



Decision in case 1698/2019/MDC on procedural shortcomings in an audit managed by the Research Executive Agency

Decision

Case 1698/2019/MDC - Opened on 30/09/2019 - Decision on 20/04/2020 - Institution concerned European Research Executive Agency (No further inquiries justified) |

The case concerned the decision of the Research Executive Agency (REA) to recover funds from a company, following an audit of its work on two EU-funded projects. The complainant considered that the audit should be declared null and void due to procedural flaws and the fact the process had taken over four years.

The Ombudsman found that the REA's failure to abide by the deadline set out in the grant agreement for issuing the final audit report was regrettable. However, in spite of the REA's delay in issuing the final audit report, the complainant had been able to contest effectively the findings of the audit. Moreover, the REA had engaged in a second, exceptional revision of the audit report. This resulted in a reduction of 85% in the amount of funds the REA was seeking to recover.

As the REA acknowledged its failure to abide by the deadline set out in the grant agreement, apologised for the delay in this case and also took steps to seek to avoid similar problems in future, the Ombudsman closed the case.

Background to the complaint

- 1.** The complainant, a private consultancy firm, was part of a consortium that carried out two projects under an EU-funded programme, managed by the Research Executive Agency (REA).
[1]
- 2.** After the projects ended, the REA announced its intention to audit both projects. The audit took place on 25 November 2014 at the complainant's premises.
- 3.** The complainant received the draft audit report on 3 March 2016. This found some of the costs claimed by the complainant to have been ineligible. The complainant submitted comments on 23 March 2016.
- 4.** On 21 September 2016 (that is, six months after the complainant submitted its comments), the REA sent the complainant the (first) final audit report.
- 5.** On 30 September 2016, the complainant contested the findings of the (first) final audit



report. It also contested the validity of the audit arguing, among other things, that the REA was duty-bound to send the final audit report within two months of the expiry of the deadline for submitting observations. [2] The complainant therefore asked the REA to reconsider the entire audit.

6. On 11 November 2016, the REA acknowledged receipt of the complainant's letter, and on 13 January 2017, it informed the complainant that it was still awaiting feedback from the auditors. [3]

7. At the end of 2018, the auditors sent a revised final audit report (hereinafter referred to as the 'second final audit report') to the REA. On 12 April 2019, the REA sent a second 'letter of conclusion' to the complainant, together with the second final audit report. The final report had been amended to take account of the additional information and evidence provided by the complainant. The costs deemed ineligible were significantly reduced as a result. Taking both projects together, costs amounting to EUR 336 527.73 that had previously been considered ineligible were deemed eligible in the second final audit report. The costs finally deemed ineligible amounted to EUR 45 850.13.

8. Among other things, the REA apologised for the long delay in replying, and stated that it had to consult with the external auditor in order to obtain its views on the matter. The REA also acknowledged that it had taken too long to send the first final audit report. However, it contended that this did not call into question the audit and its findings (about ineligible costs).

9. On 16 May 2019, the REA informed the complainant that it intended to recover EUR 37 695.92 for the ineligible costs and EUR 1 453.12 by way of 'liquidated damages' in accordance with the grant agreement [4] .

10. On 17 May 2019, the complainant contested the recovery because the audit had not complied with the "*timeframes and procedures*" set out in the grant agreement.

11. The complainant argued that the time limits set out in the grant agreement had not been respected and that the REA had not contacted it about the matter for 27 months. The complainant argued that the procedure was "*irregular and its conclusions null and void*". Consequently, it requested the REA to cancel the audit and not proceed to recover the related funds.

12. On 14 June 2019, the REA replied to the complainant that it was still considering the matter.

13. On 27 August 2019, the REA replied to the complainant's letter, rejecting its request to cancel the audit and related recovery of funds. It restated the arguments it had made in April and stated that, while it had taken into account the complainant's explanations, these did not call into question the audit's findings.

14. The REA added that it had changed the conclusions of the final audit report after



receiving additional information and evidence from the complainant. Changing the conclusions was *“not a standard procedure”* and therefore the time taken was not unreasonable. The REA also pointed out that changes made were in the complainant’s favour. Consequently, the REA confirmed its intention to issue two debit notes for the sums described above.

15. Dissatisfied with the REA’s decision to recover the funds, the complainant turned to the Ombudsman on 9 September 2019.

