a half years and that it had always been reimbursed by the Commission.

(6) See Annual Report 1997, p. 22.

(7) See footnote 2.

(8) The letter of Contract was signed by the complainant on 30 August 1999 and by OMSAR on



30 September 1999 and also contains the endorsement (undated) by the Head of Delegation.

(9) The Financial Proposal is dated 12 November 1998.

(10) The price breakdown mentions three items, namely, (i) fees, (ii) direct expenses, and (iii) reimbursable expenses.

(11) The Technical Proposal is dated 17 November 1998.

(12) See Case T-203/96 *Embassy Limousines v Parliament* [1998] ECR II-4239, paragraph 74 and the case-law cited therein.

(13) The indication "Subject" in that letter referred to " *Framework for Future Interventions (FFAI) Global Work Plan* ".

(14) OMSAR signed the addendum to the contract on 19 September 2002 and the complainant signed it on 30 September 2002. On 11 October 2002, the contract was endorsed by the Head of Delegation for financing by the European Community.

(15) In its letter of 19 March 2003, the Delegation informed OMSAR that the budgetary tables produced at that time were merely intended to illustrate the issue and could not be the subject of an examination, let alone approval.

(16) By "decision", the Commission in fact was referring to the Ombudsman's proposal for a friendly solution.

(17) The amount has been calculated on the basis of the document attached as Annex 1.b to the Commission's opinion of 20 July 2006 (" *Attendance sheet: September/October 1999* ").

(18) The Commission's reply contains a detailed table concerning this calculation.

(19) The Commission's reply contains a detailed table concerning this calculation.