

Decision in case 1984/2015/JN on the European Commission's decision to deem ineligible costs claimed by a partner in an EU-funded project for combatting racism against Roma people

Decision

Case 1984/2015/JN - Opened on 19/01/2016 - Decision on 23/05/2018 - Institution concerned European Commission (No maladministration found) |

The case concerned a decision by the European Commission to deem ineligible certain costs claimed by a non-governmental organisation, which participated in an EU-funded project aimed at combatting racism against Roma people. The complainant argued that the Commission had not properly examined the evidence before determining that the costs were ineligible.

The Ombudsman inquired into the issue and found that there was no maladministration by the Commission.

Background to the complaint

1. The complainant is a Brussels-based non-governmental organisation, which participated in an EU-funded project aimed at combatting racism against Roma people [1] from 2011 to 2013. It carried out the project together with a subcontractor (a not-for-profit online platform). The terms of their cooperation were set out in a Memorandum of Understanding and Collaboration (Preferred Services Provider Agreement) in 2009.

2. In 2014, after the project was completed, the Commission considered costs claimed by the complainant, amounting to €170 000, to be ineligible. The Commission claimed that the complainant had not complied with the applicable rules governing subcontracting under EU calls for tenders, which were set out in the 'grant agreement' concluded between the complainant and the Commission.

3. The complainant considered that the Commission was wrong to reject the costs, and turned to the Ombudsman at the end of 2015.

The inquiry



4. The Ombudsman opened an inquiry into the complainant's claim that the Commission was wrong to consider the disputed costs to be ineligible.

5. In the course of the inquiry, the Ombudsman received the reply of the European Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's reply. The Commission further sent to the Ombudsman the final audit report from an external auditor on the implementation of the project. The complainant sent additional comments following this.

Arguments presented to the Ombudsman

6. The complainant contends that the Preferred Services Provider Agreement (PSPA), which it concluded with its subcontractor in 2009, had been established in compliance with the applicable rules. In support of its claim, it had provided to the Commission: information on the call for tenders through which the subcontractor was selected, copies of the offers received from the three shortlisted candidates, an extract from the minutes of the meeting of the complainant's 'executive bureau' during which the subcontractor had been selected, a copy of the PSPA, and a memorandum (legal advice) from a law firm specialising in EU procurement rules, which confirms the complainant's position.

7. In its reply to the Ombudsman, the Commission said that:

Ø It had deemed the funds ineligible due to the “ *information about the costs, relevant contracts and other supporting documents* ” provided by the complainant. The Commission had first flagged potential issues related to the subcontracting in February 2014. Based on the information in its possession at the time, the Commission considered the relevant costs ineligible, and informed the complainant of this in May 2014. The complainant challenged the Commission's decision and provided further information. The Commission had replied to the complainant in October 2014 and January 2015, maintaining its conclusions.

Ø Its letters had stated the reasons for its decision and consistently referred to the relevant provisions of the grant agreement - Articles II.9 [2] and II.2.1 [3] .

Ø It had taken into account all information provided by the complainant, as well as other relevant information. The Commission's letters did not mention certain documents [4] to which the complainant refers because the Commission received them in the context of another project. However, the Commission carefully analysed these documents, which did not alter its decision. This is so, in particular, because only part of the fees to be charged was included in the PSPA or the different tenders submitted by the complainant to prove that its call for tenders had been based on the selection of the tender offering the 'best value for money'. Moreover, neither the tenders nor the PSPA contain any detailed description of services to be provided and the related prices. As such, it was not possible to use these documents to evaluate if the call for tenders resulted in the selection of the tender offering the best 'value for money'. The



Commission received no other documentation that could be used as evidence to demonstrate this.

Ø Given the disagreement concerning the eligibility of certain costs, the Commission had decided to commission an external audit to verify its conclusions. The Commission said that the complainant had welcomed this. The Commission said it would adjust its decision if the external audit demonstrated that this was necessary.

8. Subsequently, the Commission forwarded to the Ombudsman the final audit report, which included the following relevant conclusions:

“ The analysis of the supporting documents showed that several activities have been subcontracted to [the subcontractor] . However, [the subcontractor] works as a platform, bringing together experts and service providers from several member states.

The Coordinator mentions that for each service a request is sent to [the subcontractor] who circulates this request amongst its subcontracted members for execution. These subcontracted members, if they are interested in providing the service, make an offer to [the subcontractor] .

Based on our audit we conclude on the following:

1. We conclude that [the project coordinator] did not perform a procurement procedure in order to choose [the subcontractor] . [The complainant] had automatically chosen [the subcontractor] for this project based on a previous tender process that was performed and in which [the project coordinator] did not take part, nor in which this specific project was mentioned.

2. We could not verify any procedures related to the selection of the members subcontracted by [the subcontractor] to perform the activities of the project. Therefore the auditor concludes that evidence of tendering between [the subcontractor] and their members is not available. Consequently we are unable to conclude on how these subcontracted members of [the subcontractor] have been chosen neither on how they organised and concluded on the competitive procedure.

3. The auditor was not able to conclude on the output of the service provided by the subcontractors of [the subcontractor] who conducted the missions. We were therefore unable to assess the execution of the activities performed by the subcontracted members. The only documents the auditor could verify were the invoices of [the subcontractor] (and not the invoices from the subcontracted members) including a very general description of the activities performed and the final report of the project which provides a description of the activities.

Considering the above mentioned points, we were not able to determine:

1) if the selected offers (both from [the subcontractor] and from the subcontracted members) were the best among the options providing the best value for money;



2) if the actual cost of the activity was the amount invoiced by [the subcontractor] ; and

3) if the activity actually took place, since the descriptions in the invoices were vague and inconclusive concerning services provided.

