



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY
Audit
The Director

Brussels,
REGIO C2/REGIO D(2013) 239064

Subject: Bulgaria – ERDF and Cohesion Fund (2007 – 2013) – Complementary EPM 'To obtain assurance on the functioning of the management and control systems through the audit of Operational Programmes / areas and horizontal themes (2010-2012)'

Regional Development OP (CCI N°: 2007BG161PO001)
Audit mission of 14 – 18 March 2011
Mission no: 2011/BG/REGIO/J2/943/1

Ref.: Your letter 1.1-3294 of 23 August 2012 (Ares(2012)995075)

Your Excellency

I am writing to inform you that Directorate-General of Regional Policy has concluded the audit carried out between 14 and 18 March 2011. Following the analysis of the information provided in your letter of 3 November 2011 and additional information provided in your letter of 23 August 2012, you will find in **annex I** our conclusions in this regard.

As the irregular expenditure detected, as presented in annex II, has been accepted by you, and you have agreed to make the required financial corrections, no further action will be taken by the Commission. The audit is therefore closed and a hearing is no longer necessary.

Details of financial corrections accepted by the Member State are provided in **annex II**.

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I would like to remind you that under Article 90(1) of Council Regulation (EC) N° 1083/2006, the competent bodies and authorities are required to keep available all relevant documents for a period of three years following the closure of an operational programme as defined in Article 89(3) of the Regulation or three years following the year in which partial closure takes place, in case of documents regarding expenditure and audits on operations referred to in 90(2) of the Regulation.


Yours faithfully




Lena Andersson Pench

Enclosures: Annex I – Commission's observations, conclusions and recommendations
Annex II – Summary of irregular expenditure where financial corrections were accepted by Member State

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ANNEX I – COMMISSION'S OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

Findings 1.1, 1.3, 4 and 6 were closed in our letter of 20 June 2012 (ref. Ares(2012)735249). Below are our conclusions in relation to the remaining findings.

Reconstruction, renovation and equipment for several schools on the territory of the Municipality of Cherven Bryag (BG161PO001-1.1.01-070) – Priority Axis 1 – Sustainable and integrated urban development

Finding n°1.2 Lack of transparency during the questions and answers session; failure to state all the selection and contract award criteria in the tender documents or tender notice

Before the deadline for submission of tenders there were several questions and answers relating to specific items in the bill of quantities. The clarifications provided by the contracting authority to the potential tenderers were included in a 'revised' bill of quantities. However there was no clear indication as to the requirement to use the 'revised' version when preparing the offer. There were 4 tenders that were evaluated at the technical stage. Three out of the four tenderers submitted their bids using the original bill of quantities as included in the procurement notice and were subsequently rejected on the grounds that they did not take into account the clarifications provided by the contracting authority. The requirement to use the revised bill of quantities thus can be considered as an award criterion and should have been included in the tender documents or in the tender notice, which was not the case. The contract was awarded to the one tenderer who submitted its bid using the 'revised' bill of quantities for EUR 2 242 587. The approach taken by the contracting authority is considered as a breach of the rule that all the selection and contract award criteria should be included in the tender documents or tender notice.

Action n°1.2 (Responsible body: Contracting authority; Deadline: 90 days; Priority: High):

The contracting authority was requested to explain why it required the 'revised' bill of quantities be used for the evaluation process and why it did not re-publish the procurement notice with the 'revised' bill of quantities. It was also requested to ensure that where changes are made to the tender requirements that any new requirements are clearly advised to all tenderers. The fact that only 1 of the 4 tenderers complied with the new bill of quantities requirement strongly indicates that the clarifications provided by the contracting authority were not sufficiently clear and this led to reduced competition.

First reply of the Member State

Pursuant to Article 29(1) of the Bulgarian Public Procurement Law, up to 10 days prior to the deadline for tender submission, the persons concerned may request, in writing, that the contracting authority provide clarification regarding the tender documentation, and the contracting authority has an obligation to deliver written clarification within 3 days. Cherven Bryag Municipality, in its capacity of a contracting authority, fulfilled these legal requirements and sent clarifications to all persons who had bought tender documentation under Article 29(2) of the Bulgarian Public Procurement Law.

