Decision of the European Ombudsman closing the complaint 346/2014/PMC against the Executive Agency for Health and Consumers

Decision
Case 346/2014/PMC - **Opened on** 02/04/2014 - **Decision on** 31/07/2014 - **Institution concerned** Consumers, Health, Agriculture and Food Executive Agency (No further inquiries justified) |

Dear Mr W.,

On 19 February 2014, you submitted, on behalf of your association (hereinafter referred to as 'the complainant'), a complaint to the European Ombudsman against the Executive Agency for Health and Consumers (from here on referred to as the 'EAHC' or 'the Agency') concerning a project.

In its complaint, the complainant submitted the following allegations and claim.

Allegations

1. Although a budget amendment and an extension of the project end date were agreed, the EAHC failed to take this into account in the calculation of the final balance payment.

2. The Agency failed to provide explanations to the complainant as regards the cuts or rejections of costs per partner.

3. The Agency repeatedly lost or misplaced documents sent by the complainant.

Claim

The EAHC should calculate the final balance payment on the basis of the changes agreed upon.

I opened an inquiry into the present complaint and requested, on 2 April 2014, clarifications from the Agency in relation to the first allegation and related claim. I also informed the complainant and the Agency that I would decide at a later stage on how to proceed as regards the second and third allegations, as well as the respective claims.

Subsequently, on 3 April 2014, the complainant provided me with certain explanations. The

Agency then provided the clarifications requested by letter of 30 April 2014, in relation to which the complainant provided comments on 15 May 2014.

I have now assessed all the evidence available to me and come to a conclusion as regards the present complaint. In what follows, I will deal with the key issues one-by-one.

Concerning the first allegation

(a) As regards the point that the Agency agreed to certain changes and subsequently refused to take these changes into account

The Agency's position rests upon three main arguments: (i) it allowed the complainant to transfer appropriations to its new partner, in the absence of the required documents, in order to guarantee the proper implementation of the project, without, however, implying that a formal amendment was not necessary; (ii) in any event, the email of 24 May 2011 only concerned one budget change, while the complainant had made several amendment requests which also required approval; and (iii) the complainant never questioned the need to provide the documents the Agency had requested.

The Agency's position as regards this aspect of the case is convincing and the complainant has not put forward any arguments capable of challenging it. In particular, the complainant's comment in reply to the Agency's clarifications that the Agency had accepted the complainant's request for a budget amendment is not a substantive argument, but a mere statement.

Moreover, the Ombudsman does not share the complainant's astonishment concerning the grounds why the final payment was still based on the original grant agreement, considering that " *the all activities have been fulfilled by the partners* ". In this regard, it has to be underlined that the underlying question in the present case is not whether the activities of the project at hand have been properly implemented, but whether the amendment requests made by the complainant have been properly approved by the Agency, in accordance with the applicable rules. In this respect, it has to be noted that the Agency repeatedly invited the complainant to provide the missing documents. The Agency cannot thus be criticised for wrongdoing in this respect.

Additionally, the complainant did not address at all the Agency's argument that its email of 24 May 2011 'approved', if at all, only one out of several budget amendment requests, and also did not address the point that it had never questioned the necessity to provide the relevant documents. In relation to this last point, it must be observed that the complainant argued in its complaint that it had provided the required documents and that the Agency had misplaced or lost them. However, as the assessment of this point falls under the complainant's third allegation, it is being dealt with in that context.

In view of the foregoing, I conclude that the Agency was right in calculating the final payment to the complainant on the basis of the original grant agreement.

Consequently, I consider that there are insufficient grounds justifying further inquiries into this aspect of the complaint.

(b) As regards the point whether the subcontracting costs by a partner of the complainant were affected by the changes to which the EAHC agreed or whether they would have been rejected in any event

In this respect, it has to be recalled that the Agency essentially stated, first, that subcontracting between co-beneficiaries runs contrary to the applicable rules and, second, that it had never authorised the subcontracting in question, as required. It thus contended that the rejection of the relevant subcontracting cost was not linked to the non-signature of the amendment.

I am of the opinion that the Agency's position as regards (b) is convincing and the complainant has not put forward any arguments capable of challenging it.

Apart from not putting forward any substantive argument challenging the Agency's statement that subcontracting between co-beneficiaries is prohibited in accordance with the applicable rules, the complainant's observation that all activities were implemented by " *divisions of the University of Cumbria not involved in the project* " does not alter the fact that those divisions which carried out the activities are part of the complainant's new partner and that the relevant activities were thus carried out by a co-beneficiary in violation of the applicable rules. Moreover, the argument that the complainant's partner had organised the summer camp in good faith does not imply that the applicable rules as regards the eligibility of costs incurred no longer apply.

Consequently, the complainant's statement made on 3 April 2014 that if the amendment had gone through the costs would have been submitted as incurred by the respective partners, in conformity with the applicable rules is not convincing.

In view of the foregoing, I am of the view that the Agency was right in rejecting the subcontracting costs by a partner of the complainant.

Consequently, I consider there are insufficient grounds justifying further inquiries into this aspect of the complaint, as well.

As regards the second allegation

It has to be recalled that, on 1 July 2013, the Agency sent to the complainant (i) the determination of balance payment table, showing the different steps leading to the calculation of the final grant for the action and resulting balance payment, as well as (ii) the participants' financial sheets, indicating the reasons of cost rejection per partner. By letter of 14 October 2013 and 17 January 2014, the EAHC also reiterated that it had duly informed the complainant that the cost rejections were related to the subcontracting costs of a partner.

The complainant provided a copy of all the above-mentioned documents. The content of the

related tables provides sufficiently detailed information which allows understanding the reasons on which the Agency based itself as regards cuts or rejections of costs per partner.

Consequently, I conclude that there are insufficient grounds justifying opening an inquiry into this allegation.

As regards the third allegation

It appeared that the complainant had not raised this issue before its letter of 7 August 2013, even though it repeatedly exchanged correspondence with the Agency in relation to documents which had allegedly not reached the latter. After the complainant explicitly raised the issue that the Agency had lost certain documents, the latter, both in its letters of 14 October 2013 and 17 January 2014, explained to the complainant its internal documents registration procedures, and noted that it had no record of lost documents that were subsequently found due to a delivery receipt, contrary to what the complainant alleged. The complainant does not appear to have addressed this issue in its complaint.

What is more, considering that the Agency had, in the past, repeatedly contacted the complainant asking it to submit missing documents, there are no reasons to doubt the EAHC's position in this respect. It has to be noted that the complainant attached to its complaint two sending receipts dated 5 October and 14 November 2012, and one acknowledgment of receipt dated 15 April 2013. However, while sending receipts by definition do not acknowledge receipt of any document, and are therefore irrelevant as proof in the present case, the acknowledgment of receipt dated 15 April 2013 only proves that the complainant sent certain documents to the Agency *after* 19 October 2012, that is the date on which the Agency informed the complainant that it would assess the final report in light of the original grant agreement, and thus too late to be considered.

Consequently, I consider that there are insufficient grounds for opening an inquiry into this aspect of the complaint.

In view of the foregoing, I have decided to close your case with a finding that no further inquiries are justified in relation thereto and informed the Agency accordingly.

Finally, I note that you asked me for advice on how to pursue this matter in general. While I am not in a position to reply to this question, I wish to inform you of the possibility of turning to a lawyer for advice as regards what further steps to take.

Yours sincerely,

Emily O'Reilly