



Decision in case 616/2020/DL on how the European Commission dealt with a contractor that had not paid its consultants

Decision

Case 616/2020/DL - Opened on 23/04/2020 - Decision on 19/05/2021 - Institution concerned European Commission (No maladministration found) |

The complainant worked as an expert for an external contractor to the EU Delegation to Ghana. Not having been paid for her work, the complainant turned to the Ombudsman, claiming that the EU Delegation had failed to ensure that the external contractor respects its obligations towards the experts.

The Ombudsman found that both the EU Delegation and the European Commission had acted in accordance with the applicable rules when withholding some payments under the contract. She also found that they had taken appropriate action vis-a-vis the contractor to try to resolve the situation that affected the complainant. The Ombudsman considers that the Commission has adequate mechanisms in place to monitor contractors, and she trusts the Commission will use these mechanisms to monitor the situation and to take action within its remit if needed.

The Ombudsman therefore closed the case with a finding of no maladministration.

Background to the complaint

1. The European Union Delegation to Ghana ('the Delegation') signed a contract with a company, 'the consortium leader', to support communication and visibility activities and events in Ghana. [1] A consulting company ('the external contractor'), who was part of the consortium implementing the contract, recruited the complainant to work as an expert for the period from 2019 to 2021.
2. In January 2020, the complainant reported to the Delegation that neither she, nor the other experts, had received sufficient payment since the start of their contract with the external contractor.
3. The Delegation replied that it had received similar complaints from the other experts and that it would inform the responsible department of the European Commission. The Delegation also said that it had suspended the payments to the consortium since December 2019, as the consortium had failed to provide financial supporting documents.
4. Extensive correspondence ensued between the Delegation, the consortium leader, the



external contractor and the complainant. The complainant raised several allegations concerning the financial and administrative arrangements of the external contractor. The latter denied all allegations.

5. As she had still not received sufficient payment, the complainant turned to the Ombudsman in April 2020. The complainant considered that, although the underlying issue was with the external contractor, the Delegation did nothing to prompt it to pay the experts and to submit correct financial documents.

The inquiry

6. The Ombudsman opened an inquiry into:

1) how the European Commission [2] ensures that the contractor pays the experts for the days worked under the contract;

2) how the European Commission monitors implementation of its framework contracts.

7. The Ombudsman asked the Commission for information about the status of the relevant payment and about what type of action it was taking on the matter. The Ombudsman received the reply of the Commission and, subsequently, the comments from the complainant on that reply. After a careful analysis of the information provided, the Ombudsman's inquiry team asked the Commission to provide additional information regarding its suspension of payments to the consortium and on how it monitors framework contracts more generally. The Commission provided such information.

8. The complainant regularly updated the Ombudsman about her situation in the course of the inquiry.

Payment of the experts

Arguments presented to the Ombudsman

The complainant's arguments

9. The complainant said that she remained unpaid for several of the days worked under her contract. The external contractor argued that it could not pay her because the Delegation had suspended the payments under the contract. The complainant considered that the Delegation, in assigning tasks and approving all experts' timesheets and reports, should bear the responsibility for the experts being paid. Although the Delegation was aware that the external contractor did not pay the experts on time, it still required her to do more work and continued to work with the company.

The Commission's arguments

10. The Commission said that it has no contractual relationship with the complainant, only with the consortium. The consortium leader is the sole party responsible for all administration related to the contract, such as signing contracts with experts and paying them. [3] The Commission has no obligation or means of monitoring that the experts are paid.

11. Nonetheless, the Commission acknowledged that it is bound by the principle of 'sound financial management' and therefore needs to ensure that EU funds are used for their



intended purpose. Consequently, it had taken a number of measures to ensure that the consortium leader and the external contractor respect the financial obligations towards the experts:

1) In December 2019, the Delegation informed the consortium leader that it had noticed certain irregularities in the timesheets for the complainant and another expert, as well as in relation to 'incidental expenditure', amounting to a total of EUR 36 910. In particular, the timesheets had not been approved by the Commission before they were verified in the 'expenditure verification report' [4], as was contractually required. [5] The Delegation therefore asked the consortium leader to provide clarifications and supporting financial documents. Meanwhile, the Delegation would have to retain the disputed amount.

2) In March 2020, the Delegation contested the expenditure verification report since it did not provide sufficient supporting evidence [6]. The Delegation asked the consortium leader to provide proof that the experts had been paid [7].

3) Following the complaint to the Ombudsman, in June 2020 the Commission departments responsible for the contract asked the consortium leader for additional supporting documents, such as proof of having paid the experts.

12. The Commission thus argued that it had explored all means, in line with its contractual obligations, to ensure that the external contractor respects its obligations towards the experts. Since it had not yet received the supporting documents from the consortium, it could not proceed with the payment of the disputed amount of EUR 36 910.

The Ombudsman's assessment

13. Although the Commission has no contractual obligations towards experts employed by an external contractor, and is thus not responsible for whether they are paid by the contractor or not [8], the Delegation and the Commission took action in this case to follow up on the complainant's concerns. This is important and welcome.