Furthermore, those clarifications were also enclosed to the documentation which is subsequently bought by other tenderers.

Based on the evidence submitted by the beneficiary, the managing authority believes that there was no breach of transparency during the question and answer session. Upon reviewing and analysing the contracting authority's clarifications, the managing authority finds that they are clear and correct. The clarifications, which were sent to a total of 30 legal persons (all of whom had bought tender documentation), did not change the tender participation conditions.

Assessment of DG REGIO

In the letters reviewed by the audit team the contracting authority has not stated explicitly that the 'revised' template for the bill of quantities should be used, nor was it clear what the legal basis for changing the template was. Three of the four bidders who were evaluated at the technical stage submitted tenders following the original bill of quantities as it was included in the call for tenders. Only one bidder understood that the 'revised' bill of quantities should be used. This offer was the only one evaluated in its entirety and this bidder was awarded the contract.

There were 30 interested parties who purchased the tender documentation and 13 tenderers submitted bids. Only one bid was evaluated in its entirety and this bidder was awarded the contract.

As a result of the unjustified rejections in the award phase and the resulting lack of competition with only one bid evaluated in its entirety we maintain that a financial correction should be applied. The proposed 10% financial correction amounts to EUR 228 744 ($\text{BGN } 5\,263\,343 \times 10\% \times 85\% = \text{BGN } 447\,384$; $\text{BGN } 447\,384 / 1.9558 = \text{EUR } 228\,744$) and the managing authority was requested to confirm its agreement to make the financial correction of the remaining EUR 114 372 by deducting the related expenditure from the next expenditure declaration.

Should the managing authority consider that lack of the use of the revised bill of quantities did not constitute an exclusion criterion, and that the 3 bidders were not excluded on the basis of the fact that they did not use the correct template, it was requested to provide the Commission services with additional proof on why the 3 bidders were excluded.

Second reply of the Member State

The managing authority maintained its position and provided additional arguments and evidence to support its position.

Three of the rejected bidders filed complaints with the Commission for the Protection of Competition (CPC). By its decision No. 1110/22.10.2009, the CPC overruled two complaints and the other complainant withdrew its complaint. The justification for the CPC decision contains detailed counterarguments against the arguments of the complainants, part of which coincide with the findings of the EC:

"In Section IV.3.4 of the procurement notice the final deadline for submission of bids stipulated by the contracting authority was July 21st, 2009. In this context, it is to be assumed that pursuant to Article 29(1) of the Public Procurement Act (PPA), not later

than 10 days prior to the expiry of the time limit for the submission of bids, bidders may request written clarification from the contracting authority regarding the tender documentation, and the contracting authority must supply such clarification within three days from receipt of said request. (...) The contracting authority has provided clarifications to all bidders with respect to questions raised by them earlier about the tender documentation. Pursuant to PPA Article 29(2), the contracting authority must send the clarifications as per paragraph 1 to all entities who have purchased the tender documentation. Such clarification is also enclosed with the documentation yet to be purchased by other bidders and becomes an integral part thereof. The dates on which such clarifications were requested and the dates on which the contracting authority circulated its replies to their requests, namely the clarifications to the bidders, as well as the time limit set by the contracting authority for submission of the tenders, all lead to the conclusion that the bidders' requests for clarification of some unclear aspects of the tender documentation had been submitted to the contracting authority within the time limit as per PPA Article 29(1).

