



Decision in case 1064/2015/JAP on the European Commission's rejection and recovery of costs claimed under an FP6 grant agreement

Decision

Case 1064/2015/JAP - **Opened on** 18/12/2015 - **Decision on** 22/06/2017 - **Institution concerned** European Commission (Settled by the institution) |

The case concerned the Commission's rejection and proposed recovery of certain costs related to subcontracted activities in the context of an FP6 grant agreement. Arising from the Ombudsman's inquiry the Commission decided not to proceed with the recovery of costs totalling almost 87.000 EUR. The Commission explained that it had decided to change its original decision on the basis that the complainant had acted in good faith and in accordance with advice which the Commission had itself given.

The Ombudsman welcomed this new decision; nevertheless, she found it to have been unfortunate that for several years the complainant had the prospect of a major recovery of funds hanging over it.

The background to the complaint

1. The complainant, a Polish research institute, implemented a number of projects that were co-financed by the European Union under the 6th Framework Programme for Research and Technological Development ('FP6') between 2004 and 2009.
2. On 15 February 2005, the complainant consulted the Commission's project officer by email in order to ascertain whether it could subcontract some works. On 16 February 2005, the project officer replied by email and suggested that the complainant could employ a specific person under an employment contract in order to avoid a subcontracting call for tenders.
3. After the successful completion of the projects, the Commission carried out, in July 2010, a financial audit into three projects. The audit report revealed a number of problems. The Commission shared its preliminary conclusions with the complainant in March 2011 and the complainant sent extensive explanations.
4. In August 2013, the Commission sent the final audit report to the complainant. The report rejected the costs related to some tasks considered as sub-contracting. The subsequent dialogue, involving extensive correspondence and a number of meetings, proved



unsuccessful from the complainant's point of view.

5. The reason for the rejection of the costs was non-compliance with the grant agreement rules. The auditors rejected the costs claimed for a number of service contracts concluded with another entity because the complainant had not tendered for the contracts but had awarded them directly. This was contrary to Article II.6.2 of the grant agreement, which stipulates that subcontracts must be awarded to "*the bid offering the best value for money (...) under conditions of transparency and equal treatment*". Given the importance of the contracts, which covered some core elements of the project, the auditors did not agree with the complainant that the tasks constituted "*minor services*", which would exempt them from the above rule. Moreover, the original grant agreement did not envisage any subcontracting possibilities [1]. The auditors also said that they could not agree to the selection of the contractor nor to "*the selection of the legal form of the co-operation*".

6. As a result, the Commission ordered a recovery of all the subcontracting costs, totalling almost 87.000 EUR.

7. On 28 October 2013, the Commission project officer sent an email to the complainant and confirmed that, in his email of 16 February 2005, he had "*agreed after internal consultation with [the Commission's] legal Unit for no tendering and recommended an employment contract (...)*". Moreover, "*instead of [the employment contract] ... [he] was satisfied with the service contract selected in the end (...)*". The project officer concluded by saying: "*I insist on the fact that I was kept updated at each subsequent contract after the initial contract*".

6. The complainant's efforts to find an amicable solution were unsuccessful. Consequently, in June 2015, the complainant turned to the European Ombudsman.

The inquiry

7. The Ombudsman opened an inquiry concerning the Commission's decision to reject and subsequently recover costs related to certain subcontracts, even though these were concluded with the support of the relevant project officer.

8. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and, subsequently, the comments of the complainant. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission incorrectly rejected the costs related to subcontracts and ordered their recovery

Arguments made by the complainant and the institution

9. The complainant argued that the Commission should not have rejected the costs because the tasks covered by the relevant service contracts were "*minor tasks*" [2], for which "*only the agreement of the Commission was required but not a full tender procedure*". As evidenced



by email correspondence (see paragraphs 2 and 7 above), the complainant sought and obtained prior authorisation from the Commission's project officer to conclude these contracts. The project officer confirmed the authorisation verbally as well. In an e-mail of 28 October 2013, in the course of the complainant's dialogue with the Commission, the project officer certified that he had been fully aware of the complainant's decisions to choose a different legal form of co-operation with the entity and the extension of the contracts. In this context, the complainant noted that while the Commission "took note" of this correspondence, it did not comment on its substance. As regards the fact that the complainant awarded the contract directly, this was justified because the sub-contractor had a "unique and specific experience" relevant to the tasks.

10. In its reply to the Ombudsman, the Commission said that its auditors had never contested that the project officer had taken note of the possibility of the subcontracting in question. Nonetheless, the Commission confirmed its view that the costs were ineligible because the complainant had not complied with the grant agreement rules. However, considering "the particular circumstances of [this] case, [the complainant's] good faith and the advice [the complainant had] received", the Commission offered to waive the recovery of 86.720,11 EUR [3].

