

Besluit in zaak 2597/2007/RT - Verzuim om werkzaamheden in het kader van een project uit te betalen

Besluiten

Zaak 2597/2007/RT - Geopend op 14/11/2007 - Besluit over 09/12/2008

De klager is een Frans IT-bedrijf dat gefuseerd is met een andere Frans firma en haar plaats heeft ingenomen in een consortium dat in het kader van een door de Commissie gesteund project werkzaamheden uitvoerde. De klager werd voor het werk dat hij verricht heeft in het kader van het project niet betaald. Daarom heeft hij per e-mail contact opgenomen met de Commissie om opheldering te vragen. De Commissie heeft niet op deze e-mail geantwoord. Daarop heeft de klager zich tot de Ombudsman gewend.

In de loop van het onderzoek van de Ombudsman heeft de Commissie toegelicht dat sommige leden van het consortium gezorgd hadden voor vertraging bij het indienen van de documenten die noodzakelijk waren voor de ondertekening van een contractwijziging. Deze wijziging, op grond waarvan de klager de Franse firma waarmee hij een fusie was aangegaan, verving, werd voor de Commissie de rechtsgrondslag voor de uitstaande betaling.

Ondanks het feit dat de voornoemde documenten ontbraken sinds maart 2006 en nog steeds ontbraken op het moment waarop de Commissie besloten had de wijziging te ondertekenen, heeft zij de wijziging in kwestie pas in januari 2008 ondertekend en de klager een aantal maanden later uitbetaald. Dit gebeurde nadat de Ombudsman dit onderzoek had geopend.

De Ombudsman stemde in met de Commissie dat zij een rechtsgrondslag nodig had om een betaling te kunnen doen. Hij benadrukte echter dat, als de Commissie in staat was om de wijziging in januari 2008 te ondertekenen, zij dit ook had kunnen doen voor dat tijdstip. Het feit dat de documenten ontbraken, is immers niet relevant gebleken. Met betrekking hiertoe was hij van mening dat niets de Commissie in de weg had gestaan om actief te worden en contact op te nemen met leden van het consortium in verband met de ontbrekende documenten. In plaats daarvan had de Commissie erop gerekend dat de coördinator van het consortium daarvoor zou zorgen.

Gezien het feit dat de Commissie echter in de loop van het onderzoek van de Ombudsman de wijziging had ondertekend en de desbetreffende betaling had uitgevoerd, was geen verder onderzoek naar dit aspect van de zaak gerechtvaardigd.



De Ombudsman was desalniettemin van mening dat de Commissie rechtstreeks op de in de e-mail van de klager geuite bezorgdheid had moeten reageren, in plaats van erop te vertrouwen dat de coördinator de klager hierover zou informeren. De Ombudsman heeft in dit opzicht een kritische opmerking gemaakt.

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a French IT company. In May 2003, it merged under French law with another company, Atlantel Multimedia ('the French enterprise'). As a result, the French enterprise ceased to exist.
2. According to the merger agreement, the complainant took over the French enterprise's tasks under the Mobile Adaptive Procedure (MAP) project, which was supported by the European Commission's Directorate-General for Information Society and Media ('the Project').
3. The Project was carried out on the basis of a contract signed by the Commission and a number of local public entities and private enterprises, including the French enterprise ('the Contractors'), all of which belonged to a consortium. The Contractors were led by one of the members of the consortium, an Italian enterprise ('the Coordinator').
4. According to Article 3 of the contract, entitled 'Estimated costs and maximum financial contribution of the Community', the Project would be partially financed by the Community. The Commission, acting on behalf of the Community, would make the initial advance payment, the periodic payments and the final balance payment. All the above payments by the Commission would be made to the Coordinator, which would distribute the payments among the Contractors in accordance with a table containing the indicative breakdown of the estimated eligible costs.
5. The Commission made the initial advance payment and the first payment for the tasks carried out by the Contractors between 1 March 2002 and 28 February 2003.
6. On 16 November 2004, the Coordinator asked the Commission for the second payment for the tasks carried out by the Consortium between 1 March 2003 and 31 May 2004. Subsequently, it informed the Commission of the complainant's merger. As a result, the Commission stated that an amendment to the contract should be signed in this respect.
7. On 8 September 2005, the Commission made the second payment of EUR 231 368, 26 to the Coordinator. However, it asked the Coordinator to distribute this sum to the Contractors, with the exception of the complainant and another contractor, which were not mentioned in the original contract.
8. On 7 March 2007, the complainant contacted the Commission as regards the payment due to it for its participation in the Project. On 11 April 2007, the Commission met the Coordinator regarding this matter.