As can be seen from the tender submitted by [REDACTED] and enclosed with the case file, the CPC found that the bidder was in breach of the requirement of the contracting authority, stated in advance, namely to reflect the additionally specified types of works in the bills of quantities circulated by the contracting authority to the bidders with cover letters ref. No. No. 38-00-827(1)/25.06.2009, 38-00-921(2)/13.07.2009, 38-00-891(1)/09.07.2009, 38-00-829(1)/25.06.2009 and 38-00-888(1)/09.07.2009, as the bidder had mistakenly assumed that those did not have the binding force of mandatory instructions, on account of the fact that they "were not announced in accordance with the procedure as per PPA: by either a new order or a new procurement notice". Here is the place to note that if the clarifications and instructions contained in the letters referred to above had been incorrect or unclear to said company, it should have appealed against these within the time limit prescribed by law. (...)

In relation to the terms and conditions set for participation in the tender procedure and PPA Article 54(1), it should be noted that when preparing their tender, each bidder should adhere strictly to the terms and conditions announced by the contracting authority. In view of the fact that the company failed to comply with the requirements of the contracting authority set forth in the letters referred to hereinabove, the tender committee has correctly proposed the rejection of said bidder from the tender procedure on the authority of PPA Article 69(1), item 3, namely, non-compliance of the tender submitted by [REDACTED] with the terms and conditions announced in advance by the contracting authority. In this context, the claim of the complainant that it had been wrongly and unlawfully rejected from the tender procedure, is unfounded."

There is no evidence of said CPC decision being appealed before the Supreme Administrative Court. Said decision has become effective. By a letter dated July 19th, 2012, the beneficiary attests to the fact that said decision has not been appealed against and is in force and effect. In view of the above, the managing authority is of the opinion that the contracting authority is not in breach of the PPA in the questions and answers procedure or in rejecting bidders.

Assessment of DG REGIO

The managing authority argues that the clarifications provided were timely and legal. DG Regio nevertheless maintains the position that the clarifications (i.e. changes of the bill of quantities) were not communicated to the tenderers clearly. This position is supported by

the fact that only one of the four tenderers evaluated understood that the new bill of quantities should be used.

The contract amount is below the thresholds of the European procurement directives. A financial correction is applicable according to point 24 'Breach of the principle of equal treatment' of 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement' (COCOF 07/0037/03) specifies that the applicable correction is 10% which may be reduced to 5% depending on seriousness.

The rejection of three of four tenderers suggests that the impact on the competition was serious in this case. On the other hand, the Commission for the Protection of Competition rejected complaints submitted by the rejected tenderers and ruled that the reasons for the rejections were valid according to the applicable Bulgarian regulations. Taking this into account, a financial correction of 5% can be considered acceptable.

As the managing authority has already applied a financial correction of 5% in relation to another problem identified in relation to the contract in question, no additional correction is proposed due to the 'Commission guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections' which states that "flat rates of correction are not cumulated, the most serious deficiency being taken as an indication of the risk."

However, the managing authority should ensure that the bill of quantities is not changed after the tender publication and ensure the clarity of documents for all future tenders.

The finding is **closed**.

Finding n° 2: Unjustified extension of the works contract implementation deadline

In the tender notice, the duration of the works (contract signed for EUR 2 242 587) constituted one of the award criteria. The shorter the contract period proposed by tenderer, the higher the score awarded in the evaluation. In addition, there was an indicative duration of 8 months.

It was noted that the contract was suspended due to bad weather conditions that led to an extension of the implementation period of 3 months (representing 38% of the initial duration).

The prolongation of the contract represents an irregular modification of the terms of the tender resulting in an infringement of the public procurement law, namely a breach of the equal treatment and transparency principles (Article 2 of the Bulgarian Public Procurement Law).

Action n°2 (Responsible body: Managing authority; Deadline: 90 days; Priority: High):

A financial correction corresponding to 10% of the works contract awarded under the operation was deemed appropriate in this case based on the non-compliance with the principle of equal treatment and transparency. However, as a financial correction has

been proposed under 1.2, an additional financial correction for this issue was not deemed proportionate.

The managing authority was requested:

- to confirm its agreement to make the financial correction under 1.2 by deducting the related expenditure from the next expenditure declaration, and
- to pay particular attention to the question of using the proposed contract duration as one of the award criteria, while subsequent prolongation decisions are being taken.

