

## Decision of the European Ombudsman closing the inquiry into complaint 1063/2012/(ER)PMC against the European Commission

Decision

**Case** 1063/2012/PMC - **Opened on** 21/06/2012 - **Decision on** 14/03/2014 - **Institution concerned** European Commission ( No maladministration found ) |

### The background to the complaint

1. The complainant is a company leading a consortium which was awarded two specific contracts within the EuropeAid Framework Contract Commission 2007: (i) Contract n. X, concerning the organisation of three conferences in Budapest, Bucharest and Rome, and (ii) contract n. Y, concerning the organisation of the Lebanese Forum on Agriculture. The complaint concerns the eligibility of costs incurred by the complainant in the execution of the two contracts.

2. **Contract n. X** provided for an overall budget of EUR 199.991,00 for the three conferences. The costs incurred for the first two events were EUR 80.621,66 (Bucharest) and EUR 62.474,00 (Budapest) respectively. As a total of EUR 143.095,66 of the maximum contract amount of EUR 199.991,00 had thus already been spent, the complainant needed to calculate the costs of the last conference on this basis. Due to a calculating error, however, the complainant considered that the budgeted cost for the Rome conference (EUR 83.319,00) was still within the limits allowed by the contract. In reality, this budget exceeded the amount that was still available by EUR 26.423,66. The budget for the Rome conference was approved by the Commission. It was only after the third conference had taken place that the complainant detected the error. It then apologised for this error and asked the Commission to reimburse the excess amount of EUR 31.488,97 [1] . However, the Commission refused to do so.

3. **Contract n. Y** required the consortium to draft the transcript of the Lebanese Forum on Agriculture and to make them available in three languages (Arabic, French and English). However, the Commission refused to accept the transcripts submitted by the complainant and to reimburse the related costs on the ground that the transcripts were unreliable.

4. On 22 May 2012, the complainant turned to the Ombudsman.



## **The subject matter of the inquiry**

5. The complainant made the following allegations and claims.

### **Allegations**

1. By deciding not to reimburse the costs incurred by the complainant in the execution of contract n. X which, as a result of a clerical error, were not correctly reported in the budget, the Commission failed to act in accordance with the principles of good administration.
2. By deciding not to reimburse costs incurred by the complainant for the preparation of the transcript of the proceedings of the Lebanese Forum on Agriculture and the translation of this document (contract n. Y), the Commission failed to act in accordance with the principles of good administration, and in particular with the principles of proportionality and legitimate expectations.

### **Claims**

1. The Commission should reimburse the complainant EUR 31.488,97 as costs incurred in the execution of contract n. X.
2. The Commission should reimburse the complainant EUR 21.5189,20 as costs incurred for the preparation of the transcript of the proceedings relating to contract n. Y and the translation of that transcript.

## **The inquiry**

6. On 21 June 2012, the Ombudsman opened an inquiry and invited the Commission to submit an opinion. Since the Ombudsman's present inquiry concerns the execution of two EuropeAid contracts falling under the responsibility of two different Commissioners, the Commission sent two separate opinions. The two opinions were forwarded to the complainant, who sent observations on 27 March and 30 April 2013 respectively.

## **The Ombudsman's analysis and conclusions**

### **Preliminary remark**

7. The Ombudsman wishes to point out that although the principles of good administration are binding on institutions when they act in the framework of contractual agreements concluded with individuals, the scope of the review that she can carry out in contractual cases is, however,



limited. The Ombudsman considers that she should not try to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question can be dealt with effectively only by a court of competent jurisdiction, which would have the possibility of hearing the arguments of the parties concerning the relevant law and of evaluating conflicting evidence on any disputed issues of fact.

8. The Ombudsman therefore takes the view that, in cases concerning contractual disputes, she is justified in limiting her inquiry to the examination of whether the EU institution or body involved has provided her with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman's conclusion would be that her inquiry has not revealed an instance of maladministration. That conclusion would not affect the right of the parties to have their contractual dispute examined and determined by a court.