The inquiry

16. The Ombudsman opened an inquiry into the time taken by the REA to issue the final audit reports and into the complainant’s claims that the audit procedure should be declared null and void due to a procedural defect and that the complainant should be compensated for the expenses it had incurred due to the REA’s errors and delays.

17. In the course of the inquiry, the Ombudsman examined all the evidence provided by the complainant, as well as the REA’s reply to the complaint, and the comments of the complainant in response to the REA’s reply.

Arguments presented to the Ombudsman

18. The complainant contended that, not only had the REA not respected the two month deadline set out in the grant agreement as explained above, but there had also been a number of anomalies and errors [5] in the audit procedure.

19. In its reply to the Ombudsman, the REA disagreed with the complainant’s argument that it had not followed the procedures set out in the grant agreement [6] . The REA pointed out that the complainant was given the opportunity to comment on the preliminary findings and the draft audit report. The REA acknowledged that it had incurred an almost four-month delay in issuing the (first) final audit report but claimed that this was due to the incomplete information it had received from the complainant. According to the REA, the complainant had failed to inform it that its subsidiary had been involved in the project. Moreover, it had submitted insufficient or conflicting information about where the employees of its subsidiary actually worked.

20. The REA also argued that the delay in issuing the (first) final audit report was justified by the complexity of the case. The REA explained that, before issuing the report, it had to determine which costs flagged by the audit were ineligible. This required considerable internal discussion within the REA.

21. In addition, the REA argued that the failure to meet the two-month deadline set out in the grant agreement does not render the audit procedure null and void, especially since this was due to the assessment of additional evidence provided after the audit. [7]

22. Furthermore, the REA claimed that the delay in sending the (first) final audit report did not affect the complainant’s ability to contest effectively the findings of that report.



According to the REA, the arguments and additional evidence submitted by the complainant after the (first) final audit report resulted in the conclusions of the report being amended in favour of the complainant, with the amount of ineligible costs significantly reduced. [8]

23. Regarding the 27-month period between the REA's last communication and the date it sent the (second) final audit report, the REA explained that changing the conclusions of the (first) final audit report was an exceptional procedure, which needed to be properly prepared and supported by solid arguments and evidence.

24. The REA stated that its auditors had to analyse carefully all the arguments submitted from a substantive and procedural perspective, as well as information and additional supporting documents that were not available when the (first) final audit report was being prepared. The REA also pointed out that it had to examine an allegation made by the complainant concerning the conduct of the external auditors (see footnote 5 above). According to the REA, all of this required numerous exchanges between the REA's auditors and the external audit firm, as well as internally between REA staff members.

25. The REA argued that the complainant had not put forward any evidence to demonstrate the expenses it claimed it had incurred due to the delays and errors, and for which it was requesting compensation.

26. In reply, the complainant contested the REA's statement that the complainant was responsible for the delay. It argued that it had expressly informed the auditors about the situation related to its subsidiary. The complainant also stated that it always did its utmost to make available all the documents and all supporting evidence requested.

27. Finally, the complainant considered that it has been penalised by the length of the procedure, and argued that the REA's request for payment of "procedural costs" (the liquidated damages) amounting to EUR 1 453.12 was unjustified.

The Ombudsman's assessment

28. The grant agreement [9] clearly states that the final audit report must be sent to the audited company within two months of the deadline by which the contractor had to submit its observations on the provisional report.

29. In this case the REA failed to comply with this deadline, sending the (first) final audit report almost four months late. While the REA has set out in detail why it did not adhere to the deadline, the fact remains that it breached this provision of the grant agreement. This is regrettable.

30. The grant agreement does not stipulate what the consequences of such a delay are. In line with case-law of the General Court [10], in circumstances like those in this case, the REA's failure to abide by the two month deadline does not render the audit procedure null and void. Similarly it did not affect the complainant's ability to contest the findings of the



audit reports. [11] The REA and its auditors analysed the arguments and additional information submitted by the complainant. Moreover, they engaged in a 'second round of revision of the final audit report', an exceptional exercise which sought to identify costs that could be deemed eligible and which was undoubtedly in the complainant's favour. This **led to a substantial reduction (around 85%) of the amounts to be recovered** .

