



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

Brussels,  
REGIO C2/ [REDACTED] D(2014) 2990033

**Subject: Final audit report**  
**Procedure under Article 99(1) of Council Regulation (EC)**  
**No 1083/2006**  
**Module 4 – Re-performance of audits of operations**  
**Environment OP CCI 2007BG161PO005**  
**Regional Development OP CCI 2007BG161PO001**  
**Competitiveness OP CCI 2007BG161PO003**  
**Mission n°2013/BG/REGIO/J2/1237/1 of 23 September 2013 to 4**  
**October 2013**

**Ref.: Draft Audit report of 2 December 2013 (Ares(2013)3616926)**  
**Draft Audit report of 31 January 2014 (Ares(2014)223147) (BG**  
**language version)**  
**Member State reply 37-01-3 of 5 March 2014 (Ares(2014)781557)**

Your Excellency,

I am writing to inform you that the Directorate General Regional and Urban Policy has analysed the reply received from the national authorities to the related draft audit report of the audit mission referred to above.

Please find enclosed the **final audit report** setting out the Commission's final position on all the remaining open findings and related actions and recommendations.

The irregular expenditure detected during the audit where financial corrections have been accepted and executed by Member State is presented in **Annex I**.

His Excellency Mr Dimitar TZANTCHEV  
Ambassador Extraordinary and Plenipotentiary Permanent Representative  
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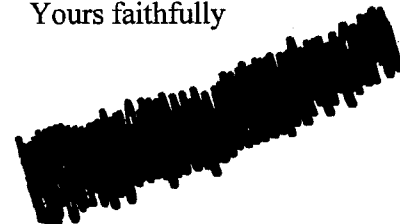
The position of the Directorate General Regional and Urban Policy on the additional findings identified for the Environment Operational Programme during the audit mission 2013/BG/REGIO/C2/1318/1 performed in May 2014 is presented in **Annex II**.

I request that you treat the enclosed audit report as confidential until the follow up procedure set below has been brought to a final conclusion. If the whole or part of the report is transmitted to persons concerned by the audit to enable them to provide comments, please ensure that the information set out in this paragraph accompanies the transmission.

The national authorities are requested to inform the Commission on the implementation of actions and recommendations set out in the final audit report within two months of receipt of the national language version of this final audit report by the Permanent Representation.

Furthermore they are requested in their reply to confirm that findings which have a financial impact on the EU budget exceeding €10.000 have been reported to OLAF in the IMS system for reporting irregularities and to provide the relevant references.

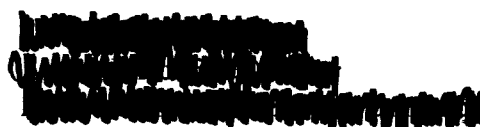
Yours faithfully



Franck Sébert

Enclosures:     Annex I – Final Audit Report  
                     Annex II – Summary of financial corrections accepted by Member State  
                     Annex III – Additional findings for the Environment Operational Programme

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**EUROPEAN COMMISSION**  
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**FINAL AUDIT REPORT**  
**Mission n° 2013/BG/REGIO/C2/1237/1**

**ENQUIRY :** To obtain assurance on the functioning of systems 2007-2013 through review of the work of audit authorities

**FUNDS :** European Regional Development Fund (ERDF) and Cohesion Fund (CF)

**MEMBER STATE :** Bulgaria

**AUDIT AUTHORITY :** Audit authority (AA) – Audit of EU Funds Executive Agency

**KEY REQUIREMENT:** Adequate audits of operations (art. 62.1 b) and 98.4 of Regulation 1083/2006, art. 16-17, 23 c) and Annex IV of Regulation 1828/2006).

**AUDIT WORK MODULE:** Module 4 - Re-performance of audits of operations

**OPERATIONAL PROGRAMMES:** Regional Development OP (2007BG161PO001)  
Competitiveness OP (2007BG161PO003)  
Environment OP (2007BG161PO005)

**DATE OF MISSION :** 23 September – 4 October 2013

**DG/UNIT CHEF DE FILE :** DG REGIO C.2

**PRINCIPAL AUDITOR :** [Redacted]

**ASSOCIATED AUDITORS :** [Redacted]  
[Redacted]  
[Redacted]

This report sets out the provisional findings, conclusions and recommendations of the Commission auditors. These may be modified in the light of the observations and further information received from the national authorities. Accordingly, this report should be treated as confidential until the follow up procedure has been brought to a final conclusion. If the whole or part of the report is transmitted to persons concerned by the audit to enable them to provide comments, please ensure that the information set out in this paragraph accompanies the transmission.

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## **EXECUTIVE SUMMARY**

### **AUDIT SCOPE AND OBJECTIVES**

The audit was performed in the context of the Enquiry Planning Memorandum (EPM) 'To obtain assurance on the functioning of systems 2007-2013 through review of the work of audit authorities'. The specific objective of this audit mission was to obtain reasonable assurance on the effective functioning the management and control system key requirement 3 in relation to the audit authority: Adequate audits of operations through re-performance of two audits of operations in the Regional Development OP (2007BG161PO001), two audits of operations in the Competitiveness OP (2007BG161PO003) and four audits of operations in the Environment OP (2007BG161PO005).