## **A. Allegation that the Commission was wrong not to reimburse the additional costs incurred by the complainant in relation to contract n. X**

### **Arguments presented to the Ombudsman**

9. In support of its allegation, the complainant argued that (i) the actual costs for the organisation of the Rome conference had been approved by the Commission; and (ii) the calculating error that had occurred was manifest and recognisable by the Commission.

10. In its opinion, the Commission stressed that it had made it clear to the complainant that it needed to make sure that the budget for the Rome conference did not exceed the funds remaining after the events in Bucharest and Budapest. The complainant had nevertheless submitted a budget that exceeded the remaining funds. It was only five months after the Rome conference that the error was detected by the complainant.

11. That having been said, the Commission acknowledged that its services had themselves failed to detect the calculating error when the budget for the Rome conference was submitted by the complainant. In these circumstances, the Commission declared itself willing to make an *ex gratia* payment amounting to 50% of the relevant amount of EUR 26 423.66, that is EUR 13 211.83.

12. In its observations, the complainant made it clear that it was not satisfied by the amount offered by the Commission. It claimed that the Commission should reimburse an amount of EUR 31.488,97, though it said it was willing to write off certain other costs [2]. The complainant also claimed that the Commission should pay interest on account of the delay in paying that sum.



## The Ombudsman's assessment

13. The Ombudsman considers that there can be no doubt that the primary responsibility for ensuring that the costs of the Rome conference remained within the budget that was available under the relevant contract lay with the complainant. At the same time, it seems clear that this budget needed to be approved by the Commission and that, when doing so, the Commission failed to detect that the budget proposed by the complainant clearly exceeded the funds that were still available. There was thus contributory negligence on the part of the Commission. However, the Ombudsman does not see why the Commission's share of the responsibility for this error should be considered greater than that of the complainant.

14. The Ombudsman is pleased to note that, in its opinion, the Commission made it clear that it accepted partial responsibility for the error that had occurred and offered to make an *ex gratia* payment to the complainant amounting to 50% of the difference between the budget for the Rome conference that it had approved and the amount that was in effect still available for that conference. The Ombudsman takes the view that the Commission's proposal is eminently reasonable and fair in the circumstances of the case. She is particularly pleased to see that the service concerned [3] had made this proposal of its own volition, without waiting to be prompted by the Ombudsman. The Ombudsman thus applauds the Commission's pro-active approach and also trusts that it will make the proposed *ex gratia* payment amounting to EUR 13 211.83 to the complainant.

15. It is true that the complainant has made it clear that it is not satisfied by the above-mentioned offer and expects the Commission to pay a much higher amount, together with interest on what the complainant considers to be a delay in making payment. However, the Ombudsman sees no reason that would oblige the Commission to improve the offer it has made. It should be noted that it was the complainant itself that submitted a budget for the Rome conference to the Commission that clearly exceeded the funds that were still available.

16. In view of the above, the Ombudsman considers that the Commission has taken adequate steps to settle the matter in so far as regards the complainant's first allegation and its first claim are concerned.

## B. Allegation that the Commission was wrong not to reimburse certain costs as regards contract n. Y

### Arguments presented to the Ombudsman

17. In support of the second allegation, the complainant argued that (i) the Commission's decision was disproportionate; (ii) the Commission failed to take into account the difficult circumstances in which the Forum took place; and (iii) the Commission's project manager had proposed the stenographers and asked for the translation in French and English of the transcript before assessing its quality.



**18.** The Commission pointed out that, as the participants in the relevant conference were representatives of parliamentary groups and professional associations in Lebanon, the transcription of the proceedings was a very sensitive task. The transcript that was finally received contained obvious errors as regards the names of the intervening speakers. After checks had been carried out, it appeared that the names of the speakers had not been registered properly during the conference. Therefore, it was impossible to know who had said what. As a result, the transcript had no value. Consequently, the Commission was unable to disseminate the record of this high-level conference to its external partners, defeating the purpose of the transcript and its translations.