Note that [the subcontractor] is located at the same address/phone number as [the complainant] , with different registration numbers [and there may possibly be conflicts of interest].

Therefore, it was not possible to determine whether the Coordinator complies with its obligations regarding tender procedures. Therefore, the Auditors maintain the finding regarding the ineligibility of the amount concerned..."

9. In its comments, the complainant disagreed with the Commission's position and the auditors' findings. It argued that:

Ø The Commission and the auditors failed to take into account all available evidence, including copies of the offers concerning all relevant subcontracted activities.

Ø The Commission's and the auditors' arguments were inconsistent and evolved over time.

Ø Based on its knowledge of Commission audits, the audit in its case had taken too long.

Ø Article II.9.1 of the grant agreement concerning subcontracting does not apply to subcontracting agreements concluded before the execution of the grant agreement , such as the PSPA.

Ø Regarding the potential conflict of interest, the complainant argued it was simply sharing workspace with the subcontractor and three other organisations. However, the subcontractor had been located at a different address at the time the PSPA had been concluded. The complainant selected the subcontractor because it was the only provider that offered to charge for its services alone, with no additional costs. Thus, it represented the best value for money.

Ø In its reply, the Commission had made new arguments, which were incorrect. Contrary to what the Commission had claimed, the PSPA did not refer to a percentage of fees to be charged to the subcontractor. The documents submitted to the Commission clearly show the services in question as well as their price.

The Ombudsman's assessment

10. The dispute arises from Article II.9.1 of the grant agreement, which states that: *"If the beneficiaries have to conclude contracts in order to carry out the action and they constitute costs of the action under an item of eligible direct costs in the estimated budget, they shall award the contract to the bid offering best value for money; in doing so, they shall take care to avoid any*



conflict of interests" .

11. In the course of the inquiry, the complainant contended that this provision should not apply to the specific subcontracting arrangement at issue in this case, which had been concluded before it signed the grant agreement. The Ombudsman does not share the complainant's view. Article II.9.1 of the grant agreement is sufficiently broad to cover the subcontracting agreement at issue in this case. As the auditors said in their final report, which appears to express the Commission's final position, one of the issues was that the project coordinator did not organise any competitive tender procedure at the specific points in time when the activities in question were subcontracted. The Ombudsman considers that no provision of the grant agreement supports the argument that Article II.9.1 of the grant agreement should be considered inapplicable to the subcontracting of activities for the entire duration of the project (2011-2013), based on the framework agreement concluded by an individual beneficiary years prior to the grant agreement, namely in 2009. Such an interpretation would run counter to the purpose of Article II.9.1 of the grant agreement, which seeks to ensure an effective use of EU funds in economic terms based on the "best value for money" criterion. Compliance with the purpose of Article II.9.1 would have necessitated carrying out a dedicated call for tenders. The complainant could not simply rely on the PSPA, which had been concluded in 2009, that is, before the grant agreement was signed.

12. The Ombudsman notes that the Commission sent several letters to the complainant on the issue of subcontracting. It is clear from these letters that the Commission thoroughly examined the issue in light of all the available information.

13. The Commission explained that the complainant had submitted some documents in the context of another project, which is why the Commission had not mentioned them in its correspondence concerning this project. However, the Commission said in its reply to the complaint that it had examined these documents.

14. The Ombudsman further notes that the complainant had several opportunities to make its case, in its correspondence with the Commission and in the context of the audit. The evidence before the Ombudsman does not support the view that the Commission and the auditors disregarded the information provided and arguments put forward by the complainant. Thus, the procedure followed and the conclusion arrived at were fair.

15. Moreover, the entire correspondence shows that the Commission and the auditors had been consistent in considering that the complainant had failed to demonstrate that it had ensured that the activities charged to the EU budget had been executed in accordance with the "best value for money" criterion.

16. Furthermore, the final audit report confirms the Commission's stance.

17. In light of the above, the Ombudsman considers that the procedure was fair and that the Commission took all the complainant's arguments and supporting documents duly into account before deciding that the contested costs were ineligible.



18. Regarding the potential conflict of interest, it appears from the final audit report that this issue was of a secondary nature and was not decisive for the Commission's conclusion. Nevertheless, the Ombudsman finds it reasonable that the Commission and the auditors pointed to the fact that the complainant and the subcontractor shared the same address, phone and fax numbers as a factor giving rise to concerns about a potential conflict of interest.

19. Against this background and as the other arguments advanced by the complainant cannot change the Ombudsman's finding, the Ombudsman concludes that there has been no maladministration.

Conclusion

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

There was no maladministration by the European Commission.

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

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Strasbourg, 23/05/2018

[1] Project "I AM ROMA: Changing Mindsets", reference JUST/2009/FRAC/AG/1245. The project leader was a municipality in an EU Member State and the project ran from 1 February 2011 until 31 January 2013.

[2] Article II.9.1 reads as follows: "*If the beneficiaries have to conclude contracts in order to carry out the action and they constitute costs of the action under an item of eligible direct costs in the estimated budget, they shall award the contract to the bid offering best value for money; in doing so, they shall take care to avoid any conflict of interests.*"

[3] Article II.2.1 reads as follows: "*The beneficiaries undertake to take all the necessary measures to prevent any risk of conflict of interests which could affect the impartial and objective performance of the agreement. Such conflict of interests could arise in particular as a result of economic interest, political or national affinity, family or emotional reasons, or any other shared interest*".



[4] The call for tenders, copies of the offers received from the three shortlisted candidates and the memorandum (legal advice) from a law firm. The Commission said that the memorandum was produced after the last exchange of correspondence between it and the complainant.