### **SUMMARY OF MAIN FINDINGS AND ACTIONS**

The work of the audit authority is considered of a good standard, with the exception of weaknesses in the area of public procurement where irregularities requiring financial corrections were identified for the four operations audited in the Environment OP, namely:

- Incorrect financial correction rate used by the audit authority (2 contracts) in relation to the unlawful selection or award criteria with dissuasive effect, i.e. criteria not allowed as selection or award criteria by the Directive 2004/18/EC (Section 2 and Article 53).
- Reduction of deadlines for submission of tenders based on incomplete Prior Information Notice for several contracts in breach of Article 38 of Directive 2004/18/EC.
- Discriminatory requirement for membership in the Bulgarian Central professional register of builders at submission of tenders stage for participation in one works contract without allowing for equivalent national membership in breach of Article 46 and the principles of equal treatment and non-discrimination under Article 2 of Directive 2004/18/EC.
- Unequal treatment of bidders during the selection stage (i.e. acceptance of one tenderer who should have been rejected if treated in the same way as other rejected tenderers) for one service contract in breach of the principles of equal treatment and non-discrimination under Article 2 of Directive 2004/18/EC.
- Irregular extension of deadline for submission of tenders due to being advertised at national level only in breach of the principles of equal treatment and non-discrimination under Article 2 of Directive 2004/18/EC.

The audit authority was requested to review its audits of operations for the expenditure declared to the Commission in 2012 in light of the abovementioned public procurement related findings and to reflect any additional errors identified in the error rate to be reported in the Annual Control Report for 2013.

Flat-rate corrections were requested in all cases when a dissuasive effect is present because punctual financial corrections do not remedy the full financial harm caused by applying unlawful selection and award criteria.

The specific weaknesses identified and the audit authority's own findings indicated serious deficiencies in the management verifications in the Environment OP. Proposed corrective actions were requested in the interruption and pre-suspension letters (letters Ares(2013)3574478 – 27/11/2013 and Ares(2014)341899 – 11/02/2014).

#### **OVERALL CONCLUSION/OPINION**

In our opinion, based on the work performed and the remaining findings identified as described in section 4 of this report, we conclude that:

**Key Requirement 3 - Adequate audits of operations**, is fulfilled by the audit authority. The key requirement 3 - Adequate audits of operations is thus assessed as **Category 2: Works, but some improvements are needed**

## **1. LEGAL BASIS**

The audit was performed in the context of the Enquiry Planning Memorandum (EPM) 'To obtain assurance on the functioning of systems 2007-2013 through review of the work of audit authorities'.

The legal basis for the Commission audits in the Member States in relation to structural actions' expenditure is provided by Article 72.2 of Council Regulation (EC) No 1083/2006.

## **2. AUDIT OBJECTIVES**

The overall objective of the enquiry was to obtain reasonable assurance on the functioning of the management and control systems in the Member States through being able to rely on the work of the national audit authorities as reported in the annual control reports and audit opinion. In order to reach this overall objective, the audit work carried out under this mission to follow-up on the previous results of the enquiry aimed to:

- obtain reasonable assurance that the work carried out by the audit authority is compliant with the requirements of Regulation (EC) No 1083/2006, in particular with Article 62
- and consequently, assess the degree of reliance to be placed on the results of the audit authority's audit work presented in the annual control reports and annual opinions (as part of the overall assurance for the DG Regional and Urban Policy Annual Activity Report).

The specific objective of this mission was to obtain reasonable assurance that (i) the actual application of the audit authority's methodology for audits of operations was correctly executed, (ii) the work carried out by the audit authority ensures that legality and regularity of expenditure was properly checked and (iii) conclusions reached by the audit authority are adequate and correspond to the audit work carried out.

## **3. AUDIT SCOPE**

The re-performance audit was carried out at the level of beneficiaries in relation to the operations audited by the audit authority in 2013 (expenditure certified by 31 December 2012) covering 3 of the 5 programmes in Bulgaria.

The audit authority selected the operations for its audits of operations using MUS statistical sampling. The audit authority has audited 30 payment claims from 26 operations in the Regional Development OP, 45 operations in the Competitiveness OP, 30 payment claims from 26 operations in the Technical Assistance OP, 30 payment claims from 11 operations in the Transport OP and 34 payment claims from 24 operations in the Environment OP.

Operations to be re-audited by the DG Regional and Urban Policy auditors have been selected from the Competitiveness OP, Environment OP and Regional Development OP. No operation to be re-audited has been selected from the Transport OP as the majority of the operations audited by the audit authority in the context of 2013 annual control report have already been audited by DG Regional and Urban Policy in its 'Bridging the assurance gap' mission of April 2013 or in its previous audit missions. No operation to



be re-audited has been selected from the Technical Assistance OP as this programme is considered very low risk in the DG Regional and Urban Policy 2012 Country Fiche.