First reply of the Member State

The managing authority published on its website relevant information and clarification to all beneficiaries regarding frequent mistakes found when evaluating tenderers in procurement procedures. The information published stipulates that essential parts of procurement contracts shall not be modified without existing grounds to apply the exceptions under Article 43(2) of the Public Procurement Law. One such instance is “modifying the term of the contract without the occurrence of circumstances that may qualify as *force majeure*. In addition, the proposal concerning the contract implementation period was subject to an evaluation within the procurement procedure.”

Furthermore, the managing authority specifically highlighted that, if the proposed period for procurement implementation is used as an award criterion, no decisions should be subsequently taken to extend this period.

The managing authority believes that the above actions have adequately addressed the recommendation.

Concerning the project at issue, the managing authority believes that there are no grounds pointing to the purported violation (“unjustifiable extension of the contract implementation period”). Chapter Two, Article 7(3)(10) of Regulation No 3 of 31 July 2003 concerning the drafting of statements and protocols during construction stipulates that Appendix No 10 shall be used to draft a statement ascertaining the condition of the construction when discontinuing works because of temperature non-conducive to carrying out construction and engineering works; this statement should be signed by the relevant technical experts in accordance with Spatial Development Act and Regulation No 3 (see Article 36(1) Bulgarian Public Procurement Law, State Gazette, Issue No 37/2006). In this case, discontinuing works is compliant with Article 43(2)(1) Bulgarian Public Procurement Law, which provides that a modification to a signed procurement contract shall be admissible when the term of the contract needs to be changed as a result of a *force majeure* event. According to §1(14) of the Additional Provisions of the Public Procurement Law, ‘*force majeure*’ means unavoidable occurrences that the contracting authority could not or was not obliged to foresee or avoid, despite the exercise of due care by that party. According to the case-law, ‘*force majeure*’ also includes natural disasters, such as flooding, heavy snowfall, etc. In the occurrence of a *force majeure* event, the affected party should prove it by providing the relevant documents. In this regard, the beneficiary did enclose the relevant documents: statement (Appendix No 10) ascertaining the stage of construction when discontinuing the works because of temperature, which was non-conducive to carrying out construction and engineering works; a statement (Appendix No 11) to resume works previously discontinued; and a statement of information issued by the National Institute

of Meteorology and Hydrology of the Bulgarian Academy of Sciences proving the low temperature during the period of discontinuance, which would otherwise have caused poor quality construction and engineering works.

Furthermore, the managing authority took account of the fact that the tenderer was not obliged, nor was he able to foresee, at the stage of public procurement tendering, when the possibility to enter into a contract will arise because, at the time of submitting their tenders, none of them could know whether the procurement procedure will be contested, nor when and whether the contracting authority's award decision will enter into force.

Assessment of DG REGIO

The managing authority rightly defines the force majeure as occurrences that the contracting authority could not or was not obliged to foresee or avoid, despite the exercise of due care, such as natural disasters.

The mentioned report of the National Institute of Meteorology and Hydrology was not attached to the reply. Nevertheless, based on the publicly available information, the temperature in the period from 15 December 2009 until 15 March 2010 was not significantly lower than long term averages for these months.

Therefore, while the argumentation of the managing authority would be appropriate for a force majeure event, no such event was present during the period in question.

As a result, the managing authority is requested to provide evidence of the existence of a force majeure event for the period from 15 December 2009 until 15 March 2010 and to pay particular attention to the question of using the proposed contract duration as one of the award criteria, while subsequent prolongation decisions are being taken.

Second reply of the Member State

The managing authority maintained its initial position and supporting arguments on the issue at hand. The information statement supplied by the Meteorological Service about the average daily temperatures as well as Statement No. 10 drawn up in accordance with the established procedure by the technical construction experts constitute sufficient evidence of the emergence of circumstances justifying the discontinuation of works for the period in question.