9. On 15 October 2007, the complainant submitted its present complaint to the Ombudsman.

10. On 9 January 2008, that is, after the complaint was submitted to the Ombudsman, the Commission signed the amendment.

11. On 14 July 2008, the Commission made the balance payment for the project to the Coordinator. The complainant received part of it.

THE SUBJECT MATTER OF THE INQUIRY

12. In his original complaint to the Ombudsman, the complainant submitted the following allegations and claim:

Allegations :

- the Commission did not pay it the eligible costs to which it was entitled;
- the Commission failed to explain its delay in the above payment and to answer to its e-mail dated 7 March 2007; and

Claim :

- the Commission should pay it the eligible costs.

13. In its further e-mail to the Ombudsman of 16 June 2008, the complainant referred to the above claim. It pointed out that it had carried out tasks under the Project in 2003 and 2004, and had incurred expenses over the following four years, without being repaid by the Commission. This had been prejudicial for its business. It also felt that it should be entitled to "*possible late payment interest*" [1] from the Commission. The Ombudsman considered that this statement could be added as a new element to the complainant's original claim. On the basis of the evidence collected within the inquiry, which is known to both the Commission and the complainant, the Ombudsman felt that he could take a position on this new element without having to contact the Commission for separate comments.

14. In September 2008, the complainant informed the Ombudsman that the Coordinator had paid it an amount of money which was considered to be the final payment from the Commission. However, the complainant was not satisfied with the Coordinator's calculation.

The Ombudsman understands that the complainant's above concerns are directed against the Coordinator. In this regard, he would like to point out that he can only investigate complaints concerning maladministration by Community institutions and bodies. The Coordinator is an Italian enterprise and, therefore, the Ombudsman has no power to deal with issues concerning the complainant's relationship with the Coordinator.

15. In light of the above, the subject matter of the present inquiry is limited to the original allegations and claim, including the new aspect described in paragraph 13 above.



THE INQUIRY

16. On 26 March 2008, the Commission sent its opinion, which was drafted in English. On 9 April 2008, the Commission provided a translation of its opinion into French, which was forwarded to the complainant with an invitation to make observations. The complainant presented its observations on 3 June 2008.

17. On 16 June 2008, the complainant sent additional information.

18. On 15 July 2008, the Commission informed the Ombudsman's services that the final payment for the project had been made.

19. On 23 September 2008, during a telephone conversation with the Ombudsman's services, and on 30 September 2008 by e-mail, the complainant sent further additional information.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of failure to pay the complainant's eligible costs and related claim

Arguments presented to the Ombudsman

20. In the original complaint, the complainant alleged that the Commission had not paid it the eligible costs and claimed that it should do so. In its subsequent e-mail of 16 June 2008, the complainant pointed out that it had carried out tasks under the project in 2003 and 2004, and had incurred expenses over the following four years, without being repaid by the Commission. This had been prejudicial for its business [2] .

21. The complainant originally argued that it had submitted the relevant cost statement for the tasks executed by it under the contract between 12 May 2003 and 31 May 2004. However, the Commission had failed to make the relevant balance payment before it complained to the Ombudsman. The complainant pointed out that it had carried out work under the Project, replacing the French enterprise with which it had merged while the contract was already in force. According to the merger agreement, the complainant was entitled to receive all the payments due under the contract [3] .

