Európsky ombudsman

Rozhodnutia vo veci 786/2006/JF - Čiastočná platba za údajne nekompletnú prácu

Rozhodnutie
Prípad 786/2006/JF - **Otvorené dňa** 10/05/2006 - **Rozhodnutie z dňa** 14/12/2006

Sťažovateľ vykonal štúdiu na základe zmluvy s Výborom regiónov a predložil záverečnú správu. Podľa zmluvy mal výbor 30 dní na schválenie alebo zamietnutie správy. Päť dní po uplynutí obdobia uvedeného v zmluve výbor informoval sťažovateľa, že nebol spokojný s kvalitou správy a bol preto pripravený zaplatiť sťažovateľovi iba dve tretiny zo sumy dohodnutej v rámci zmluvy.

Sťažovateľ tvrdil, že výbor nedodržal ustanovenia zmluvy a neinformoval ho o možnostiach odvolania. Tvrdil tiež, že výbor neodpovedal na jeho listy vrátane listu, v ktorom žiadal o mimosúdne vyriešenie záležitosti. Sťažovateľ žiadal, aby mu výbor zaplatil poplatok podľa zmluvy aj s úrokmi.

Výbor vysvetlil omeškanie pri poskytnutí svojho stanoviska k záverečnej správe sťažovateľa tým, že poukázal na potrebu dôkladného preskúmania a konzultácie so svojimi útvarmi vnútorného auditu a právnych služieb o ďalších krokoch. Neodpovedal na listy sťažovateľa, pretože sťažovateľ uviedol, že je pripravený podniknúť právne kroky.

Pôsobnosť ombudsmana pri skúmaní sťažností týkajúcich sa plnenia zmluvných povinností je obmedzená. Dospel preto k názoru, že by nemal zisťovať, či došlo k porušeniu zmluvy, alebo či bol výbor podľa zmluvy oprávnený, aby odmietol vyplatiť plnú sumu. Ak však výbor nemohol splniť zmluvnú lehotu, mal v rámci správneho úradného postupu náležite informovať sťažovateľa pred uplynutím lehoty. To, že tak neurobil, bolo nesprávnym úradným postupom a preto ombudsman uviedol kritickú poznámku.

Ombudsman porozumel stanovisku výboru v tom zmysle, že napriek omeškaniu pri informovaní sťažovateľa bol oprávnený nevyplatiť plnú sumu dohodnutú v zmluve, pretože sťažovateľ nedodal správu v takej kvalite, na akú mal výbor nárok podľa zmluvy. Preto dospel k záveru, že výbor poskytol ucelené a primerané vysvetlenie právneho základu svojho konania a dôvodov, prečo sa domnieva, že je jeho stanovisko k zmluvnej pozícii oprávnené.

Pokiaľ ide o ostatné aspekty sťažnosti, ombudsman dospel k názoru, že nakoľko zmluva obsahovala konkrétne ustanovenie upravujúce spory, výbor nebol povinný informovať sťažovateľa o iných všeobecnejších možnostiach. Ombudsman však kritizoval výbor za to, že neodpovedal na listy sťažovateľa.

Strasbourg, 14 December 2006
Dear Mr B.,

On 16 March 2006, you submitted a complaint to the European Ombudsman against the Committee of the Regions of the European Union (the "CoR"). Your complaint concerns the CoR's decision on the revised final report of the study "Democratic Consolidation in the Western Balkans - the role of regional and local authorities".

On 10 May 2006, I forwarded the complaint to the President of the CoR. On 18 July 2006, I received the CoR's opinion, which I forwarded to you with an invitation to make observations. On 27 September 2006, I received your observations.

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

THE COMPLAINT

According to the complainant, the facts are, in summary, as follows.

On 13 December 2004, the complainant was contracted by the CoR's Directorate for Consultative Works to carry out a study assessment on the "Democratic Consolidation in the Western Balkans - the role of regional and local authorities". According to the "Service Contract", the final report for this study was due on 30 September 2005.

On 18 September 2005, the complainant submitted the final report to the CoR.

On 21 October 2005, the CoR rejected the complainant's final report and requested him to introduce corrections and to submit a revised final report on the basis of Article I.4.2 of the Service Contract.

