

Proposal of the European Ombudsman for a solution in case 784/2019/JN on the European Commission's decision to reject certain costs in the context of an EU-funded project supporting education in Somalia

Solution - 03/03/2020

**Case 784/2019/JN - Opened on 19/07/2019 - Decision on 13/10/2020 - Institution
concerned** European Commission (No further inquiries justified) |

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

Background to the complaint

1. The complainant is a UK non-governmental organisation that participated in the EU-funded Somali-Wide Education Synergies project (SWES). [2] The goal of the third stage of the project (SWES III) was to “ *strengthen the capacity of [local] Ministries of Education so that they can hold examinations of international standards and implement the new curriculum framework that the examinations use as their assessment criteria* ”. [3] The European Commission agreed to finance a maximum contribution of EUR 1 900 000.

2. The project was audited twice. The second audit found that the complainant had provided insufficient evidence for the costs it had claimed concerning security personnel, invigilators and markers, which had been provided by the relevant government ministries. In particular, the auditors considered that the complainant should have kept attendance registers. As a result, the auditors identified an amount of EUR 49 663 “ *for further consideration by the Commission* ”. [4] Based on the audit, the Commission refused to finance these costs.

3. The complainant turned to the Ombudsman on 1 May 2019.

The inquiry

4. The Ombudsman opened an inquiry into the Commission's decision to reject the costs identified by the audit.

5. In the course of the inquiry, the Ombudsman received the Commission's reply on the



complaint and, subsequently, the comments of the complainant in response to the Commission's reply.

Arguments presented to the Ombudsman

6. The complainant said that the grant agreement, which sets out the terms applying to the funds, did not require it to provide attendance registers. As such, the Commission should not penalise it for not having done so.

7. Moreover, the first audit approved the costs claimed. The second audit, which was merely a systems audit, did not deem the costs ineligible, but rather signalled that the Commission should give them further consideration.

8. The complainant provided evidence showing that the amounts in question had been invoiced and paid, and that the staff concerned had worked on the relevant days. The exams took place, which would not have been possible without adequate staffing to ensure security, invigilation and marking.

9. The Commission said that:

- To be eligible, costs must have been incurred by the organisation(s) with whom the grant agreement is concluded ('the beneficiary') and be in accordance with the relevant rules (including the 'General conditions' in Annex II of the grant agreement).
- Article 14.9 of the General conditions lists among non-eligible costs: "*salary costs of the personnel of national administrations, unless otherwise specified in the Special Conditions and only to the extent that they relate to the cost of activities which the relevant public authority would not carry out if the Action were not undertaken*". The memorandums of understanding the complainant concluded with the ministries in the context of the project were mentioned neither in the project proposal nor in the 'Special conditions' to the grant agreement. The complainant did not inform the Commission that it had concluded these memorandums while it was carrying out the project under the grant agreement.
- The Commission was legally obliged to reject the contested costs because the entity that incurred them was neither a beneficiary nor affiliated with a beneficiary. The costs were based on memorandums of understanding signed by the complainant, which did not include any amount and do not qualify as contracts between the ministries and the complainant. Since, under the grant agreement, the ministries were identified neither as beneficiaries, nor as associates or affiliated entities of the complainant, their costs could not be deemed eligible.
- The grant agreement sets out conditions under which beneficiaries may award contracts in order to implement the project, notably to procure goods, works or services. To be eligible, the costs incurred under such contracts must be necessary for the project to be implemented.
- The Commission did not impose any new requirements retroactively. In fact, according to the General conditions, beneficiaries should keep verifiable accounting records, including the relevant supporting documents of costs incurred. This includes staff and payroll records, such as contracts, salary statements and time sheets (Articles 14, 16.7 and 16.9).
- Although, under the terms of the grant agreement, the Ministries' costs were ineligible, the



Commission and the auditors showed some flexibility by allowing the complainant to provide attendance registers to substantiate these costs.

- The complainant did not provide evidence demonstrating how it had verified that the costs in question had in fact been incurred by the three ministries. The complainant concluded agreements with the ministries that did not require the ministries to provide supporting documents with their invoices. Thus, the complainant was not able to verify that the costs had been incurred. For example, there were no time sheets signed by the security personnel, invigilators and markers.
- Contrary to the complainant's view, the audit that led the Commission to declare the costs ineligible was a financial and systems audit, not a systems audit only. The first and second audits had been based on samples of the expenditure and did not necessarily review the same expenditure items. Thus, it is understandable that they may have reached different outcomes.

10. The complainant maintained its view that it was unfair and disproportionate of the Commission to reject the costs. According to the complainant:

- The first audit, which was extensive, had verified and endorsed the complainant's expenditure, of which the costs in question were one of the largest single items.
- The complainant and the Commission agreed in the contract that funds would be spent to assist the ministries with the cost of staff for running the exams and for security. The Commission had approved the budget, which included the security costs. As such, it was wrong of the Commission to argue subsequently that the costs were ineligible because they concerned the staff of the ministries.
- The evidence provided by the complainant should be sufficient. The complainant was unable to obtain attendance or time sheets. However, it provided invoices from the ministries and signed lists of the exam and security staff certifying the days worked, as well as other evidence to show that they had been present such as evidence of their transport.
- The General conditions do not specify what particular evidence is necessary in any given circumstance. It is wrong of the Commission, long after the completion of a project, to state that only a particular type of document will be accepted as proof of an expense.
- There is no question that the complainant paid the costs and that the services were provided to the satisfaction of all parties. Therefore, it is disproportionate to reject the costs in their entirety. This has had a significant detrimental effect on the complainant, a small charity, as it cannot recover the costs from the ministries.