11. The complainant expressed satisfaction with the Commission's proposal.

The Ombudsman's assessment

12. The Ombudsman welcomes the Commission's decision not to proceed with its proposed recovery in this case. In the particular circumstances, this was the correct decision to have taken. It is the view of the Ombudsman that the recovery would have been neither just nor in accordance with the principle of proportionality. In arranging to contract out some aspects of the project, the complainant acted in good faith and in accordance with the advice of the Commission's project officer, advice which the latter was authorised to give. The very function of the project officer implies that it includes the giving of advice and that the recipient of such advice is entitled to trust that action in accordance with that advice will be acceptable to the Commission. If this were not the case, then the complainant (and indeed other grant beneficiaries) can never be sure when, or to what extent, it can rely on communications from the relevant project officers within the Commission. This would jeopardise citizens' trust in the administration and impair the running of programmes such as FP7. While the parties to such grant agreements have the option of bringing any disputed matters to a court, this is not always a realistic option, particularly for smaller operators (grant recipients) who may not be in a position to risk the expense of the legal costs involved. While there has now been a satisfactory conclusion to this particular case, it is unfortunate that for several years the complainant faced the prospect of having to refund almost 87.000 EUR to the Commission.

13. This particular case highlights that in matters like this, the Commission must be very attentive not to let its actions be determined solely by the technicalities of the grant agreement but must keep an eye to compliance with the principle of proportionality which is a higher ranking principle binding upon the Commission and the observance of which, in



recovery matters, is explicitly required by the Implementing Regulation to the Financial Regulation. [4] It is an acknowledged fact that grant agreements under FP7 are of a complexity that can be bewildering to beneficiaries. Errors may happen in the course of the life of a project. The Commission must on the one hand enforce grant agreements, with a view to protecting the financial interests of the EU. Given the high number of grant agreements that the Commission administers, it is also understandable and right that the treatment of agreements becomes to a certain extent standardised. On the other hand, the Commission must also examine what is fair and just in the circumstances of an individual agreement. A view held by public sector ombudsmen generally is that no legal rule should be applied in so inflexible a manner as to cause a serious injustice or unfairness; principles of good administration must namely also be observed. The principle of equality requires that equal situations must be treated equally but also that different situations shall not be treated equally. The principle of proportionality requires that the sanction for a non-compliance must be reasonable in relation to the gravity of the non-compliance; other circumstances to take into account are for instance the good faith and diligence of the beneficiary. Thus there is a balance to be struck in such cases between the strict application of contractual stipulations and the need for public bodies to act in accordance with the demands of justice and fairness that such principles embody. Accordingly, the Ombudsman suggests to the European Commission that it reflect on developing its own good practice guidance on how best to reconcile the application of the contractual stipulations with the requirement to act in a fair and just manner.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion [5] :

The Commission has settled the issue.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 22/06/2017

[1] Subcontracting was not set out in Annex I to the grant agreement as required by Article II.6.2.c of the general conditions to the grant agreement.

[2] Article II.6.1. of the general conditions to the grant agreement stipulates that “[*d*]uring the implementation of the project, contractors may subcontract other minor services, which do not represent core elements of the project work (...)”.



[3] The Commission relied on Article 91.1(c) of the Rules of Application of the Financial Regulation which reads as follows:

" 1. The authorising officer responsible may waive recovery of all or part of an established amount receivable only in the following cases: (...)

c) where recovery is inconsistent with the principle of proportionality .

2. In the case referred to in point (c) of paragraph 1, the authorising officer responsible shall act in accordance with predetermined procedures established within each institution and shall apply the following criteria which are compulsory and applicable in all circumstances:

(a) the facts, having regard to the gravity of the irregularity giving rise to the establishment of the amount receivable (fraud, repeat offence, intent, diligence, good faith, manifest error);

(b) the impact that waiving recovery would have on the operation of the Union and its financial interests (amount involved, risk of setting a precedent, undermining of the authority of the law).

Depending on the circumstances of the case, the authorising officer responsible may also have to take the following additional criteria into account:

(a) any distortion of competition that would be caused by the waiving of recovery;

(b) the economic and social damage that would be caused were the debt to be recovered in full ."

[4] Article 91 of Regulation 1268/2012 (Implementing Regulation to the Financial Regulation).

[5] Information on the review procedure can be found on the Ombudsman's website :
<http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/70669/html.bookmark>