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EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Investigations & Operations  
Internal investigations, direct expenditure and structural actions : Anti-Corruption

Brussels, 01687 05.02.2004  
NT/sr D (2003-AC-19723)

*OLAF Operations*

## Final Case Report

### Case Identification

CMS No.	OF/2002/0356
CMS Title	Application of Commission Decision C(2002)845
Legal Basis	Art 9, Regulation (EC) No 1073/1999
Type of case	Internal investigation cases
Adviser in charge	BAADER Peter
Investigator in charge	THOMSON Neil

### Summary

Date of opening decision	18/10/2002
Financial Impact (EURO)	None
Results of the investigations	<input checked="" type="checkbox"/> no irregularity found <input checked="" type="checkbox"/> no follow-up action required

### Executive summary

On the basis of information from Mr Guido STRACK, formerly an official in OPOCE, three main allegations were made against officials of OPOCE in relation to a contract with [REDACTED] to consolidate EU legislation.

The first allegation, made by Mr STRACK, was that OPOCE officials had committed an irregularity in failing to levy penalties on [REDACTED] for underperformance, as provided for in the contract.

The second allegation, also made by Mr STRACK, was that OPOCE officials misled the CCAM to a possibly fraudulent degree when applying for an Avenant to the Contract benefiting [REDACTED].

The third allegation, which arose from a suspicion on the part of the OLAF evaluator, was that OPOCE officials colluded with [REDACTED] to award [REDACTED] the Contract at a low price and pay [REDACTED] more later.

On the basis of a review of the relevant documentation the third allegation has been dismissed outright and the other two allegations rejected on the basis that they refer to nothing more than commercial decisions taken in the context of a difficult contract.



Mr STRACK stated that in December 2001, following negotiation, an 'Avenant' to Contract 1896 was agreed. This had the effect of increasing the unit price of [REDACTED]'s output, thus benefiting [REDACTED]. At the same time the total number of pages required was supposed to be reduced, leading to a reduction of 14% in the total cost of the contract to OPOCE.

Mr STRACK stated, however, that in early 2002, [REDACTED] asked to be paid for producing the pages that were supposed to have been "saved", ie pages which did not have to be produced, by the terms of the December 2001 Avenant. Ultimately OPOCE agreed yet another pricing structure which, according to Mr STRACK, increased the cost to OPOCE by 58% compared with [REDACTED]'s original tender. (Mr STRACK commented, however, that this still left [REDACTED]'s price far lower than that of the only other valid bidder at the time the contract was awarded).

## The allegations

### The first allegation – irregular failure by OPOCE officials to enforce the penalty clause of the Contract with [REDACTED]

In his email of 30 July 2002, Mr STRACK expressed his allegation as follows:

*"My fundamental concern is that my complete hierarchy at OPOCE, i.e. ... [REDACTED] and [REDACTED] might have applied and amended contract 1896 in an incorrect way against the financial interests of the Communities."*

Apparently, therefore, Mr STRACK was alleging only irregularities on the part of OPOCE officials.

In his email, Mr STRACK did also make reference to [REDACTED]'s engaging in "illegal activities, aiming more to assure sufficient financial benefits for [REDACTED] than to defend the financial interest of the Communities ...". However, Mr STRACK explained that by speaking of "illegal activities" he meant that [REDACTED] continued to demand the right to be paid by OPOCE for more pages than had been previously agreed. Mr STRACK's appears therefore to have been using the term "illegal" to mean something along the lines of "in breach of contract".

In any case, Mr STRACK made no allegation in his email of any illegality on the part of Commission officials.

### The second allegation – possible fraud by OPOCE officials in misleading the CCAM when applying for an Avenant to the Contract

As discussed below, however, in a telephone conversation with the Investigator on 17 December 2003, Mr STRACK did allege that OPOCE officials acted fraudulently in misrepresenting the real position when they applied to the CCAM for the Avenant to the Contract in December 2001.

### The third allegation – collusion between OPOCE officials and [REDACTED] in awarding the contract to [REDACTED] at a very low price with the intention of paying [REDACTED] more later.