The Ombudsman's assessment

11. Having carefully examined the arguments and the documentary evidence provided by the Commission and the complainant, the Ombudsman believes that the Commission's decision to reject all the costs in question was unfair in the specific circumstances of this case.

12. The purpose of the project was to “ *strengthen the capacity of the [Somalian] Ministries of Education so that they can hold examinations of international standards and implement the new curriculum framework that the examinations use as their assessment criteria* ”. [5] The evidence put forward suggests that the complainant implemented the project successfully.



13. The ‘description of the action’ (Annex I to the grant agreement) specifically mentions that the complainant was to contribute, at the level of 40%, to exam costs. [6] The balance was to be paid by the local ministries of education. [7] Moreover, the description of the action specifically refers to costs related to invigilation and marking and emphasises security as a significant issue related to the successful implementation of the action. [8] The budget for the action (Annex III to the grant agreement) also referred to exam invigilation and marking.

14. Thus, the grant agreement, read as a whole, clearly foresaw the use of security staff, invigilators and exam markers in the context of the project. This is logical because security staff, invigilators and exam markers were necessary for the successful completion of the purpose of the action in the given setting. In fact, it is difficult to imagine that the examinations in question could have been organised without the attendance of security personnel, invigilators and exam markers.

15. The complainant provided documents which, overall, demonstrate that it incurred the costs in question in the context of the implementation of the project. The complainant even provided some attendance sheets, lists of signatures of the staff involved, as well as proof of transport. Based on this evidence, it is hard to dispute that the work was actually done. Although it may have been desirable for the complainant to keep additional evidence allowing the Commission to verify that all the costs were fully eligible, the fact it did not do so cannot be attributed to the complainant alone (see next paragraph) and, in any case, should not stand in the way of a solution to this case.

16. The Ombudsman further notes that, unlike in other projects where the auditors determine that costs are ineligible, the auditors in this case merely signalled this issue “for further consideration by the Commission”. [9] In particular, the auditors criticised the complainant for not having kept attendance registers. However, the General conditions [10] do not specifically require their use. They contain only an indicative list of evidence that can be used. In the Ombudsman’s view, it would be unfair if this lack of clarity were to result in the complainant being penalised.

17. The Ombudsman acknowledges that the Commission must ensure that EU funds are spent in accordance with the principles of sound financial management. It is the duty of those who receive EU funds to keep all relevant evidence demonstrating that they complied with all applicable conditions. However, the Commission must also respect the general principles of fairness and proportionality [11] . The Ombudsman believes that the Commission could do more to achieve a solution in this case and makes, accordingly, a proposal below.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that the European Commission should:



- **reconsider its assessment. Taking into account all evidence provided by the complainant and all circumstances of the case, the Commission should determine a reasonable amount to be paid to the complainant for the costs incurred in relation to ensuring exam security, invigilation and marking.**
- **to avoid similar problems occurring in future, update the type of evidence required to substantiate costs, which is set out in the General conditions, by adding a specific reference to attendance registers.**

The European Commission is invited to inform the Ombudsman by 5 May 2020 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly European Ombudsman

Strasbourg, 05/03/2020

[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] Contract numbers FED/2015/370-522 and FED/2015/371-118.

[3] Description of the Action, Annex I to the grant agreement, page 9.

[4] Pages 8, 31-32, 89-92 of the audit report.

[5] The description of the action, Annex I to the grant agreement, page 9.

[6] The description of the action, Annex I to the grant agreement, page 11.

[7] The description of the action, Annex I to the grant agreement, page 11.

[8] The description of the action, Annex I to the grant agreement, in particular pages 8, 11, 12, 16, 19.

[9] Pages 8 and 31 of the audit report.

[10] Article 16.9 reads, in relevant part, as follows: *"In addition to the reports mentioned in Article 2, the documents referred to in this Article include:*

a) Accounting records ... from the Beneficiary(ies)'s accounting system ...;



- b) Proof of procurement procedures such as tendering documents ...*
- c) Proof of commitments such as contracts and order forms;*
- d) Proof of delivery of services such as approved reports, timesheets, transport tickets, proof of attending seminars, conferences and training courses;*
- e) Proof of receipt of goods such as delivery slips from suppliers;*
- f) Proof of completion of works, such as acceptance certificates;*
- g) Proof of purchase such as invoices and receipts;*
- h) Proof of payment such as bank statements, debit notices, proof of settlement by the contractor;*
- i) Proof that taxes and/or VAT that have been paid cannot actually be reclaimed;*
- j) For fuel and oil expenses, a summary list of the distance covered ...*
- k) Staff and payroll records such as contracts, salary statements and time sheets ...”.*

[11] In accordance with Article 101(2) of the Financial Regulation, “ *The authorising officer responsible may waive recovery of all or part of an established amount receivable ... where recovery is inconsistent with the principle of proportionality.* ” Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1581944455684&uri=CELEX:32018R1046>
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