The relationships between participants in the performance of construction works are governed by the provisions of a special law: the Spatial Development Act (SDA). Pursuant to SDA Article 169(3), items 2 & 3, construction projects are designed, executed and maintained in accordance with the statutory requirements of engineering and technical rules on disaster and emergency safety and the physical protection of the construction works.

On the authority of Article 169(3)&(4) of the currently applicable version of the Spatial Development Act and §18 of the SDA Additional Provisions, a Regulation No. 3 was issued on July 31st, 2003, concerning the drafting of statements and protocols during construction.

Article 7(3), item 10 of said Regulation identifies the entities responsible and the reasons for drafting as well as the content of such a statement (Appendix No. 10) ascertaining the condition of the construction when discontinuing works; the reasons for such an action

are not listed exhaustively while providing that discontinuation must be in accordance with the procedure under SDA or for another reason.

By force of a Statement (Appendix No. 10) ascertaining the condition of the construction when discontinuing works, dated December 15th, 2009, issued in accordance with Regulation No. 3, construction was discontinued "on account of temperatures non-conducive to carrying out construction and engineering works (wet processes in finishing works and on the authority of Order No. 2 dated December 1st, 2009 by the Construction Supervision Company) and the statement was issued. It was established that as of December 15th, 2009, based on the stated condition of the works, construction works were not completed on 5 sites only (out of the 10 sites, which were subject to this public procurement contract) and the percentages of fulfilled scheduled works for said five sites were 57.2%, 90.3%, 20.8%, 10.1%, and 50% respectively. Section 4.4 of the statement identifies the necessary measures to resume the works: average monthly temperature above 5°C. It is evident from the information statement on the average daily temperature in the area of Cherven Bryag for the period December 1st, 2009 — March 15th, 2010, that temperatures during the months of December, 2009, January and February, 2010, were below zero and no average monthly temperature above 5°C was reached for any of the three months. According to the schedule of works, part of the activities to be carried out in the open (repair of the roof; access ramp for disabled people; some excavation work, etc.) were scheduled for the period indicated above.

The works were resumed by force of a Statement (Appendix No. 11) dated March 16th, 2010, "due to temperature increase conducive to carrying out construction and engineering works".

Construction works were completed and the contractor handed the site over to the contracting authority by force of a Statement (Appendix No. 15) on July 26th, 2010.

The delay caused by the suspension of works, which was established in accordance with the procedure of Regulation No. 3, is less than three months after the deadline as per the contract, which was April 30th, 2010.

In the light of the above reasoning and evidence and in view of the applicable special provisions, we are of the opinion that the contracting authority did not breach the provisions of the Public Procurement Act and the general prohibition to change the public procurement contract by agreeing with the need to suspend the works, which was established and catered for in compliance with the procedure provided for in the special piece of legislation.

Assessment of DG REGIO

The works were interrupted in compliance with the applicable provisions of Bulgarian laws and regulations. The interruption period was due to low temperature and would have been granted to any tenderer and the works were implemented as contracted. No financial correction is therefore proposed in relation to this finding. Finding is **closed**.

Finding n°3: Use of experience criteria during the award stage of the supervision contract

The criterion of 'experience' was used at the tender award stage.

The contracting authority failed to distinguish between the selection and award criteria.

Action n°3 (Responsible body: Managing authority; Deadline: 90 days; Priority: High):

A financial correction of 10% of the value of the supervision contract was proposed based on non-compliance with public procurement rules. As the value of the contract is below the EU threshold, the amount of the financial correction proposed was based on irregularity type n° 23 of the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'¹ (COCOF 07/0037/03).

The amount of the supervision contract signed on 2 September 2009 was BGN 171 990 BGN (EUR 87 937) excluding VAT, i.e. BGN 206 388 or EUR 105 526 including VAT.

A calculation of the proposed financial correction (amounting to EUR 8 970 EUR = BGN 206 388 BGN * 10% * 85% / 1.9558 = EUR 8 970) was presented in the draft audit report and the managing authority was requested to confirm its agreement to make this financial correction by deducting the related expenditure from the next expenditure declaration.