The following 8 operations have been re-audited by the DG Regional and Urban Policy auditors:

OPERATION NUMBER	OPERATION	BENEFICIARY	AMOUNT CERTIFIED IN 2012 (BGN)	AMOUNT CERTIFIED IN 2012 (EUR) (1 EUR = 1.9558 BGN)
<b>Environment OP CCI N°: 2007BG161PO005</b>				
1	Mapping and determining the conservation status of habitats and species - Phase I	Ministry of Environment	8 800 666	4 499 778
2	Integrated Water Project - Pirdop	Municipality Pirdop	7 890 555	4 034 439
3	Establishment of a regional system of waste management in the region of Botevgrad	Municipality Botevgrad	2 922 396	1 494 220
4	Preparation of an integrated development project for waste treatment infrastructure management	Municipality Panagyurishte	520 040	265 896
<b>Competitiveness OP CCI N°: 2007BG161PO003</b>				
5	Expanding the infrastructure and improving the competitiveness of <del>the region</del>	<del>the region</del>	3 774 954	1 930 133
6	Improving the competitiveness of <del>the region</del> through technological modernization	<del>the region</del>	1 151 607	588 816
<b>Regional Development OP CCI N°: 2007BG161PO001</b>				
7	Improvement of services in the field of culture in Elin Pelin, by updating the related infrastructure	Municipality Elin Pelin	3 659 892	1 871 302
8	Multimedia Catalogue of Tourist Sites and Electronic Marketing of Destination Bulgaria	Ministry of Economy and Energy	3 876 791	1 982 202

The 'mini reports' prepared by the audit authority for these 8 audited operations were reviewed in order to assess the quality and completeness of the audit work carried out, the reliability of the conclusions drawn, the calculation of the error rates and the related quality control over this work.

#### 4. FINDINGS, RECOMMENDATIONS AND ACTIONS

The findings from our re-performance work in relation to the audits of operations carried out by the audit authority are presented below.

These findings have:

- either not been identified by the audit authority in its 'mini-reports' or
- when identified by the audit authority, appropriate financial corrections and/or other appropriate corrective actions had not been proposed by the audit authority.

<b>Finding 1 relates to the audit methodology in the Environment OP</b>
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#### **FINDING n°1**

##### ***Finding n°1: Not all expenditure declared was included in the population for sampling***

For the Environment OP, four operations from 24 were selected by DG Regional and Urban Policy for the re-performance of the audit authority's audits of operations.

For the payment claims for the Environment OP, the list of expenditure used as basis for sampling by the audit authority did not agree with the amount of expenditure declared to the Commission but rather to the amount of the corresponding public expenditure included in the payment claims. The population from which the sample was drawn by the audit authority was not complete and it wrongly omitted expenditure in the amount of EUR 2 448 867.

This problem was not identified for the other programmes audited (Competitiveness OP and Regional Development OP) and the audit authority stated this problem does not affect the Transport OP or the Technical Assistance OP.

##### ***Action n°1 (Responsible body: Audit authority; Deadline: 60 days; Priority: High):***

The audit authority was requested to explain the difference in the expenditure in the total amount of EUR 2 448 867 and to provide a breakdown of the amount. This should include relevant amounts, operation identifiers, operation names and a short description of the amount and why it was not declared as public expenditure.

The audit authority carry out audit work in relation to the expenditure which did not have chance to be selected (total amount of EUR 2 448 867). The audit authority was requested to consider this expenditure as a separate stratum for reporting purposes.

The audit authority should confirm that this problem does not concern other programmes.

In the future, the audit authority should draw its samples from all the expenditure declared to the Commission in the reference period.

##### ***Member State reply***

The Member State (Audit Authority) replied as follows:

The audit authority explained that it includes in the population for sampling in the audit of operations all expenditure declared to the Commission during the reference period.

Due to the managing authority's specific presentation of the expenditure financed by beneficiaries' contribution, there is an error under the Environment OP, which has been detected by the audit authority as well. The audit authority verified and analysed in detail this expenditure in the systems audit and reported the results in the 2013 annual control report on the Environment OP.

As requested, the Audit Authority provided detailed information on the expenditure of EUR 2 448 867 or BGN 4 789 494 certified in 2012 and financed by the beneficiaries' contribution. This expenditure was included in 12 payment claims.

The Audit Authority also explained that three payment claims involving own contribution included in CR 15 were examined by chance as the final payment claims of the projects and the relevant supporting documents were included in the population for sampling of payment claims for expenditure certified in 2012. The audit authority's methodology sets out that if a final payment claim is included in the sample, all supporting documents attached thereto, including those relating to own contribution, will be examined. Both payment claims involving own contribution included in CR 13 also fell within the scope of an inspection in accordance with the audit authority's methodology.

The reports on audit of operations (the project's 'mini-reports' and a summary report) detail the outcome of the audits of the projects in question.

The audit authority also confirmed that the audits of operations it carried out in 2013 under the other four operational programmes financed by the CF and the ERDF, showed that all certified expenditure covered by beneficiaries' contribution were included in the population for sampling of expenditure for verification.

#### ***Commission position***

This issue was also followed up in the context of the Annual Control Report for 2013 for the Environment OP where it was confirmed that this issue had no material effect on the reported error rate. We note that the audit authority confirmation that no other operational programmes were affected by this issue and that in the future it will include all expenditure in the population to be sampled for the Environment OP. This finding is therefore **closed**.

<b>Findings 2-10 relate to the Environment OP</b>
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#### **Finding n°2:**

##### **Operation No 1: Mapping and determining the conservation status of habitats and species — Phase I (Environment OP)**

##### ***Finding n°2 Deadlines for submission of offers were shortened based on a non-compliant prior information notice***

The finding concerns seven service contracts awarded by the National Office for Protection of Nature (a department within the Ministry of Environment). The tender notice was sent to the Official Journal of the EU on 6 April 2010. Six contracts were signed on 21 March 2011 and one contract was signed on 29 March 2011. The contract amounts range from BGN 1 198 817 (EUR 612 955) to BGN 5 893 315 (EUR 3 013 250) including VAT. The total amount of the seven contracts is BGN 18 557 489 (EUR 9 488 439) including VAT.

