

Decision 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

Decision

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

The case concerned the European Commission's decision to reject almost EUR 50 000 in the context of an EU-funded project supporting education in Somalia.

The Ombudsman made the preliminary finding that the Commission's decision was not fair. She made a corresponding proposal for a solution.

The Commission disagreed with the Ombudsman's proposal and provided additional explanations for its position. The grant agreement, it said, contains a list of non-eligible costs including salary costs of the personnel of national administrations, at issue here. Declaring the costs eligible, although they are clearly ineligible, could create a precedent that the rules in question can be circumvented. In light of these and further explanations, the Ombudsman reached the conclusion that no further inquiries were justified. The grant agreement, read as a whole, supports the Commission's position sufficiently.

However, the Ombudsman considered it regrettable that an organisation that successfully carried out a project in good faith and incurred the costs in question, should find itself in this situation. She suggested that the Commission consider how it could improve the clarity of the information in its 'grant agreements' with entities selected to carry out EU-funded projects, to avoid similar cases arising in the future.

Background to the complaint

1. The complainant is a non-governmental organisation from the United Kingdom that participated in the EU-funded Somali-Wide Education Synergies project (SWES) [1] . 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* " [2] . The



European Commission agreed to finance a maximum contribution of EUR 1 900 000.

2. The project was audited and the auditors found that the complainant had provided insufficient evidence for the costs it had claimed concerning security personnel, invigilators and markers, who 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*”. Based on the audit, the Commission refused to finance these costs.

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

The fairness of the decision to reject the costs

The Ombudsman's proposal for a solution

4. The Ombudsman opened an inquiry into the Commission’s decision to reject the costs identified by the audit. In the course of the inquiry, the Ombudsman received the Commission’s reply and the complainant’s comments on that reply. Having carefully examined the arguments and the documentary evidence, the Ombudsman made the preliminary finding that the Commission’s decision was unfair. [3]

5. The Ombudsman pointed out that:

- The evidence put forward suggests that the complainant carried out the project successfully.
- The grant agreement specifically mentions that the complainant was to contribute 40% of the costs of carrying out the exams, with the balance paid by the local ministries of education. The grant agreement also specifically refers to costs related to invigilation and marking, and emphasises security as a significant issue.
- The complainant provided documents in support of its position that it incurred the costs in question in the context of carrying out the project. These included attendance sheets and lists of signatures of the staff involved, as well as proof of transport. It is thus hard to dispute that the work was actually carried out.
- 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”.
- The auditors criticised the complainant for not having kept attendance registers. However, the ‘General conditions’ of the grant agreement do not specifically require attendance registers to be used but, rather, set out an indicative list of evidence that *can* be used. [4] This lack of clarity should not result in the complainant being penalised.

6. Referring to the principles of fairness and proportionality, the Ombudsman proposed that:

- **The Commission should reconsider its assessment. Taking into account all the evidence provided by the complainant and the 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, the Commission should update the 'General conditions' to specify the type of evidence required to substantiate costs, notably by adding a specific reference to attendance registers.**

7. The Commission rejected the Ombudsman's proposal. It argued, in summary, that:

- As the Ombudsman stated in her proposal, the Commission must ensure that EU funds are spent in accordance with the principles of sound financial management.
- To be eligible for funding, costs submitted in the context of a project must be identifiable, verifiable and actually incurred.
- In this case, the complainant mistakenly believed that the costs incurred by the ministries could be reimbursed according to the same rules applying to the complainant's costs. However, the ministries were not identified as co-beneficiaries, affiliated entities or associates in the grant agreement. Moreover, according to the applicable rules [5], unless explicitly and previously approved, government employees cannot work on projects in receipt of EU funding.
- The complainant accepted invoices as evidence of salary costs but did not require the ministries to provide evidence that their staff dedicated a specific amount of their working time to tasks related to the project. As such, and in the absence of other supporting documents, there was no proof that they carried out the work in question.
- As such, the Commission maintained that its decision is fair and in line with the provisions of the grant agreement and with the principle of proportionality. The Commission and the auditors treated the complainant fairly also from a procedural perspective. The costs are not eligible under the grant agreement. In spite of this, the Commission and the auditors gave the complainant the possibility to prove that the ministries had incurred the costs, with a view to them being deemed eligible. The complainant was unable to provide adequate evidence because its agreements with the ministries did not require them to provide supporting documents justifying their invoices.
- The fact that the auditors did not declare the costs ineligible but signalled this issue "*for further consideration by the Commission*" does not imply that the Commission's assessment is wrong. It merely implies that it is for the Commission to make a final assessment, taking into consideration the quality of the supporting evidence provided by the complainant and the legal framework.
- The fact that the contract (in the 'Description of the Action') foresees certain measures - the use of security staff, invigilators and exam markers - does not automatically mean the costs claimed for these measures are eligible. Assessing the eligibility of the relevant costs is done at a later stage, once the Commission has verified that those costs were incurred in line with the grant agreement.
- It would be contrary to the applicable rules to reimburse costs claimed by an entity that is not able to provide evidence demonstrating that the associated work was actually carried out - in this case, the time spent by its staff on the project.
- It is not accurate to state that the complainant provided some attendance sheets, lists of signatures of the staff involved, as well as proof of transport. In its correspondence, the complainant acknowledges that it did not receive copies of contracts of the staff involved. Regarding security staff, the complainant said that it had verified only a detailed list of security personnel involved (names, region, days and signature of each staff member acknowledging the amount paid). The auditors found that the complainant could not demonstrate that the