14. Having examined the applicable rules and the supporting documents, the Ombudsman finds that the Commission acted in line with its legal obligations when acting on the irregularities in the timesheets, contesting the expenditure verification report [9] and suspending the payments to the consortium leader [10]. Some of the suspended payments relate to the complainant's timesheet. However, although the situation has implications for the complainant, the Commission is indeed obliged to ensure sound financial management of EU funds.

15. The Ombudsman notes that the Commission has taken steps to be able to proceed with the suspended payments. The Commission has reminded the consortium, on various occasions, to present proper timesheets (signed by the project manager and correctly validated) in the expenditure verification report of its next invoice. [11] However, since the Commission has not received the invoice in question with the requested timesheets, it is



justified in retaining the disputed amount.

16. The Ombudsman also considers that the Delegation has kept the complainant adequately informed and that it acted properly by reporting the matter to the responsible Commission department for follow-up.

17. On the basis of the above, the Ombudsman finds no maladministration by the Commission in how it followed up on the complainant's concerns about not being paid.
Monitoring of framework contracts

Arguments presented to the Ombudsman

The complainant's arguments

18. The complainant raised several issues related to the external contractor's financial and administrative arrangements. In her view, the Commission should carry out a more general inquiry into how the external contractor had acted in various framework contracts over the last years. The complainant considered that her situation indicates a systematic issue with framework contracts, namely the absence of a monitoring mechanism in relation to contractors. External experts have little or no legal options to challenge these companies in case of problems.

The Commission's arguments

19. The Commission argued that the complainant's allegations were unsubstantiated. It nevertheless took additional actions, such as asking other consortium leaders of framework contracts for input on the matter. The Commission further stated that, when it comes to monitoring individual contracts, the applicable rules stipulate that the consortium must report on the state of progress of the contract implementation, which is a necessary condition for payment. [12]

20. More generally, the Commission said that it has certain mechanisms in place to monitor framework contracts. For example, in the 'Financial Regulation' [13] and in 'the Commission's practical guide to procurement and grant award procedures for EU external actions' [14] there are adequate rules to control issues concerning employment matters, such as the payment rate of experts.

The Ombudsman's assessment

21. The Ombudsman considers that the Commission took appropriate action in response to the complainant's concerns and that it has described appropriate mechanisms for monitoring framework contracts in general. The Ombudsman trusts that the Commission will monitor the situation and take action within its remit if needed.

22. In conclusion, the Ombudsman finds no maladministration by the Commission on this aspect of the complaint.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusions [15] :



There was no maladministration by the European Commission.

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 19/05/2021

[1] The contract was signed under framework contract EuropeAid/137211/DH/SER/Multi (FWC COMM 2015) LOT 2. More information is available at: https://ec.europa.eu/international-partnerships/framework-contracts_nl .

[2] The inquiry is formally against the European Commission, which was responsible for the funding of

the project.

[3] Article 3(2) of the Global Terms of Reference EuropeAid/137211/DH/SER/Multi Framework Contract COM 2015, Lot 2: Communication.

[4] In fee-based framework contracts, the consortium leader is required to submit to the Contracting Authority an expenditure verification report. The report is produced by an external auditor, who examines and verifies the invoices and financial reports of the company, in accordance with Article 28(2) of the General Conditions for Service Contracts. The auditor also verifies the experts' timesheets.

[5] In accordance with Article 24(2) of the General Conditions for Service Contracts.

[6] It did not comply with Article 28(3) of the General Conditions for Service Contracts, which stipulates that the auditor must be satisfied that relevant, reliable and sufficient evidence exist on the financial report presented by the consortium leader.

[7] In line with Article 25 of the General Conditions for Framework Contracts.

[8] As indicated in Article 3(2) of the Global Terms of Reference EuropeAid/137211/DH/SER/Multi Framework Contract COM 2015, Lot 2: Communication.

[9] In line with Article 28(3) of the General Conditions for Service Contracts.

[10] As is its right to do under Article 29(9) of the General Conditions for Service Contracts.

[11] In line with Article 9(1) of the General Conditions for Framework Contracts, the payment



from the Commission to the contractor is based on the invoice accompanied by an interim progress report and an expenditure verification report.

[12] In accordance with Article 26 of the General Conditions for Framework Contracts.

[13] Article 23 of Annex I of Regulation 2018/1046 on the financial rules applicable to the general budget of the Union, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1046> , sets out mechanisms to deal with abnormally low tenders.

[14] Chapter 3.4.4 of the Practical Guide for European Union external actions, available at: <https://ufmsecretariat.org/wp-content/uploads/2012/09/ePrag-en-2019.0.pdf> , stipulates “ *In view of the evidence provided by the tenderer, the Contracting Authority decides on whether the tender is to be considered irregular and has consequently to be rejected*”.

[15] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the Decision of the European Ombudsman adopting Implementing Provisions