On 18 November 2005, the complainant submitted the revised version of the final report.

On 23 December 2005, the Director of the CoR's Directorate for Consultative Works informed the complainant that, after careful examination of the revised final report, the CoR had concluded that the modifications therein were still insufficient with respect to the terms of the Service Contract. The Director (i) noted that a part of the final report had been copied entirely from the internet; (ii) emphasised that the complainant had been warned, on several occasions, that a study which would not meet the minimum contractual standards would not be considered for publication; and (iii) explained that, in view of the above, the complainant's study could only be used by the CoR for internal purposes. The Director further informed the complainant that, on the basis of the Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (1) ("the Financial Regulation"), and after consulting the CoR's Legal Service, it could not proceed to the payment of the remaining amount of EUR 24 780, but to two thirds of the total amount agreed

under the Service Contract (that is, EUR 23 600) which would, in his view, represent a fair solution. Based on the fact that the complainant had already received EUR 10 620 as advance payment, the Director informed him that a remaining sum of EUR 12 980 was in the process of being paid.

On the same day, the complainant commented on the CoR's decision in an e-mail addressed to the CoR's Head of Department. Up to the date of his complaint to the European Ombudsman, the complainant had not received any reply or acknowledgement of receipt.

On 3 February 2006, the complainant addressed a complaint letter to the CoR's Secretary-General. Up to the date of his complaint to the Ombudsman, the complainant had not received any reply or acknowledgement of receipt.

On 16 March 2006, the complainant lodged a complaint with the Ombudsman.

The complainant alleged that
- the CoR failed to respect the provisions of the Service Contract. In support of this allegation, the complainant referred to, and provided copies of, the relevant Service Contract's articles on "payments" (2) .
- the CoR failed to indicate possibilities of appeal in its decision of 23 December 2005;
- the CoR failed to reply to complainant's letters of 23 December 2005 and 3 February 2006.

The complainant claimed that the CoR should pay him the contractual fee in full with interest for late payment.

THE INQUIRY

The CoR's opinion

The CoR's opinion can be summarised as follows.

Background

On 13 December 2004, the CoR contracted the complainant, following a public procurement procedure, to carry out the study "Democratic Consolidation in the Western Balkans - the role of regional and local authorities".

On 23 February 2005, the CoR received the complainant's first interim report.

During March and April 2005, the CoR exchanged letters with the complainant in which it (i) commented on the complainant's first interim report; (ii) received a revised version of this report; and (iii) commented on the revised version of this report. The CoR asked the complainant to alter his methodological approach, in particular, to redraft the questionnaire, since it did not meet the CoR's standards. After an initial reluctance to make the required modifications, the complainant requested a contract extension of six weeks.

The CoR agreed to an extension of the period of execution by four weeks and, on 18 and 25 April 2005, signed an additional contract with the complainant.

On 30 June 2005, the CoR received the complainant's second interim report.

On 28 July 2005, the CoR (i) informed the complainant that, despite the extension granted by it, the second interim report did not fulfil its conditions or meet with its quality standards; and (ii) described the improvements to be made in the final report. Following his answer to this letter of the CoR, it was agreed that the complainant would present his final report at a meeting to be held at the CoR's premises on 30 September 2005.

On 19 September 2005, the CoR received the complainant's final report and, on 30 September 2006, as agreed, met the complainant at its premises.

By letter of 21 October 2005, the CoR rejected the complainant's final report and requested him to provide an amended version within 30 days, as stipulated by the contract.

On 18 November 2005, the complainant submitted his revised final report. It was accompanied by an invoice for the balance, which, given that an advance of EUR 10 620 had already been paid, amounted to EUR 24 780.

On 23 November 2005, the CoR finalised its analysis of the complainant's revised final report. At this stage, the CoR realised that whole pages of the revised final report had been copied from the internet. Moreover, (i) not only had the complainant failed properly to take into account the CoR's previous comments, but (ii) the report did not meet the minimum methodological standards required for a scientific project; (iii) several factual errors had been identified; and (iv) the study was too short (only 150 pages instead of the normal 250-300 pages).

On 24 November 2005, the CoR consulted its Internal Auditor and, on 30 November 2005, its Legal Service.

