

Proposal of the European Ombudsman for a solution in case 279/2018/JN on the European Commission's decision to recover funds from a company that participated in an EU-funded project in Namibia

Solution - 13/03/2019

Case 279/2018/JN - Opened on 12/03/2018 - Decision on 07/08/2019 - Institution concerned European Commission (Settled by the institution) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The complainant, a German company, participated in an EU-funded project in Namibia between 2010 and 2014. The project was managed by the EU Delegation to Namibia and the National Planning Commission Secretariat of Namibia (the National Contracting Authority), with the European Commission ultimately responsible. The project sought to develop the capacity of national authorities to manage EU funds and implement EU-funded programmes.
2. Following an audit, the Commission sought to recover EUR 103 911.85 from the complainant. The amount corresponded mainly to personnel costs that were deemed ineligible. In particular, the auditors considered that some staff members [2] did not meet the requirements set out in the contract regarding minimum qualifications and experience, and that some staff members had worked on Sundays and public holidays, in breach of Namibian law.
3. The complainant contested the decision to recover funds with the Commission. As it did not receive a satisfactory reply, the complainant turned to the Ombudsman in February 2018.

The inquiry

4. The Ombudsman opened an inquiry into the complainant's claims that the decision to recover funds was unfair.
5. In the course of the inquiry, the Commission forwarded to the Ombudsman a copy of the reply the Delegation had sent to the complainant. Subsequently, the Ombudsman received the



comments of the complainant in response to that reply.

Arguments presented to the Ombudsman

6. The complainant argued that the staff involved in the project and the terms of their work, such as working on Sundays and public holidays, had been approved by the responsible authorities (see paragraph 8 below). The decision to recover funds was thus unfair [3] .

7. The Delegation considered that, by recruiting individuals who did not have the required qualifications and by failing to respect national labour law, the complainant had breached the contract and the applicable rules. Nevertheless, the Delegation acknowledged that the National Contracting Authority may have approved the recruitment of the staff in question and the terms of work. As a result, the Delegation considered that, if the National Contracting Authority agreed to accept responsibility, the Commission could offset the amount it was seeking to recover from future payments to be made to the Namibian authorities in the context of other EU-funded projects.

8. In response, the complainant stated that it had carried out the work required under the project, and that the National Contracting Authority had been satisfied with the work. The complainant argued that the staff and their terms of work had been approved not only by the National Contracting Authority, but also on behalf of the EU Delegation and the Commission. The complainant said that it had kept the EU Delegation and the Commission informed throughout, and that they had never raised any objections. The complainant further argued that, while the audit findings and the recovery were linked to the failure to fulfil criteria set out in the terms of reference, these were not mandatory requirements. The complainant anticipated that the government of Namibia would not agree to the solution suggested by the Commission.

The Ombudsman's assessment

9. The Ombudsman acknowledges that the Delegation and the Commission have tried to help the complainant to find a solution. However, it appears that the situation has not yet been resolved and it is not clear whether the way forward suggested by the Delegation has any chance of being successful. Moreover, the Ombudsman is not convinced that the Commission has fully and adequately addressed all relevant issues raised by the complainant.

10. The Ombudsman notes that both the auditors and the Delegation consider that the criteria set out in the terms of reference [4] represent mandatory contractual requirements , and that the complainant breached these requirements.

11. The complainant argues that the criteria in the terms of reference are merely recommendations for the relevant job profiles, at least regarding minimum qualifications and experience [5] . The complainant further pointed out that in the local labour market in Namibia, it was difficult to recruit individuals with professional qualifications matching the criteria.



12. The Ombudsman notes that the terms of reference refer to the criteria in question as *"indicative profiles"* that *"should"* be met. The terms of reference also set out other criteria that *"must"* be met, rather than merely *"should"* [6] .

13. The Ombudsman thus takes the view that the complainant's position that the relevant criteria were not mandatory requirements is reasonable. It is equally reasonable to conclude that the complainant took this into account when selecting the relevant staff, and expected to be paid in full for carrying out the project in compliance with the terms of reference.

14. Furthermore, the Delegation accepts that the National Contracting Authority approved the recruitment of the complainant's staff and was satisfied with its work . The complainant also contends that the Delegation never raised any objections during the four-year duration of the project. The information provided to the Ombudsman further suggests that the National Contracting Authority authorised the practice of staff members working on Sundays and public holidays.

15. Finally, the auditors and the Delegation do not appear to have taken into account some of the complainant's explanations regarding its staff members.

16. The Ombudsman's preliminary conclusion therefore is that (i) the complainant acted in good faith while carrying-out the project, (ii) the authorities involved approved the recruitment of the staff in question and the terms of their work, (iii) the Delegation was kept informed about the project throughout its implementation, and did not raise any objections; and (iv) the project was carried out to the satisfaction of the National Contracting Authority, which was the ultimate beneficiary of the work. As such, it appears that the objective of the project, that is, to make the national authorities better at managing EU funds, was met. Moreover, the amount the Commission is seeking to recover is significant. Taking into account the above, this amount appears to be disproportionate, and the recovery arguably unfair.

17. As a solution, the Delegation has already proposed that, if the Namibian government agrees to accept financial responsibility for the recovery, the Delegation could seek to offset the amount it is seeking to recover against future payments due to the Namibian government in the context of other EU-funded programmes. It would then pay the amount that has been offset to the complainant.

18. The Ombudsman does not find this solution appropriate for the following reasons: (i) it depends on the agreement of the Namibian government which is in no way guaranteed; (ii) in the meantime, the complainant is deprived of the funds in question even though it relied on the approval it obtained from the National Contracting Authority; (iii) it suggests that the Commission and the Delegation are in no way responsible for the problems identified in this case, despite what the Ombudsman has set out above; (iv) it takes no account of the fact that the very purpose of the project in question was to develop the capacity of national authorities to manage EU funds and implement EU-funded programmes.



19. Accordingly, the Ombudsman makes a proposal for a solution below.

The proposal for a solution

Based on the above findings, the Ombudsman makes the following proposal for a solution:

The Commission should address the points raised in the Ombudsman's assessment and, on that basis, review its position on the recovery order in this case.

The European Commission is invited to inform the Ombudsman by 31 May 2019 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly

European Ombudsman

Strasbourg, 13/03/2019

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The specific term used in the contract to describe the staff members in question is 'other staff'.

[3] The complainant's lawyer argued that the recovery was in breach of its 'legitimate expectations' to be reimbursed for the project it had carried out in good faith and along agreed lines.

[4] The criteria are also set out in the 'service contract' that was signed with the complainant to carry out the project.

[5] Section 6.1.2 of the terms of reference.

[6] This reflects the distinction between an action or criterion being mandatory ("must") or desirable ("should").