## **OLAF's assessment of the initial information**

An OLAF evaluator carried out an assessment of the case. The assessment was based on the contents of Mr STRACK's email and the documentation attached to it, as well as on information obtained by the evaluator from the internet and from Worldbase about [REDACTED] and [REDACTED], the two contracting companies. It was discovered by the evaluator that these two companies, which together formed [REDACTED], were in fact both subsidiaries of [REDACTED].

In his assessment of initial information, the OLAF evaluator stated that the allegation was of "*collusion to frustrate contract conditions giving unfair competitive advantage to [REDACTED] to win contract and to subsequently negotiate more favourable terms*".

OLAF's assessment report does not make clear on the basis of what information the allegation was extended beyond that made in Mr STRACK's email, to include collusion in the award of the contract itself, as opposed to irregularities in the operation of the contract. This wider allegation, unlike the allegation made by Mr STRACK, could imply possible corruption on the part of OPOCE officials.

On the basis of the assessment report, an OLAF internal investigation was opened on 18 October 2002.

## **Investigative steps**

### SYSPER information

SYSPER records were obtained, which showed that the three named officials had held their present posts since the dates shown below:

[REDACTED]	1 August 2000;
[REDACTED]	16 March 2001;
[REDACTED]	1 May 2000.

### Interview of Mr STRACK

On 13 November 2002, Mr STRACK was interviewed at OLAF, with the purpose of clarifying his complaint.

In the course of this interview, Mr STRACK stated that he himself had been involved in setting up the OPOCE contract and designing the tender specifications, as well as in the choice of the contractor.

Mr STRACK indicated in his interview that, although [REDACTED]'s main rival for the contract, Euroscript, were the 'incumbent' OPOCE contractor, OPOCE had no real choice but to select [REDACTED] for this contract given [REDACTED]'s much lower price. Mr STRACK stated that although the contract was designed as a 'framework' contract, allowing participation by more than one contractor, [REDACTED] bid for 100% of the contract and OPOCE could not find any financial justification for awarding to Euroscript even the 30% for which Euroscript had bid.

In his interview, Mr STRACK was asked if he was alleging corruption on the part of Commission officials. Mr STRACK stated: "*I don't have any indication for this.*"

(Mr STRACK did mention that [REDACTED] had given him a cheque for BEF 10,000 (€250) to buy a present for his daughter. Mr STRACK said he had reported the matter to [REDACTED], and that [REDACTED] had advised him to return the cheque, which Mr STRACK duly did).

Mr STRACK indicated in his interview that in his view the OPOCE hierarchy committed irregularities, firstly in failing to apply the penalty clause in the contract, and secondly in accepting repeated variations to the agreement arrived at in May 2001 with [REDACTED].

Mr STRACK stated in the interview: "I don't think there was any corruption, but the problem was that there was political pressure for the OPOCE to get this consolidation done." By this Mr STRACK appears to have meant that it was not practically possible for OPOCE to risk the failure of the consolidation project, and that OPOCE therefore had to meet [REDACTED]'s financial demands in order to ensure its completion.

#### Discussions in November 2002

Following the interview of Mr STRACK, the members of the OLAF team held discussions on how to advance the case. A note was made of these discussions, of which the concluding paragraph is:

*"At this stage it appears that OPOCE had taken on an incompetent contractor to carry out work of an urgent nature. It is also likely that OPOCE would have been under some political pressure to have the consolidation work completed as it related to candidate countries. It may be that OPOCE took what they believed to be practical steps to ensure that the contract was completed. The question therefore would appear to be whether the action taken was irregular which would warrant disciplinary or other such action."*

It was stated in this note that OLAF intended to obtain and examine copies of the tendering documentation in order to investigate the matter further.

#### Documentation of the award of the contract

On 5 December 2002, the CCAM [Comité Consultatif des Achats et Marchés] Secretariat of DG BUDG made available its files on the tendering and contract award letting for the OPOCE consolidation exercise. Documents of interest to OLAF were copied and subsequently reviewed.

The file of CCAM documentation copied by OLAF contains the following:

- Contract-cadre multiple No 1896, signed on 15 June 2000, between the Commission and the companies [REDACTED] and [REDACTED].