First reply of the Member State

The managing authority took the necessary remedial action of starting a procedure on 11 March 2011, in order to establish the beneficiary's violation and impose a financial correction. Within the said procedure, the managing authority established that the violation consists of combining the criteria for selection of tenderers with the criteria for evaluation of tenders; the reason is that the procedure started after 1 January 2009, when a prohibition for such an approach was introduced in the Public Procurement Law.

The financial loss is the starting point for determining the amount of the financial correction. The amount of the loss is determined by comparing the amount of the funds used under the contract after the occurrence of the violation (in this case, BGN 171 990, excluding VAT) and the hypothetical amount of the expenditure in a non-violation scenario (in this case, BGN 163 260 – EUR 83 474).

Upon re-performing the work of the evaluation committee by excluding the vitiated indicators I1 and I2, the managing authority found that the ranking of the successful beneficiary under the contested tender evaluation methodology resulted in negative financial repercussions in the amount of BGN 8 730 – EUR 4 464 (the difference between: 1. the price offer of the tenderer ranked highest on the shortlist and selected as the contractor, and 2. the price offer of the tenderer ranked second).

Based on the procedure under Article 13 MOFC (adopted by Decree No 134 of 2010 of the Council of Ministers), which was finalised on 23 June 2011, the managing authority will deduct the amount of BGN 8 730 – EUR 4 464, as ineligible expenditure, from the

¹ Irregularity type 23 - Application of unlawful criteria which deter certain bidders on account of unlawful restrictions laid down in the tender procedure (for example, the obligation to have an establishment or representative in the country or region or the setting of technical standards that are too specific and favour a single operator).

contract for construction supervision when processing the final payment claim, which is currently at the second stage of control.

Assessment of DG REGIO

The managing authority committed itself to apply a financial correction in the amount of the actual financial impact of the illegal award criterion by deducting the amount of ineligible expenditure of BGN 8 730 (EUR 4 464) from the subsequent payment claim. This corresponds to a financial correction of $\text{EUR } 3\,794 = \text{EUR } 4\,464 * \text{co-financing rate of } 85\%$.

The VAT is claimed as eligible expenditure for the project. The calculation of actual impact of the irregularity should therefore take into account the VAT-inclusive amounts. As a result, additional $\text{BGN } 1\,746 = \text{BGN } 8\,730 * 20\%$ or $\text{EUR } 893 = \text{EUR } 4\,464 * 20\%$ should be therefore deducted from the next payment claim to the Commission.

Second reply of the Member State

This recommendation was fulfilled. An irregularity was registered and a financial correction was imposed amounting to BGN 8 730 or EUR 4 464. The irregularity was closed by deducting the amount from a payment claim under the project. With respect to the deduction of VAT relevant to the finding, another notice of irregularity and calculation form were issued to reflect the amount due, which was BGN 1 746 (EUR 893) and constitutes the VAT amount charged on the amount of the financial correction (which is BGN 8 730). A debt was registered for the above-indicated outstanding VAT amount and the managing authority sent a letter asking the beneficiary to recover this amount voluntarily. The amount of BGN 1 746 was voluntarily recovered by the Municipality of Cherven Bryag on 2 August 2012.

Assessment of DG REGIO

The full amount of correction including VAT was recovered from the beneficiary and the managing authority deducted the irregular expenditure from the payment claim validated on 27 September 2012. The managing authority agreed to deduct the ineligible VAT from the next payment claim to the Commission. The finding is **closed**.

Improvement and modernisation of educational infrastructure in the Municipality of Byala Slatina (BG161PO001-1.1.01-0043) - Priority axis 1 – Sustainable and integrated urban development

Finding n°5: Delay in payment by the managing authority to the beneficiary

A significant delay (exceeding one year²) in executing the payment to the beneficiary by the managing authority was observed during the visit to the beneficiary. The reason for the delay was that during its management verification the managing authority identified an irregularity in the award of small value contracts (award without any publication and split of the energy efficiency survey into 3 contracts). The Commission acknowledges the fact that the managing authority has performed its verification in a satisfactory manner.