On 23 December 2005, the CoR informed the complainant that, after careful examination of the revised final report, and after taking into account the opinions of the above-consulted services, it had decided to reduce the payment to two thirds of the total amount, that is, to EUR 23 600. Considering that only parts of the study could be used, for the purposes of publication or internal distribution, it was considered that the payment of two thirds of the agreed amount was fair and in line with the provisions of the Financial Regulation. On the same day, the complainant commented on the CoR's decision by e-mail to that institution.

On 7 February 2006, the CoR's Secretary-General received a request for mediation from the complainant (3) .

The CoR's position on the complainant's allegations and claim

Throughout the whole period in which the study was carried out, the CoR was confronted with numerous problems relating to its collaboration with the complainant.

Although it is true that, according to the contract, the CoR had 30 days after submission of new documents to approve or to reject them, given the complexity of the situation and the

exceptionally poor quality of the study, it was necessary for the unit in charge not only to examine the final report thoroughly, but also to consult other services within the CoR, in particular, the Internal Audit Service and the Legal Service. This proved time consuming.

It appeared from the complainant's e-mail of 23 December 2005 that he was well aware of the appeal possibilities set out in Article 1.7.2 of the Service Contract. According to this article, " *[a]ny dispute between the parties resulting from the interpretation or application of the Contract which cannot be settled amicably shall be brought before the courts of Brussels* ". In this e-mail, the complainant informed the CoR that he would take legal action if the CoR did not reconsider its decision by 6 January 2006.

This was also the reason why the CoR did not answer the complainant's request for mediation of 3 February 2006, given that he had himself clearly declined an amicable solution by informing it that he intended to take the CoR to court.

In view of the above, considering that the quality of the study failed to meet the minimum required standards set out by the CoR, and that this was repeatedly pointed out to the complainant, the CoR considered that the amount paid was more than adequate remuneration for the work supplied.

The complainant's observations

The complainant considered that the CoR acknowledged that it had failed to comply with the contractual provisions.

The complainant pointed out that, according to Article 1.7.2 of the Service Contract, the contract was governed by Belgian Law (4) . Article 1134 of the Belgian Civil Code provides that " *[l]es conventions légalement formées tiennent lieu de loi à ceux qui les on faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi* ". He emphasised that, in addition, Article II.18 of the Service Contract's General Conditions provided that " *[a]ny amendment to the Contract shall be subject of a written agreement concluded by the contracting parties* ". The CoR was well aware of this provision, as it has once correctly used it to extend the contract's execution period by four weeks (5) . Furthermore, according to Article 4 of the European Code of Good Administrative Behaviour " *[t]he official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law* ". The unilateral extension of the contractual 30-day reaction period constituted, therefore, an illegal amendment to the Service Contract. The time-limits set for reacting were intended to ensure the efficient delivery of services and were binding on both parties. The CoR's breach of its obligations under the Service Contract constitutes maladministration and its arguments were, therefore, of no relevance. Furthermore, given that, after receiving the corrected version of the final report, it took the CoR only five days to finalise its assessment, the complainant failed to see the reasons why the CoR took twelve days to decide whether to consult its legal service.

The complainant further expressed the view that the CoR's decision presupposed, in effect, that he had knowledge of the relevant procedures and therefore omitted referring to any possibility of appeal. Although he agreed with the CoR's interpretation of Article 1.7.2 of the Service

Contract, the complainant emphasised that the contract did not exempt its decision of 23 December 2005 from referring to appeal possibilities. In this regard, the complainant also referred to Article 19 of the European Code of Good Administrative Behaviour (6) .

The complainant further pointed out that the CoR failed to indicate the reasons why it did not answer his letter of 23 December 2005.

As regards his letter of 3 February 2006, in which the complainant requested mediation by the CoR's Secretary-General, the complainant pointed out that, notwithstanding his letter of 23 December 2005, he had clearly indicated his intention to seek mediation (7) . In this regard, the complainant also referred to Article 14 of the European Code of Good Administrative Behaviour (8) .

The complainant concluded that the CoR did not provide him with a satisfactory answer and reiterated his initial allegations and claim.