Article 38 of Directive 2004/18/EC states that: *'When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tender under paragraphs 2 and 3 (b) may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. (...)*

*The shortened time limits referred to in the first subparagraph shall be permitted, provided that the prior information notice has included all the information required for the contract notice in Annex VII A, insofar as that information is available at the time the notice is published and that the prior information notice was sent for publication between 52 days and 12 months before the date on which the contract notice was sent.*

Annex VII A of Directive 2004/18/EC indicates the following regarding information which must be included for the prior information notices:

*'(...) In the case of public services contracts: the total value of the proposed purchases in each of the service categories in Annex II A; Nomenclature reference No (s).'*

For all seven service contracts, the deadline for submission of bids was shortened to 37 days. This is less than the 52 days required by Article 38 of Directive 2004/18/EC.

Although there was a prior information notice published in relation to these contracts, it did not include information about the value of the contracts. This information was available to the contracting authority as the project proposal prepared by the contracting authority and signed on 30 April 2009 included information on the estimated project costs. The prior information notice was sent on 6 January 2010, eight months after this information was known.

Because the prior information notice did not include all the required information, the conditions for shortening the deadlines for submission of the bids under Article 38 were not met. The use of the deadline of 37 days was therefore not justified.

The shortened deadline may have contributed to the limited competition for these contracts. The seven contracts attracted offers from a total of only three companies, some of these submitting offers for more than one contract. For three of the contracts only two offers were evaluated at the award stage and for four of the contracts only one offer was evaluated at the award stage.

The audit authority did not identify this finding in its 'mini-report' and did not propose any financial correction in this regard.

***Action n° 2 (Responsible body: Audit authority and managing authority; Deadline: 60 days; Priority: High):***

The managing authority should apply a financial correction in compliance with 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' ('Guidelines'). The applicable point of the guidelines is point 2 'Non-compliance with the advertising procedures'. A 25 % financial correction is applicable in this case.

The contracts affected by the error amount to BGN 18 557 489 (or EUR 9 488 439) including VAT (Lot 1 — BGN 2 577 484, Lot 2 — BGN 2 020 032, Lot 3 — BGN 2 378 938, Lot 4 — BGN 2 378 938, Lot 5 — BGN 2 109 965, Lot 6 — BGN 5 893 315 and Lot 7 — BGN 1 198 817). The expenditure to be deducted based on a 25 % financial correction amounts to BGN 4 639 372 or EUR 2 372 110.

The managing authority is requested to indicate its acceptance of this finding and its agreement to deduct this expenditure in the next payment claim.

The audit authority should quantify the effect of this irregularity and include it in its calculation of error rates reported in the annual control report for 2013.

The audit authority should explain why this finding was not raised in its 'mini-report' and actions taken to improve its procedures for audits of operations and the related quality control within the audit authority following such audits in order to address this weakness.

### ***Member State reply***

The Member State (audit authority and managing authority) replied as follows:

The managing authority disagreed with the finding based upon the absence of a legal framework to require mandatory indication of the estimated contract value so that the prior information notice can be valid.

The audit authority argued that the two conditions in Article 38(4), third subparagraph of Directive 2004/18/EC were fulfilled, namely:

(1) the prior information notice has included all the information required for the contract notice in Annex VII A, insofar as that information is available at the time the notice is published; and

(2) the prior information notice was sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

It also argued that the indication of the estimated value of service contracts is mandatory for the contract notice only when the procedure results in the signing of a framework agreement.

Given Article 38(4), third subparagraph of Directive 2004/18/EC, which states that the prior information notice must include all the information required for the contract notice in Annex VII A, since the estimated value is not mandatory for the contract notice, it is not mandatory for the prior information notice either. As the contracting authority was not obliged to indicate an estimated value in this particular contract notice, *per argumentum a fortiori* it was not required to indicate this information in the prior information notice either.

The audit authority also referred to the content of a standard form of prior information notices set out in Annex VII A to Directive 2004/18/EC and referred to the distinction between 'service categories' and a service contract. Annex II A to Directive 2004/18/EC lists services referred to in the Directive. These services are grouped into 16 categories, for each of which applicable CPV codes (CPV reference No) are provided. Service categories are a general term for activities that belong to a particular sector or have something in common. For example, category No 8 in Annex II A, relevant to the contract in question, involves research and development services.

In view of the above, a service category referred to in the Annex involves many activities that can fall within the scope of a public contract. A service category includes several CPV codes, each being determined in accordance with the particular contract scope. Therefore, the requirement to indicate a value in the prior information notice refers to indicating the value for the service category for which the contracting authority intends to award a contract during the year, rather than the specific service contract.

In this respect, the claim that the indication of the estimated contract value would be crucial for economic operators concerned and in particular regarding the service nature does not have a legal basis since the requirement to indicate the value does not apply to specific services, instead it applies to service categories that may be more than one.

The audit authority also referred to Commission Regulation (EC) No 1564/2005 establishing standard forms for the publication of notices in the field of public procurement (repealed), effective at the time of the procedure under review, and in particular Annex I, regarding prior information notices. Section II B, point II.3 of the standard form is formulated as follows:

*'Short description of nature and quantity or value of supplies or services (for each of the service categories).'*

The audit authority argues that this means that applicable standard form does not require a mandatory indication of the estimated value either.

Accordingly, the audit authority believes that for the contract in question there is objective evidence that the first condition for reducing the time limits referred to in Article 38(4), third subparagraph of Directive 2004/18/EC was fulfilled.