(Article 19 of the Contract, headed «*Penalités*», includes the following terms:  
» *En cas de retard ou de malfaçon dans l'exécution des prestations constatés par la Commission, un système de pénalités sera appliqué selon les modalités mentionnées au point 4.8 du cahier des charges annexé.*

*Ces pénalités seront exigibles sans mise en demeure préalable par les seuls faits du retard ou de la malfaçon... »*

The appended tender specifications, at section 4.8, include a detailed formula for calculating penalties, which, it is stated, were chargeable in case of delay in performance, «*sauf si le prestataire établissait de façon indiscutable le cas de force majeure* ».

The tender specifications would of course have been seen by the directors of [REDACTED] and [REDACTED] [REDACTED] before they submitted their bid).

- The First Avenant to the contract, dated 28 August 2000, in which [REDACTED] and [REDACTED] were replaced as contractor by the « groupement d'intérêt économique ([REDACTED]) ».
- The Second Avenant to the contract, including documentation of the proceedings of the DG BUDG CCAM and the favourable decision of the CCAM dated 13 December 2001.

(In OPOCE's submission to the CCAM, signed by [REDACTED], the prospective change to the contract represented by the Avenant was justified by the need to "accelerate" production in the light of the Interinstitutional Agreement on « refonte » of European legislation adopted by Commission on 12 September 2001. [Refonte is explained to mean amending an act by replacing it entirely with a new one, incorporating the amendments. To enable refonte of an act to be done, the act must first be consolidated, ie, a version of the act including all previous amendments has to be produced. Therefore the consolidation programme had to be accelerated.]

The technique to be used was called "grouping". It was stated in OPOCE's submission that this meant that fewer pages needed to be produced, but, offsetting this, the added complication requires that the contractor be paid more per page. The overall effect was claimed to be a reduction of 14% in the cost of the contract.

To justify the proposed avenant, reference was made to Article 15 of the Contract, which stated, in part: « *Le contractant s'engage ... à étudier toute possibilité de rationalisation du travail...La Commission pourra le cas échéant autoriser le Contractant à procéder à la mise en production des solutions proposées et avalisera par avenant les changements à opérer, tant au niveau technique que financier.* »)

- A draft of the Interinstitutional Agreement referred to above, with a covering Note dated 12 October 2001 to Directors General from Mr O'SULLIVAN and Mr PETITE;
- A letter from [REDACTED] to OPOCE dated 5 November 2001 offering, for the purpose of rationalising the consolidation process in the light of the need for a refonte of European legislation, to apply the techniques of "saving layers" and "saving prints", and giving a new maximum price per page;
- [REDACTED]'s tender document for Contract 1896;
- The draft contract sent by OPOCE to bidders;
- The CCAM report on the award of Contract 1896 dated 24 March 2000;

(This records that there were three bidders for the Contract: Jouve, [REDACTED] and Euroscript. On the qualitative evaluation these companies scored 28/40, 32/40 and 34/40 respectively. Their prices were €8,267.61, €4,782.25 and €10,754.14 respectively.

It was noted, however, that Jouve had not been willing to state a maximum price in the required form, and Jouve were therefore excluded from the selection. [REDACTED] first, and Euroscript, second, were selected as the successful bidders, to be employed on the Contract with preference to be given to [REDACTED].)

- Correspondence with the bidders and with other organisations which had expressed interest in the Contract following the initial advertisement;
- The record of the opening of offers on 14 February 2000;

(This shows that Mr STRACK chaired the opening committee; the other members are named as Mr VANDERHEYDEN, Mr MEINANTOPOULOS and Mrs NOGUEIRA)

- The record of the evaluation of offers;
- (This shows that [REDACTED] and Mr STRACK were members of the committee; the others were Mr BAGOLA, Mr VANDERHEYDEN, Mrs MAAS and Mrs MINET)
- The draft contract between the Commission and [REDACTED];
- [REDACTED]'s tender.

Mr STRACK's meeting with the OLAF Director General and subsequent contacts with the OLAF Investigator – the allegation of misrepresentation to the CCAM in relation to the Avenant

As a reaction to an email he had sent (in or about July 2003) to Commissioner KINNOCK on the subject of the Commission's treatment of whistleblowers, Mr STRACK was invited to a meeting with the OLAF Director General. This meeting was held at OLAF's offices on 15 September 2003.