THE DECISION

1 Preliminary remark concerning the scope of the Ombudsman's inquiry

1.1 The Ombudsman points out that, according to Article 195 of the EC Treaty, he 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 (9) . 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.

1.2 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.

1.3 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 believed 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.

2 The alleged failure to respect the provisions of the Service Contract

2.1 The complainant alleges that the CoR failed to respect the provisions of the Service Contract. In support of this allegation, the complainant referred to, and provided copies of, the relevant Service Contract's articles on "payments", that is, Articles I.4 and II. 4.

The Ombudsman understands the complainant's allegation as relating to the CoR's delay in examining the complainant's revised final report. The substantive dispute concerning the amount of payment will be dealt with in part 5, which addresses the complainant's claim.

2.2 In its opinion, the CoR, in summary, (i) recognised that, according to the Service Contract, it had 30 days after the submission of the complainant's revised final report to approve or reject it, and (ii) accounted for the delay by pointing to the necessity thoroughly to examine the (exceptionally poor) final report, and to consult its Internal Audit and Legal services on the next steps. This proved time consuming.

2.3 The Ombudsman notes that, in its opinion, the CoR has admitted its five-day delay *vis-à-vis* the contractual time-limit for reacting.

2.4 The Ombudsman points out that, as a matter of good administration, if the CoR was unable to meet the contractual deadline it should have informed the complainant of that fact, in advance of the expiry of the deadline. The CoR's failure to inform the complainant about the impossibility of meeting the contractual deadline before its expiry, constituted an instance of maladministration and a critical remark will be made in this regard below.

3 The CoR's alleged failure to indicate possibilities of appeal in its decision of 23 December 2005

3.1 The complainant alleges that the CoR failed to indicate possibilities of appeal in its decision of 23 December 2005.

3.2 In its opinion, the CoR stated that, in its e-mail of 23 December 2005, the complainant gave the impression that he was well aware of the appeal possibilities set out in Article 1.7.2 of the Service Contract (according to which " *[a]ny dispute between the parties resulting from the interpretation or application of the Contract which cannot be settled amicably shall be brought before the courts of Brussels* "). This impression was based on the fact that the complainant informed the CoR that he would take legal action if it did not reconsider its decision by 6 January 2006.

3.3 The Ombudsman notes that the CoR's decision of 23 December 2005 did not provide the complainant with any information as regards the possibilities of redress available to him.

3.4 However, since the contract contained a specific provision governing disputes, the Ombudsman does not consider that the CoR was obliged to inform the complainant, in its decision of 23 December 2005, of other more general possibilities in case of disputes.

3.5 In light of the above, the Ombudsman takes the view that there is no maladministration as regards this aspect of the complaint.

4 The alleged failure to reply to the complainant's letters of 23 December 2005 and 3 February 2006

4.1 The complainant alleges that the CoR failed to reply to his letters of 23 December 2005 and 3 February 2006.

4.2 In its opinion, the CoR (i) admitted that it did not answer the complainant's letters of 23 December 2005 and 3 February 2006 and (ii) explained, in this regard, that, despite his subsequent request for mediation of 3 February 2006 to the CoR's Secretary-General, the complainant had informed it, on 23 December 2006, that he was ready to take the CoR to Court, in accordance with Article 1.7.2 of the Service Contract.

4.3 Principles of good administration require that every letter or complaint to an Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period (10) .

4.4 In the present case, the Ombudsman notes that the CoR did not reply to the complainant's letters of 23 December 2005 and 3 February 2006, and takes the view that the explanation offered by the CoR in its opinion to him is not such as to justify departure from this obligation. As regards the complainant's letter of 23 December 2005, the Ombudsman does not exclude the possibility that, in the circumstances of the case, the CoR could legitimately have declined to respond substantively to the complainant's comments on the grounds that the latter had indicated his intention to begin legal proceedings. The Ombudsman takes the view, however, that the CoR should have informed the complainant accordingly. As regards the complainant's letter of 3 February 2006, the Ombudsman considers it regrettable that the CoR failed to respond to what appears to have been the complainant's expressed willingness to resolve the dispute by non-judicial means. The CoR's failure to (i) inform the complainant about the grounds for not responding to his letter of 23 December 2005 and (ii) reply to the complainant's letter of 3 February 2006, constituted maladministration and a critical remark will be made in this regard below.