The second condition refers to the period within which the prior information notice has been sent for publication. As the prior information notice was sent for publication 90 days before the date of dispatch of the contract notice, which falls within the range set out in Article 38(4), third subparagraph of Directive 2004/18/EC., the second condition set out in the provision in question was also fulfilled.

The audit authority also pointed out that it had proposed a 25 % financial correction on the basis of point 6 of the Guidelines (COCOF 07/0037/03 of 29 November 2007) for these contracts and that this was included in the programme's error rate in the annual control report for the Environment Operational Programme of 30 December 2013.

As regards the recommendation for taking action to improve audit procedures and operations and related quality control, the audit authority reviewed and analysed thoroughly the methodology in place. It found that the checklist to inspect public procurement included questions about the legality of deadline for receipt of tenders (ref. question 3 of Annex 3 — Checklist for inspection the open procedure). It gave instructions to auditors whereby in case of shortening the time limit for receipt of tenders on the basis of a prior information notice they have to verify the fulfilment of the conditions set out in Article 64 of the Public Procurement Act (ZOP).

In view of the above, the audit authority considers that it does not need to add new questions to the inspection checklist. It has revised the instructions for work given in the checklist, focusing on possible problems that may occur when shortening the time limit for receipt of tenders based on a prior information notice. It also designated the audit team leader to ensure in-depth quality control over the performance records of the work of the auditor who carried out the inspection, by re-examining facts and circumstances relevant to the conclusion about the legality of the deadline for receipt of tenders.

In connection with the amendments to the applicable methodology on 13 and 21 February 2014 all auditors of the audit authority attended training. As part of the training it gave specific guidelines for work when checking the legality of the deadline for receipt of tenders.

### ***Commission position***

The Commission accepts the argument presented by the audit authority that as the contracting authority was not obliged to indicate an estimated value in this particular contract notice, *per argumentum a fortiori* it was not required to indicate this information in the prior information notice either. The Commission nonetheless draws attention to the fact that other elements such as the selection and award criteria, insofar as these are available at the time of publication, should also be included in the PIN if the shortened deadlines for submission of tenders are intended to be used. However, as a financial correction of 25% has already been implemented by the managing authority for the concerned public procurement contracts for unlawful contract award criteria established by the contracting authority, this aspect is not further examined here and the finding is closed.

**Finding n°3:**

**Operation No 1: Mapping and conservation - habitats and species — Phase I**

***Finding n°3: No financial correction was proposed for irregular award criteria***

For all seven service contracts, the audit authority concluded that details of how the points are awarded are not clearly specified in the tender dossier and are therefore subjective. There were no weightings/scales indicated in the tender dossier. This is not compliant with Article 28(2) of the Bulgarian law on public procurement.

The audit authority did not apply any financial correction because all the contracts were awarded to the only bidder (four contracts) or to the cheaper bidder where only two bids were received (for three contracts). The audit authority did not apply the 'Guidelines' which specify in point 6 'Application of unlawful contract award criteria' that the applicable financial correction is 25 % which may be reduced to 10 % or 5 % depending on seriousness.

The calculations carried out by the audit authority only took into consideration the detriment to the budget of the European Union caused by the unlawful criteria being applied to the bids submitted. It did not take into consideration the detriment to the budget of the European Union caused by the dissuasive effect the unlawful criteria had on potential bidders. The dissuasive effect resulted in a very limited number of bids (one or two) being evaluated in the award stage. This issue was already raised in the DG Regional and Urban Policy audit report for mission 2012/BG/REGIO/J2/1164/1 (Finding 2) and for mission 2012/BG/REGIO/J2/1165/1 (Findings 4, 6 and 7).

***Action n° 3 (Responsible body: Audit authority and managing authority; Deadline: 60 days; Priority: High):***

According to the 'Guidelines', financial corrections are not cumulated. As the rate of correction applicable for this finding is equal to or lower than the rate of correction to be applied in relation to Finding 2, no additional correction would be needed if the correction under Finding 2 is made.

The managing authority and the audit authority are reminded to apply flat rate corrections in accordance with the 'Guidelines' when determining appropriate rates of financial corrections where the abovementioned 'dissuasive effect' is present.

***Member State reply***

The Member State (audit authority and managing authority) replied as follows:

The managing authority disagreed with the audit authority's finding. However, the managing authority has implemented the audit authority's recommendation given in the

final report on audit of operations of 30 December 2013 and imposed a 25 % financial correction on the affected contracts.

The audit authority also explained why it had not originally proposed a financial correction for this issue. In this regard, the audit authority stated that it had detected an infringement of Article 28(2) of the Public Procurement Act in the initial checks within the scope of the audit of operations for the programme's expenditure certified in 2012. A report on the results of a project inspection submitted to the managing authority on 12 August 2013 presented similar findings. A financial correction was not proposed for the detected infringement, as it did not have a real financial impact.