31. The Ombudsman notes that the REA has acknowledged its failure to abide by the two-month deadline set out in the grant agreement and has apologised for the delay in replying to the complainant. She trusts that the REA will do its utmost to avoid similar delays in future. The Ombudsman also notes that the REA has reminded the audit firm to keep to the stipulated deadlines in future and to "*optimise the planning of their audits and to adhere to the audit procedures*".

32. Finally, the Ombudsman notes that, in addition to issuing a debit note for the recovery of ineligible costs (EUR 37 695.92), the REA issued a debit note for 'liquidated damages' (EUR 1 453.12). The complainant is of the view that this is unjustified and contends that it was penalised by the length of the procedure.

33. Concerning the expenses the complainant claims it incurred due to the delay and errors, it has not explained what these expenses amount to nor provided evidence to support this.

34. Under the terms of the grant agreement [12] , the REA may waive a claim for damages in "*exceptional cases*". Since the audit procedure lasted for over four years, the REA could consider that this represents an "*exceptional case*". The Ombudsman invites the REA, if it considers it appropriate, to give due consideration to whether it should reimburse the complainant the amount of these liquidated damages given the circumstances of this case.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The REA's failure to abide by the deadline set out in the grant agreement for issuing the final audit report is regrettable. Nevertheless, given its second, exceptional revision of the audit report, the fact that it apologised for the delay and that it took steps to seek to avoid similar problems in future, no further inquiries into the complaint are justified.

The complainant and the Research Executive Agency will be informed of this decision .

Emily O'Reilly

European Ombudsman Strasbourg, 20/04/2020

[1] The first project aimed at providing European Security stakeholders with a toolkit based



on an open-source-software framework and a set of advanced information processing tools. The aim of the second project was to improve the quality of intelligence analysis by reducing the negative impact of cognitive biases upon intelligence analysis.

[2] Article II.22.5 of the general conditions of the grant agreement (FP7 Grant Agreement Annex II) states that:

*" On the basis of the findings made during the financial audit, a provisional report shall be drawn up. It shall be sent by the Commission or its authorised representative to the beneficiary concerned, which may make observations thereon within one month of receiving it. The Commission may decide not to take into account observations conveyed or documents sent after that deadline. The final report **shall** be sent to the beneficiary concerned **within two months** of expiry of the aforesaid deadline "* (emphasis added).

[3] On 27 September 2018, the REA received a revised audit report from the auditors, which it then asked them to amend.

[4] Article II.24.1 of the general conditions of the grant agreement states that "[a] *beneficiary that is found to have overstated any amount and which has therefore received an unjustified financial contribution from the Union shall [...] be liable to pay damages, hereinafter "liquidated damages" . [...] In exceptional cases the Commission may refrain from claiming liquidated damages "*.

[5] The complainant contended, among other things, that the auditors had given it a shorter deadline for submitting its comments on the preliminary audit report than the deadline envisaged in the grant agreement; that the auditors had asked the complainant to scan copies of supporting documents and that they did not check any original documents.

[6] In particular, article II.22 of the general conditions of the grant agreement.

[7] See judgment of the General Court of 8 March 2018, *Rose Vision v Commission* , in joined cases T-45/13 REN and T-587/15 (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=200061&pageIndex=0&doclang=FR&n>) , paragraph 103.

[8] The amount of the ineligible costs in the first project was reduced from EUR 258 631.11 in the first final audit report to EUR 45 850.13 in the second final audit report and the ineligible costs in the first final audit report for the second project (EUR 123 746.75) were considered eligible in the second final audit report.

[9] See footnote 2 above.

[10] See, among others, judgment of the General Court of 11 July 2019, *Instytut Podstawowych Problemów Techniki Polskiej Akademii Nauk (IPPT PAN) v Commission and Research Executive Agency (REA)*, T-805/16: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-805/16> .



[11] In its judgment of 11 July 2019, *Instytut Podstawowych Problemów Techniki Polskiej Akademii Nauk (IPPT PAN) v Commission and Research Executive Agency (REA)*, T-805/16, paragraphs 124 to 128: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-805/16> , the General Court found that a delay of over two years between the issuing of the draft final report and the final version of the audit report was unreasonable. Nevertheless, the Court concluded that this unreasonable delay did not affect the applicant's ability to contest the findings of that report. The Court therefore rejected the applicant's allegation that the Commission did not carry out its contractual obligations in good faith.

[12] Article II.24.1 of the general conditions of the grant agreement.