5 The claim that the CoR should pay the complainant the contractual fee in full with interest for late payment

5.1 The complainant claims that the CoR should pay him the contractual fee in full with interest for late payment.

5.2 In its opinion, the CoR stated, in summary, that the complainant (i) copied whole pages of the revised final report from the internet; (ii) failed properly to take into account the CoR's previous comments; (iii) did not meet the minimum methodological standards required for a scientific project; (iv) committed several factual errors; and (v) produced only 150 pages instead of the normal 250-300 pages. Considering that the quality of the study failed to meet the minimum required standards and that this was repeatedly pointed out to the complainant, the CoR was of the view that payment of two thirds of the total amount was adequate remuneration for the work supplied.

5.3 The Ombudsman therefore understands the CoR’s position to be that, despite its delay in informing the complainant of its position as regards the revised final report (which is dealt with in part 2 of the present decision), the CoR is justified in not paying the contractually agreed amount in full because it considers that the complainant has failed to deliver a report of the quality which it was entitled to receive under the contract.

5.4 As mentioned in the preliminary remarks, if the matter is in dispute between the parties, the

Ombudsman will not seek to determine whether there has been a breach of contract. The Ombudsman does not therefore take a view on whether the CoR is contractually entitled to refuse to pay the full amount. The Ombudsman takes the view, however that the CoR has provided 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. The Ombudsman therefore finds no maladministration in the CoR's position in relation to the complainant's claim.

6 Conclusion

On the basis of the Ombudsman's inquiries into the complaint, it is necessary to make the following critical remarks:

The Committee of the Regions' failure to (i) inform the complainant about the impossibility of meeting the contractual deadline before its expiry; (ii) inform the complainant about the grounds for not responding to his letter of 23 December 2005; and (iii) reply to the complainant's letter of 3 February 2006, constituted maladministration.

Given that these aspects of the case concern specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of the Committee of the Regions will be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2003 L 25, p. 43.

(2) According to the copies provided by the complainant, Article I.4 ("Payments") of the "Special Conditions" provides: " *(...) I.4.2. Payment of the balance: The payment of the balance will have the different stages: 1. Submission of the final report in accordance with the instructions laid down in Annexes I and III and of the relevant invoices; 2. The Committee shall have sixty days to approve or reject the document in question, and the Contractor shall have thirty days in which to submit new documents; 3. After the submission of these new documents, the Committee shall have thirty days to approve or reject them; 4. Within forty-five days of the date on which the new documents (final report, invoice) accompanying a request for payment are approved by the Committee, payment of the balance corresponding to the relevant invoices shall be made.(...)* ". Article II.4 ("Payments") provides: " *(...) II.4.2.Payment of the balance: On receipt of the documents, the Committee shall have the period of time indicated in the Special Conditions in which to (i) approve them, with or without comments, reservations or requests for additional information or (ii) request new documents. If the Committee does not react within this period, the documents shall be deemed to have been approved. Approval of the documents accompanying the request for payment does not imply recognition either of the regularity or of the authenticity, completeness or correctness of the declarations and information enclosed. (...)* ".

(3) The Ombudsman understands this "request for mediation" referred to by the CoR as the "letter of 3 February 2006" referred to by the complainant.

(4) Article 1.7.2 of the Service Contract provides that " *[a]ny dispute between the parties resulting from the interpretation or application of the Contract which cannot be settled amicably shall be brought before the courts of Brussels* ".

(5) The Ombudsman understands the complainant to refer to the additional contract signed by the CoR with the complainant on, according to the CoR, "18 and 25 April 2005".

(6) " *1. A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them. 2. Decision shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 230 and 195 of the Treaty establishing the European Community.* "

(7) According to the complainant, the letter of 3 February 2006 reads: " *I would like to kindly request your mediation concerning a Committee of the Region's decision on a service contract* ". Neither the complainant nor the CoR provided the Ombudsman with a copy of the letter.

(8) " *1. Every letter or complaint to the Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period. (...)* ".

(9) See 1997 Annual Report, p. 22 *et seq* .

(10) Article 14 of the European Code of Good Administrative Behaviour.