**19.** The Commission submitted that it had acted proportionately, considering that it could have decided not to make any payments to the complainant under the relevant heading of the contract. Instead, and as a sign of goodwill, the Commission proposed to split this heading into several sub-items and to pay for the translation of the documents that the Commission provided the complainant with, i.e. the part of the work which was accomplished in an acceptable way. The Commission also said that the complainant had transmitted the transcript more than 180 days after the relevant deadline. This alone would have entitled the Commission to ask the complainant for damages of around EUR 5 000 under the terms of the contract. However, and despite the costly efforts in time and energy undertaken by the Commission to obtain the contractually due transcript, despite the unacceptable quality of the latter and despite the long delays, the Commission decided not to request that compensation.

**20.** As regards the complainant's second supporting argument, the Commission stated that it could not accept the complainant's argument that the circumstances were difficult, since the discussions were no more animated than those during previous forums, which had been organised by another framework contractor, and for which the Commission had received accurate transcripts. Furthermore, if there had been unforeseen difficulties, it would have been the complainant's contractual duty immediately to notify the Commission in the event that it considered itself unable to fulfil the tasks in question. However, the complainant never raised any such concerns during the conference.

**21.** In relation to the complainant's third supporting argument, the Commission observed that the contract did not require, nor had its Project Manager requested, the complainant to sub-contract the relevant task. Doing so was thus entirely the complainant's responsibility, and, according to the terms of the contract, it was hence responsible for the acts, defaults and negligence of its sub-contractors. Therefore, the poor performance of the sub-contractor did not exonerate the complainant of any contractual responsibility. Moreover, it noted that Section 2.2 ToR was clear in that it was the complainant's duty officially to transmit the translation in French and English of the transcript before assessing its quality.

**22.** The Commission concluded by stating that accepting the complainant's claim would have been at odds with the principle of sound financial management and hence the interest of the EU taxpayer.



23. In its observations, the complainant maintained its complaint. It added that it also expected to be paid interest on account of what it considered to be a case of late payment by the Commission.

## The Ombudsman's assessment

24. In consideration of the Ombudsman's preliminary remark further above, the Ombudsman notes that the Commission position is appropriate and proportional, and she does not consider that the complainant brought forward any valid argument calling into doubt its view in this respect.

25. Although the Commission did not specifically address the issue of the complainant's legitimate expectation as regards this contract, the Ombudsman considers that, in view of the aforesaid issues regarding performance of the contract which were known to it and in the absence of specific assurances, the complainant could not have formed legitimate expectations regarding the reimbursement of costs incurred.

26. In view of the above, the Ombudsman concludes that the complainant's second allegation cannot be sustained. Consequently, the complainant's related claim cannot succeed either.

## C. Conclusions

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following conclusions:

**In view of the Commission's proposal to make an *ex gratia* payment of EUR 13 211.83 which represents a fair and equitable solution following the opening of the Ombudsman's inquiry, she considers that the Commission settled the matter and there is thus no longer any maladministration as regards the complainant's first allegation. The Ombudsman appreciates the Commission's change of position and trusts that it will make the proposed *ex gratia* payment to the complainant.**

**Concerning the second allegation and related claim, no maladministration has been established.**

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

Emily O'Reilly

Done in Strasbourg on 14 March 2014



[1] The complainant argued that this amount should be reimbursed to it, and not EUR 26.423,66, since, in its view, the costs approved for the Rome conference were EUR 88.384,31, and not EUR 83.319,00

[2] These items amounted to EUR 7.078 in total.

[3] In this respect, the Ombudsman notes that while the Commission service dealing with the complainant's case was DG Relex at the beginning, the institution's opinion was sent by Baroness Catherine Ashton, head of the European External Action Service and Vice-President of the European Commission