wages and costs of invigilators and exam markers “*were paid on a daily basis*” or that the complainant had a “*mechanism*” in place to verify that the staff in question worked on a daily basis.

- While the principle of proportionality is essential, any decision to waive a recovery order should be exceptional, based on solid grounds and take into account the financial interests of the EU. This means taking into account the amount involved, the risk of setting a precedent, and the possibility of undermining the authority of EU law. [6]
- There are no exceptional circumstances and solid grounds for waiving the recovery order in this case. The Commission declared the costs ineligible in accordance with clear contractual conditions known to the complainant. Declaring the costs eligible, although they are clearly ineligible, could create a precedent that these rules can be circumvented.
- A grant may not produce a profit for the organisation carrying out the project (the ‘beneficiary’). [7]
- The indicative list of evidence provided in the grant agreement is sufficiently wide. It provides examples of relevant evidence. The list specifically mentions timesheets. Moreover, the grant agreement contains a list of non-eligible costs including salary costs of the personnel of national administrations. Thus, there was no potential ambiguity.

8. The complainant challenged the Commission’s reply on the following grounds:

- The grant agreement and the contractual context made clear that the complainant would not be supplying its own staff to carry out the tasks in question. Security staff, exam markers and invigilators are tasks normally carried out by public authorities. According to the contract, the complainant was to pay 40% of the costs of holding the exams, which implies that it was to pay for the costs of individuals from other organisations, who were required for the exams.
- The Commission approved a budget in which the costs were set out. It must have been obvious to the Commission that the complainant would then proceed to incur those costs.
- It is contradictory for the Commission to state categorically that the costs are ineligible but also to state that it has acted proportionately by giving the complainant the opportunity to provide alternative evidence with a view to the costs being reimbursed.
- The Commission insisted on one form of evidence only. It disregarded the evidence that the project was carried out as foreseen. The exams took place in a secure environment and were invigilated and marked. It also disregarded the other documentary evidence demonstrating the attendance of the relevant staff.
- The list of evidence contained in the grant agreement provides illustrative examples of the types of evidence that are acceptable. It is not an exhaustive list. This allows auditors, and the Commission, to take into account the context, which is of particular relevance in this case. Somalia is one of the most difficult and dangerous places in the world to carry out a project, including finding suitable staff, and ensuring security. If the Commission intends to insist on one form of evidence in particular, it should say so as part of the specific grant conditions.

The Ombudsman's assessment after the proposal for a solution

9. The Ombudsman has reviewed carefully the arguments of the complainant and the



Commission, and all documentary evidence provided by them. She acknowledges that the Commission is concerned about creating a precedent, notably regarding government employees working on projects that receive EU funds.

10. In her solution proposal, the Ombudsman pointed to an apparent discrepancy in the wording of different parts of the grant agreement. In particular, she noted that the Commission relied on the General conditions (Annex II to the grant agreement) but the complainant based its argument on the eligibility of the costs in the Description of the Action (Annex I to the grant agreement).

11. Having considered the Commission's additional explanations, the Ombudsman finds that the grant agreement, read as a whole, supports the Commission's position sufficiently.

12. It is true that the Description of the Action specifically refers to costs related to invigilation and marking, and emphasises security as a significant issue. It also mentions that the complainant was to cover 40% of the exam costs, with the balance to be paid by the local ministries of education. The budget for the action (Annex III to the grant agreement) further refers to exam invigilation and marking.

13. Nevertheless, the Ombudsman accepts that, in order to be eligible, the costs claimed by the complainant should have met the requirements of the grant agreement. The Commission correctly states that the costs must be actually incurred, identifiable and verifiable [8] . Beneficiaries must be able to demonstrate that their costs are reasonable and comply with the principles of sound financial management, including regarding economy and efficiency. [9] Moreover, the grant agreement stated clearly that the salary costs of the personnel of national administrations are ineligible. [10] The grant agreement also did not define the ministries as co-beneficiaries, affiliated entities or associates for the project.