Furthermore, the audit authority pointed out that the methodology for verifying public procurement applied over the years by the audit authority provides for an analysis of whether there have been infringements involving mixing of selection and award criteria and infringements involving unlawful methodology for evaluation of offers (Ref. questions No 11 and No 13 of *Annex 3* — Checklist to inspect an open procedure). In this respect, it is always the audit authority which detects, documents and reports on this type of irregularities. To implement the European Commission's recommendation of 2008, when identifying such infringements the audit authority checks whether there is a real financial impact by excluding mixed or unlawful evaluation indicators. This approach has led to adequate financial corrections where there was a difference between the selected tenderer's price and the price of the tenderer which should have been selected as a contractor as a result of the new evaluation. This includes instances where the audit authority encountered cases in which it applied higher financial corrections compared to the one set out in the Guidelines (COCOF 07/0037/03 of 29 November 2007). In addition, it should be noted that during its audit of projects under the Environment OP, the European Court of Auditors accepted the audit authority's analysis about the lack of real financial impact resulting from mixing of selection and award criteria in the procedures under review.

Nevertheless, in response to the European Commission's letter Ares (2013)3274908 of 17 October 2013, the audit authority changed its approach to analysing and estimating the financial impact of irregularities involving mixing of selection and award criteria and the unlawful methodology of evaluation of tenders. By letter No 37-01-51/13 November 2013 we notified you about a change in the approach and the actions taken in this regard, including the application of a new approach in audits of operations for expenditure certified in 2012.

As a result, on 14 November 2013, the managing authority of the Environment Operational Programme received a revised preliminary report of 13 November 2013 presenting the results of the inspection of project UMIS No BG 161PO005-3.0.02-0001-C0001 'Mapping and determining the conservation status of habitats and species — Phase I' whose beneficiary is the National Office for Protection of Nature at the Ministry of Environment and Water. The revision concerns only the financial impact of the initially detected infringement of Article 28(2) of the Public Procurement Act. With regard to this, the revised report contained a new recommendation to impose a 25 % financial correction under point 6 of the Guidelines (COCOF 07/0037/03 of 29 November 2007). The financial impact of the infringement detected was included in the calculation of the error under the programme in the report of 30 December 2013 on the audit of operations for expenditure certified in 2012 and hence the annual control report for the Environment Operational Programme of 30 December 2013. (*ref. Annual Control Report for 2013, Table 2 List of ineligible expenditure audited and identified under Environment OP in 2013, row 15*).



With regard to the actions taken to implement the new approach to assessing the financial impact of this type of irregularity, being a uniform practice of the audit authority, the audit authority stated that:

1. By letter No 91-00-4/11 November 2013, the audit authority informed all institutions involved in the management and control of EU funds about the change in the approach to quantifying the financial impact of the infringements detected in the field of public procurement. To explain the causes and nature of the new approach to assessing the financial impact of this type of irregularity a meeting was held on 18 November 2013 with representatives of these institutions.
2. Auditors of the audit authority were duly notified of the change in the approach and they got familiar with the correspondence with the European Commission regarding this issue, in particular the European Commission's letter Ares (2013) 3274908 of 17 October 2013 and our letter No 37 -01-51/13 November 2013.
3. The checklists for inspection of public procurement applied by the audit authority during the audit of operations in 2013 contain questions to assess whether there is mixing of selection and award criteria and unlawful evaluation methodology. The instructions for work set out therein were revised to introduce a new approach to assessing the financial impact of this type of irregularity. The training sessions at the beginning of these audits of operations (on 13 and 21 February 2014) again clarified ways of determining the financial impact of this type of irregularities.

#### ***Commission position***

The Commission notes that despite the managing authority's disagreement with the audit authority's finding, it has nonetheless applied the requested 25% financial correction.

The contracts affected by the error amount to BGN 18 557 489 (or EUR 9 488 439) including VAT (Lot 1 — BGN 2 577 484, Lot 2 — BGN 2 020 032, Lot 3 — BGN 2 378 938, Lot 4 — BGN 2 378 938, Lot 5 — BGN 2 109 965, Lot 6 — BGN 5 893 315 and Lot 7 — BGN 1 198 817). The expenditure to be deducted based on a 25 % financial correction amounts to BGN 4 639 372 or EUR 2 372 110.

The Commission also notes that this irregularity was included in the reported error rate in the Annual Control Report for 2013. Finally, the Commission acknowledges that the audit authority has amended its procedures as regards the methodology for applying financial corrections in this type of case. Accordingly, as the recommendations have been implemented the finding is **closed**.

#### **Finding n°4:**

##### **Operation No 2: Integrated Water Project — Pirdop (Environment OP)**

##### ***Finding n°4: Extension of deadline resulting in unequal treatment of tenderers***

The tender notice for both works contracts, published in the Official Journal of the EU on 9 August 2011, set a deadline for receipt of tenders of 12 September 2011. On 12 September 2011, the deadline for receipt of tenderers was extended until 19 September 2011. The extension of the deadline was published nationally and also notified to those companies who had purchased the tender documentation. The extension was not published in the Official Journal of the EU to inform international bidders about the extension of the deadline.

Article 2 of Directive 2004/18/EC states that: '*Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.*'

The failure to publish the extension at EU level discriminated against foreign bidders who were not made aware of the extension. The late extension also represents unequal treatment of tenderers as ~~XXXXXXXXXX~~ had submitted its tender within the original deadline and therefore had less time to prepare its tender than other tenderers. It also had a dissuasive effect on potential bidders who were not in a position to submit a bid within the original deadline but would have been in a position to do so had the extension been notified earlier.

The audit authority did not include this finding in its 'mini-report' and did not propose any financial correction in this regard.