Following a further email from Mr STRACK to OLAF on 2 December 2003, in which Mr STRACK referred to the September meeting and stated that if he did not hear from OLAF within a month he would publicise his complaints more widely, the Investigator in Charge telephoned Mr STRACK on 17 December 2003.

On this occasion Mr STRACK clarified his allegation to the extent that he focussed on the statements made by [REDACTED] and OPOCE leading to the agreement of the Second Avenant by the CCAM in December 2001. Mr STRACK stated that OPOCE officials, on [REDACTED]'s behalf, misrepresented the true position to the CCAM when applying for the CCAM's agreement to the Avenant. Mr STRACK claimed that this alleged misrepresentation was so great as to be of a criminal nature. Mr STRACK subsequently sent emails setting out what he considered the relevant passages from the German penal code and attempting to show how these provisions could be applied to the conduct of the OPOCE officials.

As a result of this the Investigator reviewed the papers again in the perspective of potential misrepresentation to the CCAM.

Mr STRACK's particular concern in relation to the application for the Avenant was that, while stating to the CCAM that the new procedures would result in a reduction of 14% in the cost of the contract, OPOCE officials must have foreseen the agreement in 2002 for [REDACTED] to charge OPOCE for the "saved" layers, thus increasing the cost by 58% by Mr STRACK's calculation.

As Mr STRACK put it in his interview: *"They knew when preparing the CCAM dossier, they must have known, that it is not a saving, that it could never have been a saving. All this was initiated by [REDACTED] to get more money out of it. So how could you go there and say it is a saving?"*

### Assessment of the case

(1) The allegation of collusion in the award of the contract to [REDACTED] ("the third allegation")

Taking first the allegation of collusion, as it was set out in OLAF's initial assessment, there does not seem to be any evidence in the papers reviewed by OLAF to sustain this allegation.

It can be seen from the Sysper information referred to above that of the three officials named in the allegations, only the most junior, [REDACTED], was in post at the time that the [REDACTED] contract signed in June 2000. Presumably, therefore, [REDACTED] and [REDACTED] must be free of the suspicion of potential involvement in any alleged collusion with [REDACTED] to agree a low price at the outset of the contract.

As far as [REDACTED] is concerned, the CCAM file shows that he was responsible, along with Mr J DOGGEN (OPOCE Head of Unit, Resources), for the initial proposal and for communicating with the bidders in relation to Contract 1896. [REDACTED], along with Mr Serge BRACK (OPOCE Head of Unit, « Services auteurs »), was also responsible for making the OPOCE proposal to the CCAM to agree Avenant 2 to Contract 1896.

It is notable, as mentioned above, that OLAF's complainant, Mr STRACK, himself chaired the OPOCE meeting to open the bids for Contract 1896, and that he was also a member of the evaluation committee which produced the recommendation that [REDACTED] be selected. Indeed it is clear from the interview transcript and from the Investigator's conversation with Mr STRACK that he had a large part in both the design of the contract specifications and the decisions made in awarding the contract.

The proceedings of the evaluation meeting and the report to the CCAM indicate that [REDACTED] scored well on the qualitative assessment (with a score falling between those of the other two bidders), and were given preference over Euroscript on the basis of their much lower price.

It seems reasonable to surmise that, in order to gain the contract from the 'incumbent' Euroscript, [REDACTED] intentionally set a highly-competitive price. Given that [REDACTED] were able, in the opinion of the evaluators, to offer an acceptable quality of work, OPOCE and the CCAM seem to have had little choice, as Mr STRACK said in his interview, but to offer them the Contract.

(2) The allegation that the failure to levy penalty payments was irregular ("the first allegation")

The next question to consider is Mr STRACK's allegation of irregularities in the running of the Contract.

The specific example of an alleged irregularity given by Mr STRACK in his interview was the failure by the OPOCE hierarchy to impose penalties on [REDACTED] for delays, as allegedly ought to have been done under the terms of the Contract.