² Payment request by the beneficiary to the managing authority dated 1/2/2010

However, one year after the verification, the beneficiary has still not been informed of the amount of the correction and the remaining part of the payment request has not been paid to the beneficiary. This indicates a deficiency in the system in place for applying financial corrections and processing payment claims.

Action n°5 (Responsible body: Managing authority; Deadline: 90 days; Priority: High):

The managing authority should decide on the value of the financial correction without further delay and should process the payment to the beneficiary. Similar cases should be avoided in the future. The values of the financial corrections should be established within reasonable deadlines and payments processing should not be blocked. The amounts involved should be advised to the Commission in reply to this report.

First reply of the Member State

The managing authority registered one irregularity, as well as one alert referring to a suspected irregularity under the grant contract with the beneficiary. The payment was delayed in order to process the irregularities. The case concerned is at the stage of completion under Article 13 MOFK (adopted by Decree No 134 of 2010 of the Council of Ministers), with a financial correction pending in the amount of 10% of the value of the procurement contract awarded on the basis of an open procurement procedure, held under the Public Procurement Law, for *Delivery of Consultancy Services*. As to budget line 2.2 (*Expenditure related to conducting studies; energy consumption audits*), a procedure was initiated under Article 13 MOFK (adopted by Decree No 134 of 2010 of the Council of Ministers) and a financial correction will be imposed for the division of the public procurement, which was initially determined to represent 25% of the value of the concluded contracts under the said budget line. The investigation of the irregularities and the imposition of the relevant financial corrections will be finalised by the end of October 2011. The written position of the beneficiary concerning the irregularities subject to the procedure under Article 13 MOFK (adopted by Decree No 134 of 2010 of the Council of Ministers) has not yet been received. A final payment claim under the project was also submitted; according to the applicable Manual for the Regional Development Operational Programme Management and Implementation, this final payment claim needs to be subjected to an on-the-spot check to verify the overall implementation of project activities and the relevant public procurement procedures held. The results of the on-the-spot check should be thoroughly analysed in order to proceed to verifying the payment.

The intermediate payment claim was rejected by the managing authority because the claim concerned only the reimbursement of expenditure under the contract for consultancy services (Studies, Audits, and Energy Consumption). The grounds for rejection included the alert pointing to an irregularity that has a financial impact on the contract concluded with the beneficiary. The latter requested the reimbursement of that expenditure in the final payment claim subsequently submitted, which will be subject to non-reimbursement of 10% of the value of the consultancy services contract (non-verified expenditure) to be deducted prior to 15 November 2011.

Assessment of DG REGIO

The managing authority is requested to:

- confirm that financial correction has been made and to provide details of the correction;
- confirm that the beneficiary has now been paid the amount that was due.

Second reply of the Member State

This recommendation was fulfilled. In connection with the processing of a reported irregularity No. 70-1, an irregularity was registered under National Identification Number OIIPP/11/PP/106 with a date of initial registration on December 16th, 2011.

A financial correction was imposed amounting to BGN 18 277 or EUR 9 345. The irregularity was closed by deducting the breaching amount from the interim payment claim under the project and the payment claim was verified.

Assessment of DG REGIO

The payment claim to the beneficiary has been verified and the financial correction has been imposed. The managing authority agreed to deduct the amount from the next payment claim to the Commission. The finding is **closed**.

Market research and evaluation of the effectiveness of national marketing (BG161PO001-3.3.01-0002_ - Ministry of Economy, Energy and Tourism – Priority axis 3 – Sustainable Tourism Development

Finding n°7: Unsatisfactory performance of the contractor resulting in project delay and non-achievement of indicators

There is a significant overall delay in the implementation of the marketing study consultancy contract. The managing authority has had to return the reports for revision to the consultant several times, as it was not satisfied with the quality of the first versions of the documents which were of very poor quality. In the contract there is a 1% penalty for late implementation (1% per day of the outstanding payment).