14. The Ombudsman further notes that the General conditions (Annex II to the grant agreement) take precedence over the Description of the Action (Annex I to the grant agreement). [11] By signing the grant agreement, the complainant acknowledged having noted and accepted all parts of the grant agreement. [12]

15. The Ombudsman appreciates that the Commission showed willingness to accept some costs on condition that the complainant provided adequate evidence demonstrating that the costs in question complied with the eligibility requirements in Article 14.1 of the General conditions. The Ombudsman understands and accepts that the Commission does not find the evidence provided by the complainant satisfactory. In particular, this is because it does not demonstrate reliably (i) the number of hours worked by every individual concerned on the project and (ii) how the actual remuneration and amount of the contribution was determined. The complainant thus covered part of the costs claimed by the ministries without taking adequate steps to verify and demonstrate that those costs were spent in accordance with applicable rules.

16. Against this background, the Ombudsman considers that it was reasonable for the



Commission to declare the costs ineligible. The Commission is responsible for ensuring that EU funds are spent in accordance with the principles of sound financial management. [13] The Court has said that where the Commission rejects costs that are unverifiable, unreliable or otherwise unsubstantiated, it acts in accordance with the law and does not breach the principle of proportionality, regardless of whether the beneficiary completed the project. [14]

17. Having said that, the Ombudsman believes that the Commission could do more to avoid similar issues in the future. The complainant interpreted the grant agreement in a way that led to it paying the ministries for services that were not eligible as costs under the grant agreement. To avoid such misunderstanding in the future, the Commission should reflect on how it could improve the clarity of its grant agreements.

18. Grant agreements used by the Commission are, in principle, a compilation of texts drafted by the beneficiary (the Description of the Action, the budget) and other standard texts drafted by the Commission (the General conditions). The Ombudsman understands that it may be practically difficult for the Commission to adapt the standard template for grant agreements to every single case. However, as a matter of good administration, it should ensure that grant beneficiaries are able to understand their rights and obligations, and that there are no contradictions between the different parts of the grant agreement.

19. The Ombudsman agrees with the Commission that the indicative list of evidence contained in Article 16.9 of the General conditions is sufficiently broad. However, this can lead to problems. As this case demonstrates, a beneficiary can carry out a project in good faith, believing that the costs it accrued are eligible, and that the method and evidence it used to verify the costs complies with the grant agreement, only to see those costs rejected by the Commission as ineligible. Sometimes, this can take place years after the project has been completed, when the beneficiary cannot address the issue anymore, and is therefore forced to accept losses for costs it accrued in good faith.

20. The Ombudsman believes that the Commission could address these issues by revising the relevant parts of the standard clauses in the General conditions, and by providing adequate guidance to grant beneficiaries. This would enable beneficiaries to avoid incurring ineligible costs while carrying out projects. Accordingly, the Ombudsman closes this case with a suggestion for improvement below.

Conclusion

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

Following the further explanations provided by the Commission, no further inquiries are justified.

The complainant and the European Commission will be informed of this decision .



Suggestion for improvement

To avoid similar issues in future cases, the Commission should further enhance the clarity of its grant agreements, in particular by providing grant beneficiaries with the necessary guidance, clarifications and templates (model timesheets/attendance list).

Emily O'Reilly European Ombudsman

Strasbourg, 13/10/2020

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

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

[3] The full text of the solution proposal is available at:
<https://www.ombudsman.europa.eu/solution/133665> [Link]

[4] Article 16.9 of the General conditions, which is an annex to the grant agreement.

[5] Article 14.9.h of the General conditions.

[6] Article 101(3) of the Financial Regulation.

[7] Pursuant to Article 17.3 of the grant agreement.

[8] Article 14.1 of the General conditions.

[9] Article 14.1 of the General conditions.

[10] Article 14.9 of the General conditions.

[11] Article 6.2 of the Special conditions states: "*In the event of a conflict between the provisions of the present Special Conditions and any Annex thereto, the Special Conditions shall take precedence. In the event of a conflict between the provisions of Annex II and those of the other annexes, those of Annex II shall take precedence*".

[12] Article 1.2 of the Special conditions.

[13] Article 317 of the Treaty on the Functioning of the European Union.

[14] Cases C-14/18 P *Alfamicro v. Commission* , judgment of 28 February 2019, para. 64-71, and C-584/17 P *ADR Center SpA v. Commission* , judgment of 16 July 2020, para. 99-109.