22. In its opinion, the Commission explained that it had made the relevant payments to the Coordinator, who had the task of distributing them to the Contractors. The Commission made the initial advance payment and then the first payment for the tasks carried out under the Project before the complainant's merger. The Commission pointed out in this respect that, contrary to its obligations under the contract, the Coordinator had taken too long to inform the



Commission about the merger between the complainant and the French enterprise. It added that the claim for costs submitted by the French enterprise was already being processed at the time when the Commission was informed about the merger.

23. On 8 September 2005, the Commission received the Coordinator's claim for the second payment, covering the tasks carried out by the Consortium between 1 March 2003 and 31 May 2004, that is, after the complainant's merger. Subsequently, the Commission informed the Coordinator that its second payment could not be distributed to the complainant and another contractor, which were not mentioned in the original contract. The relevant amendment concerning the replacement of the French enterprise by the complainant needed first to be signed by all Contractors and the Commission before the second payment could be made. The Commission further explained that it could not sign the amendment because some Contractors had not submitted all of the relevant documentation (three documents had been missing since March 2006). One of the Contractors had even opposed the said amendment.

24. Nevertheless, the Commission decided to demonstrate "*a certain degree of flexibility*". Despite the fact that the documents, which were missing in March 2006, were still missing on 9 January 2008, it signed the amendment. On 14 July 2008 the Commission made the balance payment to the Coordinator.

The Ombudsman's assessment

25. The Ombudsman agrees with the Commission that the costs relating to the execution of the contract may only be paid (and thus be eligible), if there is a contractual basis for such a payment.

26. The amendment to the contract was signed in January 2008. In accordance with the amendment [4], the French Enterprise withdrew from the contract on 12 May 2003. On the same date, the complainant was added to the contract as the Principal Contractor. As a result, all rights and obligations of the French enterprise resulting from the contract were transferred to the complainant on that date. The table containing the indicative breakdown of estimated eligible costs was modified accordingly.

27. This amendment gave the Commission the legal grounds to make the relevant payment to the complainant. It follows that the Commission's decision not to pay the complainant before the amendment entered into force appears to have been based on relevant legal grounds. In light of the above, the complainant's claim for interest for late payment cannot succeed.

28. The Ombudsman notes, however, that the Commission was able to be "*flexible*" in January 2008, and sign the amendment despite the fact that three documents had not been submitted. In this regard, he does not see why the Commission could not have done so in March 2006, when the situation was the same. Consequently, he fails to understand why the Commission waited passively for the documents for nearly two years, and then decided to make the payment to the complainant, regardless of the fact that it had not received the said documents.



29. The Ombudsman considers that the special role of the Coordinator, as representative of the Contractors, did not preclude the Commission from proactively entering into direct contact with those Contractors who had not submitted documents, in order to pressure them into doing so. Moreover, there was nothing to prevent the Commission, once it received the complainant's e-mail of 7 March 2007, from responding in a proactive way, as it did in the course of the Ombudsman's inquiry.

30. The Ombudsman notes, however, that, following the opening of his inquiry into the present complaint, the Commission signed the amendment and made the balance payment on 14 July 2008.

31. In light of the above, the Ombudsman considers that no further inquiries are justified as regards this aspect of the case.

B. Allegation of failure to reply and to explain the late payment

Arguments presented to the Ombudsman

32. The complainant alleged that the Commission failed to explain its delay in making the final payment. It also alleged that the Commission failed to answer its e-mail dated 7 March 2007, in which it requested, *inter alia*, the above explanation.

33. The Commission explained that its reasons for not paying the claimed costs " *were regularly explained to the Coordinator by phone, e-mails and orally during the meetings* ". According to the contract [5], the Coordinator should have transmitted these explanations to all Contractors, including the complainant. Following the complainant's e-mail of 7 March 2007, the Commission's services had a meeting with the Coordinator on 11 April 2007 and provided him with answers to all the questions raised by the complainant in its e-mail.