Action n°7 (Responsible body: Contracting authority / Managing authority; Deadline: 90 days; Priority: High)

The contracting authority should take prompt action to protect its contractual rights and should apply the penalty clause (Art. 7.5 of the contract). If the quality of the work being done under this contract is of insufficient quality, the managing authority should consider withdrawing it from co-financing. The managing authority was requested to advise the Commission of the decision taken in this regard in reply to this report.

First reply of the Member State

The managing authority requested that the beneficiary respond to the issue raised. In its response, the beneficiary claimed that the contractor delivered the service of a good quality and that it was not necessary to resort to the default clause (section 7.5 of the contract) stipulating penalties. The managing authority believes that the beneficiary's position concerning the quality of the contractual performance was justified. Upon reviewing the written evidence submitted by the Ministry of Economy, Energy and Tourism, the managing authority found that the service was performed in compliance

with the quality requirements laid down in the relevant contract. On the other hand, there is information that the term of the procurement contract was unlawfully extended due to the fault of the contractor, regardless of the quality of performance. In light of this, the managing authority notified the Ministry of Economy, Energy and Tourism that the contracting authority should take the necessary action to seek default penalties under section 7.5 of the contract, for implementation extending beyond the contracted period. The Ministry of Economy, Energy and Tourism has not provided any up-to-date information concerning this situation. However, this information will be requested again.

In turn, the managing authority undertook action to establish whether the purported violation was committed. On 1 September 2011, it registered an alert under Registration No 63-2 in the Register of Alerts for Irregularities and proceeded to investigate the violation, with a view to imposing a financial correction. By memorandum No 141 of 4 October 2011, a financial correction procedure was initiated as per Article 13 MOFK (adopted by Decree No 134 of 2010 of the Council of Ministers). At this stage, the beneficiary is expected to submit its written position, enclosing evidence that penalties were imposed upon the contractor, so that the managing authority is able to determine the amount of the financial correction for the beneficiary. Concerning the project implementation and the fulfilment of its indicators, the managing authority is at the stage of processing, at first level of control, the beneficiary's final payment claim, which is to be subjected to a thorough on-the-spot check on the project implementation, including the fulfilment of indicators prior to 15 November 2011.

Assessment of DG REGIO

The Commission acknowledges that the quality issue has been resolved and notes that a financial correction will be proposed by the managing authority in respect of the delays in the implementation.

For information purposes details of the financial correction made should be submitted to the Commission in reply to this letter.

Second reply of the Member State

This recommendation was fulfilled. In connection with the processing of a reported irregularity No. 63-2 an irregularity was registered under National Identification Number OIIPP/11/PP/101 and a financial correction was imposed amounting to BGN 317 879 or EUR 162 532. The irregularity was closed by deducting the breaching amount from a payment claim under the project.

Assessment of DG REGIO

The requested information has been provided. The finding is **closed**.

ANNEX II – SUMMARY OF IRREGULAR EXPENDITURE WHERE FINANCIAL CORRECTIONS WERE ACCEPTED BY MEMBER STATE

Finding N°	Amount of irregular expenditure in BGN (Basis for calculation of financial correction)	Amount of irregular expenditure in € (1.9558 BGN = 1 €)	% Rate of assistance	% Financial correction	Amount of financial correction agreed by Member State in €	Date of letter of acceptance by Member State (Ares n°)
1.1	5 263 343	2 691 104	85%	5%	114 372	Ares(2011)1175583
3	206 388	105 525	85%	4.23% ³	3 794	Ares(2011)1175583
				0.85% ⁴	759	Ares(2012)995075
TOTAL	5 469 731	2 796 629			118 925	

³ The correction has been calculated by deducting the price offered by the tenderer who should have won (after exclusion of an illegal award criterion) from the price offered by the contractor.

⁴ The additional correction is the VAT applicable on the irregular amount of EUR 3 794.