***Action n° 4 (Responsible body: Audit authority and managing authority; Deadline: 60 days; Priority: High):***

The managing authority should apply a financial correction in line with the Guidelines. The applicable point of the guidelines is point 12 'Incorrect application of certain ancillary elements'. The applicable financial correction according to the guidelines is 2 %, 5 % or 10 % of the value of the contract, according to the seriousness of the irregularity. The Commission auditors consider the seriousness of the breach to be of a moderate level and a 5 % financial correction is therefore appropriate. The breach is considered of moderate seriousness because there was a reasonable level of competition (i.e. seven tenderers received for one works contract and five tenderers received for the other contract) despite the breach and because the notification to those companies who had purchased the tender documentation partially compensates for the non-publication of the extension in the Official Journal of the EU.

The contracts affected by the error amount to BGN 43 565 721 (or EUR 22 275 141) including VAT (sewer network — BGN 32 386 137 and treatment plant — 11 179 584). The expenditure to be deducted based on a 5 % financial correction amounts to BGN 2 178 286 or EUR 1 113 757.

The managing authority is requested to indicate its acceptance of this finding and its agreement to deduct this expenditure in the next payment claim.

The audit authority should quantify the effect of this irregularity and include it in its calculation of error rates reported in the annual control report for 2013.

The audit authority should explain why this finding was not raised in its 'mini-report' and actions taken to improve its procedures for audits of operations and the related quality control within the audit authority following such audits in order to address this weakness.

#### ***Member State reply***

The Member State (audit authority and managing authority) replied as follows:

The managing authority disagreed with the finding on the basis that it considered that there is an absence of a legal framework to require the notification of the extension of the deadline for the receipt of tenders in the Official Journal of the European Union.

This position was further elaborated in the reply submitted by the audit authority as set out below.

- Firstly, in response to the above finding, the audit authority again reviewed and analysed in detail Directive 2004/18/EC and other relevant EU legislation. The review covered:
  - Directive 2004/18/EC;
  - Annex VII A 'Information which must be included in public contract notices' to Directive 2004/18/EC;
  - Commission Implementing Regulation (EU) No 842/2011 establishing standard forms for the publication of notices in the field of public procurement;

Directive 2004/18/EC does not contain a requirement for the contracting authority to send to the Official Journal of the European Union the notice whereby it extends the deadlines for the procedure. Appendix VII A does not set out requirements for the standard form to be used when changing the contracting authority's terms and conditions after opening the procedure and sending the contract notice to the Official Journal of the EU. Commission Implementing Regulation (EU) No 842/2011 did not introduce a standard form to be used when changing the contracting authority's terms and conditions either.

The standard form used in practice — in the so-called Corrigendum was introduced by the Publications Office for the Official Journal of the EU to meet legal requirements. This standard form has not been developed or approved by a European Union act. Therefore, it is not a law but a good practice that can be recommended, but it is not binding for the contracting authority. This means that even if in this case the contracting authority intended to notify the change via the Official Journal of the European Union, no legal regulation was in place to govern its option to do so.

Therefore, the audit authority believes that there is no breach of a legal obligation by the contracting authority when conducting the procedure.

- Secondly, the obligation to respect the principles of awarding contracts under Article 2 of Directive 2004/18/EC is effective and binding in all cases where there is no explicit derogation. To establish whether there is infringement of the principles under Article 2 of Directive 2004/18/EC, the audit authority would like to point to the facts relevant to the case, as follows:

On 9 August 2011, the municipality of Pirdop sent the contract notice 'Selection of a contractor to carry out engineering works at sites under the Integrated Water Project of the town Pirdop 'Construction of WWTP, adjacent facilities and networks, finishing works and reconstruction of a sewerage network with reconstruction of an accompanying water supply network' with 2 lots' to the Official Journal of the EU, the State Gazette and the Procurement Gazette. Pursuant to point IV.3.4 of the contract notice, the deadline for receipt of tenders expired on 12 September 2011 and was 34 days.

The deadline for purchase of tender documentation was 2 September 2011 pursuant to point IV. 3.3 of the contract notice.

As shown above, on 9 September 2011, after the expiry of the deadline for purchase of documentation, an application was filed for extension of the time limit for receipt of tenders pursuant to Article 65(2) of the Public Procurement Act (ZOP). The original time limit proved to be insufficient due to the need for further on-the-spot inspection of the site and review of additional documents to tender documentation.

By Decision No 398/12 September 2011, the contracting authority extended the deadline for receipt of tenders until 19 September 2011. The decision was sent to the Procurement Gazette and the State Gazette on 12 September 2011. It was not sent to the Official Journal of the European Union.

Entities which had purchased tender documentation were personally notified in writing about the extension of the deadline for receipt of tenders until 12 September 2011. This further guaranteed their rights, in view of the explicit provision set out in Article 54(2) of the Public Procurement Act for tenders to be withdrawn and changed until the deadline for their receipt.

As shown above, the decision to extend the deadline for receipt of tenders was taken and sent to the above institutions after the expiry of the deadline for purchase of tender documentation. This means that in this case the extension of the deadline cannot have enabled other tenderers to purchase tender documentation apart from those notified in person about the contracting authority's actions.

In view of the above, the audit authority believes that the contracting authority applied the principle of equal treatment under Article 2 of Directive 2004/18/EC, as the extension was applicable only to the entities which had already purchased tender documentation. All of these entities have been duly informed in person about extended deadline for receipt of tenders. This means the principle of equal treatment applied to all entitled to submit a tender in the procedure as they had shown a legal interest.