The Ombudsman's assessment

34. The Commission's Code of Good Administrative Behaviour [6] requires that its staff (i) give reasons for decisions which negatively affect citizens [7] and (ii) reply to correspondence from citizens within a reasonable time [8].

35. In the present case, the Commission acknowledged that it had failed to reply directly to the complainant's e-mail of 7 March 2007. The Commission explained that it assumed that the Coordinator would inform the complainant of its answer to the complainant's e-mail in question and, in general, of the reasons accounting for the delay in paying the complainant. In this respect, the Commission stated that it had regularly discussed the Project-related problems with the Coordinator.

36. In its e-mail of 7 March 2007, the complainant stated however that, " *three years after the*



end of the project and more than one year after the Commission's final request for documents, it did not receive any information concerning the final payment ". If the Commission had regularly informed the Coordinator about the reasons for not paying the complainant, following its receipt of the complainant's aforementioned e-mail, the Commission should have been reasonably aware that this information had not reached the complainant.

37. Therefore, upon receipt of the above e-mail, the Commission was aware that it could not rely solely on the Coordinator to transmit the relevant information and that it would be useful to contact the complainant directly. The Commission, however, failed to do so and again relied on the Coordinator, in order to inform the complainant.

38. The Commission's failure to reply to the complainant's e-mail directly and to provide it with the required information, including the reasons for its delay in paying the complainant, was an instance of maladministration.

39. The fact remains, however, that however belatedly, the Commission explained its reason to the complainant in its opinion on the complaint. Therefore the Ombudsman does not make a proposal for a friendly solution or a draft recommendation. Instead, he makes a critical remark below.

C. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman makes the following critical remark:

The Commission's failure to reply to the complainant's e-mail directly and to provide it with the required information, including the reasons for its delay in paying the complainant, was an instance of maladministration.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 9 December 2008

[1] In the original French: "*Nous nous interrogeons également sur les indemnités de retard que la Commission envisage d'ajouter aux sommes dues.*"

[2] In the original French: "*(...) les prestations effectuées pour le projet MAP datent de l'année 2003, et les dépenses ont donc du être supportées par notre société pendant plus de 5 ans. Bien entendu ce délai de paiement est préjudiciable pour une entreprise de la taille de la notre.*"



[3] The merger agreement reads as follows in French: "*En conséquence de ladite cession, la société Alienor Net est substituée purement et simplement a la société Atlantel Multimedia pour l'exécution des contrats en cours au jour de la cession et notamment dans l'exécution du projet européen MAP.*"

[4] Article 3 of the second amendment reads as follows: "*Principal contractor "Atlatel Multimedia" has withdrawn effective from 12 May 2003. The Preamble of the contract, Article 6 of the contract and Annex I have been modified accordingly.*"

Article 4 of the second amendment reads as follows: "*Principal contractor Alienor Net has been added as of 12 May 2003. The preamble of the contract, the table of indicative breakdown of estimated eligible costs and Annex I have been modified accordingly.*"

Article 5 of the second amendment reads as follows: "*All rights and obligations of the principal contractor "Atlatel Multimedia" are transferred to the principal contractor "Alienor Net" from 12 May 2003. The preamble and Article 6 have been modified accordingly.*"

Article 6 of the second amendment reads as follows: "*The table of indicative breakdown of estimated eligible costs, which follows the signatures contract, has been modified (...) "*

[5] The Commission referred to the Article 2 of Annex II to the grant contract, which reads as follows: "*The project coordinator shall be the intermediary between the contractors and the Commission. In particular, he shall be responsible for transmitting to the Commission all documents and correspondence relating to the project.*"

[6] Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public, OJ L 267, p. 64.

[7] In accordance with the Commission's Code: "*A Commission decision should state the reasons on which it is based and should be communicated to the persons and parties concerned (...) "*

[8] In accordance with the Commission's Code "*a reply to a letter addressed to the Commission a reply to a letter addressed to the Commission shall be sent within 15 working days from the date of receipt of the letter from the responsible Commission department. If a reply in substance cannot be sent within the deadline mentioned above (...) a holding reply should be sent.*"