It is true that it is stated in the tender specifications, appended to the Contract that the Contractor should produce the equivalent of 2000 pages of the Official Journal per day, which equates, as Mr STRACK stated, to 10,000 per week. The terms of the Contract and the tender specifications, referred to above, are quite clear in stating that penalties should automatically follow delays or defects, although these delays or defects have first to be "constatés" by the Commission, and the rate of production required of the Contractor does not appear to be stated in the Contract itself.

According to Mr STRACK, [REDACTED] fell short of their contractual obligations from the start of the Contract, and a series of changes to their work-programme and remuneration were agreed by OPOCE as a result. These successive agreements were made in May 2001, December 2001 and early 2002.



Only the second of these three agreements, that of December 2001, was formalised by way of an amendment to the Contract (the second Avenant). At other times during the life of the Contract it might have been considered appropriate for OPOCE to seek to enforce the penalties against [REDACTED]. However, it is easy to understand why, in the context of extreme pressure to maintain output and the continuing claim by the contractor that its revenue was insufficient, the view may have been taken that it would be counterproductive to impose penalties. In this light the failure to do so cannot be regarded as an irregularity.

(3) The allegation that OPOCE officials knowingly misled the CCAM when applying for the Avenant ("the second allegation")

The allegation here is that OPOCE officials misrepresented the position when they applied for the Avenant, in that they failed to reveal their actual intention, once the Avenant had been agreed, to pay [REDACTED] for the 'saved' layers which were supposed to be the object of the saving in the cost of the Contract.

The documentation obtained by OLAF shows that the "OBJET" of OPOCE's application to the CCAM for the Avenant was stated as being "*visant à rationaliser le mode opératoire de la consolidation en vue de son accélération et à adapter le bordereau de prix en conséquence.*"

In the "MOTIF" of the application, it is stated that the reason for the Avenant was the necessity to accelerate consolidation in order to comply with the Inter-Institutional Agreement of 12 September 2001 on « *refonte* » of EU legislation. The method of rationalising production is stated as "*...regrouper, lorsque cela est possible, plusieurs cycles de production*". A letter from [REDACTED] appended to the application describes these procedures as "*saving layers*" and "*saving prints*". At the same time, [REDACTED]'s price would be increased to a flat rate of €5 per page produced. Mr STRACK explained that "*saving layers*" refers to avoiding producing separate versions of an act for each of several amendments all coming into effect on the same day, but instead producing only one which contains all these changes. "*Saving prints*" involved reducing the number of printed copies provided to OPOCE.

Mr STRACK persuasively argues that the Interinstitutional Agreement was in fact already in prospect at the time the Contract was signed, and indeed that consolidation (combining all previous changes to an act in a single document expressing the current state of the law) and *refonte* (enacting future amendments in such a way as to have the new state of the law contained in a single document) are two processes which depend on each other if they are to be useful. Mr STRACK argues, therefore, that the fact that the Interinstitutional Agreement had been signed could not have been the real reason for applying for the Avenant. Mr STRACK also stated to OLAF that the practice of "*saving layers*" was in use in the running of the Contract well before the application for the Avenant.

In the section "*CADRE ET OBJET DE LA NEGOTIATION*" of OPOCE's application for the Avenant, it is stated: « *L'offre technique et financière se traduira par une diminution estimée à 14 % du coût global de l'opération sur la période allant de janvier 2002 à mi-2003, date à laquelle le rattrapage de la consolidation devrait être achevé.* » The 14% reduction was to have resulted from the lower number of pages to be produced, as a result of « *saving layers* », in spite of the higher unit cost for each page.

The documentation provided by Mr STRACK shows that on 27 March 2002 (ie, just three months after the agreement of the Avenant, and after negotiations which seem to have been continuing at least since February 2002) [REDACTED] wrote a Note to his superior in OPOCE Mr M C NETO proposing that OPOCE should agree to pay [REDACTED] € 2.668 for each page which was 'saved' as a result of the changes agreed in the Avenant – thus increasing the overall cost, according to Mr STRACK, by 58%.

It seems clear, as Mr STRACK has explained, that [REDACTED] were demanding more revenue from OPOCE at the time that the Avenant was arranged, regardless of the Interinstitutional Agreement. It also seems likely that, in order to meet the requirements of the Interinstitutional Agreement, the consolidation process had to be accelerated, not so much compared with the production rate envisaged in the Contract, but rather compared with the much slower rate which was actually being achieved by [REDACTED].

As far as the saving of costs is concerned, it can be seen from the documentation that the CCAM, replying to OPOCE's application, asked OPOCE why "saving layers" could not be done using the existing cost structure, thus saving OPOCE even more money than the 14% mentioned in the proposal. In a Note replying to the CCAM, S BRACK, Head of Unit "Services Auteurs" at OPOCE, stated that the reason was that the new procedure "implique des contraintes techniques et une complexité accrue pour le prestataire, donc un coût supplémentaire pour celui-ci."

It was nowhere explained what these constraints or extra complexities might be, given that in reality the proposal amounted simply to [REDACTED]'s being asked to do less work. However, it is notable that in the CCAM's "AVIS FAVORABLE" to the Avenant dated 13 December 2001 the financial impact of the alteration is given as "0,00 EUR" and it is stated: « La durée et le montant du contrat-cadre restent inchangés ... » This statement appears on the face of it to be incorrect; in any case it suggests that the CCAM's decision to accept the Avenant was in fact not much influenced by the claims made by OPOCE about its financial impact (as opposed to the prospects it held out of accelerated production).

In fact it seems clear from a review of the relevant documentation that the impetus for the application for an Avenant came both from [REDACTED], who were demanding higher revenue in order to be able to carry out the contract, and from OPOCE, who needed faster production to satisfy the Institutions' demand to begin "refonte" and to avoid the embarrassment of admitting that OPOCE was failing in its task of providing the 'raw material'.

Mr STRACK's main allegation is that the OPOCE officials making the application for the Avenant knew in advance that its terms would be changed, or at least added to, soon afterwards, by the introduction of a charge for the pages 'saved'. It would of course be extremely difficult to show that this knowledge or intention was in the minds of the officials at any particular time in the past. One may surmise, however, that, given [REDACTED]'s almost constant demands for more money, [REDACTED] were unlikely to be satisfied with a mere improvement in their rate of profit accompanied by a 14% fall in their revenue; [REDACTED] could be expected to make further claims in the future – and it is by no means impossible that OPOCE officials were aware of this prospect and consciously avoided mentioning it to the CCAM.

However, before concluding that OPOCE officials contrived some machiavellian scheme to arrive at the March 2002 agreement with [REDACTED] by way of a fraudulently-arranged Avenant, one would have to show that the Avenant actually played an important part in such a scheme. In fact, as mentioned above, neither the May 2001 compromise, by which [REDACTED]'s production requirements were changed nor the other more minor variations to working practices referred to by Mr STRACK, were considered to require amendments to the Contract. The March 2002 agreement was justified on the basis that the arrangements for payment for 'saved' layers were not set out in the Avenant and these therefore had to be agreed separately between OPOCE and [REDACTED]. But although this 2002 agreement was presented expressly as 'filling a gap' in the Avenant, there is no indication that it was even reported to the CCAM.

It seems therefore that there is a risk of overstating the importance of the Avenant and of the CCAM's agreement, to enable variations to be made to the Contract.

### Conclusion

In the light of the above, it appears that, rather than being part of any larger plan, the Avenant represented a belated attempt to regularise a commercial relationship which from the start had been drifting away from its targets. While some of the statements made by OPOCE officials in the context of the application for the Avenant had the potential to mislead, there seems to have been no exaggeration in the insistence on the Avenant's prime purpose, which was the need to accelerate the production of consolidated legislation.

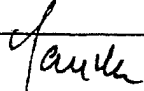
It appears that this pressing need to do whatever was necessary to achieve the purpose of the Contract fully explains the series of compromises made by OPOCE officials and makes any charge of irregularities on the part of individuals inappropriate. There are insufficient grounds, therefore, either for disciplinary or administrative follow-up of this case.



Neil THOMSON

Investigator in charge

### Visas

Adviser in charge	BAADER Peter	
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