- Thirdly, with regard to the findings raised in the draft audit report, we asked for the opinion of the Public Procurement Agency and the National Audit Office of the Republic of Bulgaria on this issue. The audit authority's final position was based on those opinions among others.

In conclusion, in view of the above, the audit authority does not accept the recommendations and the underlying finding regarding the measurement of the impact of the detected irregularity and the inclusion of the error in the annual control report for 2013. It considers that the procedure was legal and did not infringe Directive 2004/18/EC. Therefore, the report on the results from project verification (the so-called 'mini-report') did not contain a finding relating to the infringement of the principle of equal treatment when notifying the extension of the deadline for receipt of tenders.

As regards the recommendation for taking action to improve audit procedures and operations and related quality control, the audit authority stated that it reviewed and analysed thoroughly the methodology in place. It found that the checklist to inspect public procurement included questions about the legality of contracting authorities' actions when extending the deadline for receipt of tenders (ref. question No 4 of *Annex 3* — Checklist to inspect an open procedure). It gave instructions to auditors whereby in case of extending the deadline for receipt of tenders, they have to verify the reasons for the extension and how this was notified.

In view of the above, the audit authority considers that it does not need to add new questions to the inspection checklist. It revised the instructions for work given in the checklist, focusing on possible problems that may occur when extending the deadline for receipt of tenders. It also designated the audit team leader to ensure in-depth quality control over the performance records of the work of the auditor who carried out the inspection, by re-examining facts and circumstances relevant to the conclusion about the legality of the extension of the deadline for receipt of tenders.

In connection with the amendments to the applicable methodology, all auditors of the audit authority attended training on 13 and 21 February 2014. As part of the training it gave specific guidelines for work when checking the legality of the extension of the deadline for receipt of tenders.

### **Commission position**

The Commission maintains that although there is no specific provision requiring publication of an extension in the OJEU, its non-publication breached Article 2 of Directive 2004/18/EC which states that:

*'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'*

The non-publication of the notice in the OJEU discriminated against foreign bidders who were not made aware of the extension.

The argument that the extension was only made after the period for purchasing the documents had expired and that there was therefore no unequal treatment is not accepted as there is no entitlement for contracting authorities to shorten the period for obtaining tender documents.

Accordingly, the managing authority should apply a financial correction in line with the Guidelines. The applicable point of the guidelines is point 12 'Incorrect application of certain ancillary elements'. The applicable financial correction according to the guidelines is 2 %, 5 % or 10 % of the value of the contract, according to the seriousness of the irregularity. The Commission auditors consider the seriousness of the breach to be of a moderate level and a 5 % financial correction is therefore appropriate. The breach is considered of moderate seriousness as there was a reasonable level of competition (i.e. seven tenderers received for one works contract and five tenderers received for the other contract) despite the breach and because the notification to those companies who had purchased the tender documentation partially compensates for the non-publication of the extension in the Official Journal of the EU.

The contracts affected by the error amount to BGN 43 565 721 (or EUR 22 275 141) including VAT (sewer network — BGN 32 386 137 and treatment plant — 11 179 584). The expenditure to be deducted based on a 5 % financial correction amounts to BGN 2 178 286 or EUR 1 113 757.

The contracts concerned fall within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State (representing the maximum amount of 152.916.261 BGN – 78.186.042 EUR) by Decision of the Council of Ministers no. 38 of 17 September 2014.

The Certifying Authority withdrew the impact on the financial corrections applied by the Managing Authority in the Payment Claims submitted to the European Commission via SFC on 08/10/2014 and 31/10/2014 for ERDF and 30/09/2014 and 31/10/2014 for the CF.

The Certifying Authority also provided a statement of assurance to the European Commission, certifying that the following financial corrections have been applied:

- All individual financial corrections applied before the re-verification process;
- All individual financial corrections resulting from the re-verification process;

- The extrapolated flat rate financial correction (9,5%) imposed for each of the contracts without individual financial corrections.

As the contracts concerned fall within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State and the corresponding irregular expenditure was decertified, the finding is **closed**.

#### **Finding n°5:**

##### **Operation No 2: Integrated Water Project — Pirdop (Environment OP)**

##### ***Finding n°5: Late submission of contract award notices***

The contracts for the two works contracts were signed on 14 February 2012. The contract award notice to the Official Journal of the EU was sent on 18 April 2012. This is 64 days after the signature of the contracts. The deadline of 48 days under Article 35 of Directive 2004/18/EC was not respected. The audit authority did not include this finding in its 'mini-report'.

##### ***Action n° 5 (Responsible body: Audit authority; Deadline: 60 days; Priority: Low):***

The applicable point of the 'Guidelines' is point 12 'Incorrect application of certain ancillary elements'. The applicable financial correction according to the guidelines is 2 %, 5 % or 10 % of the value of the contract, according to the seriousness of the irregularity. As the contract award notice was published shortly after the deadline, a financial correction is not proposed in this particular case. The audit authority should nevertheless report this type of findings in its 'mini-reports'.

#### **Member State reply**

The managing authority and the audit authority accept the finding and the audit authority has implemented the recommendation and has included questions to check whether the contract award information has been submitted on time (ref. question No 37 of Annex 3 — Checklist to inspect an open procedure). The audit authority also explains that in this particular case, the auditor who verified the procedure detected the irregularity and documented it in the checklist available in the audit software. The omission was not included in the report presenting the results from a project inspection, as in this case it has no financial impact.

#### **Commission position**

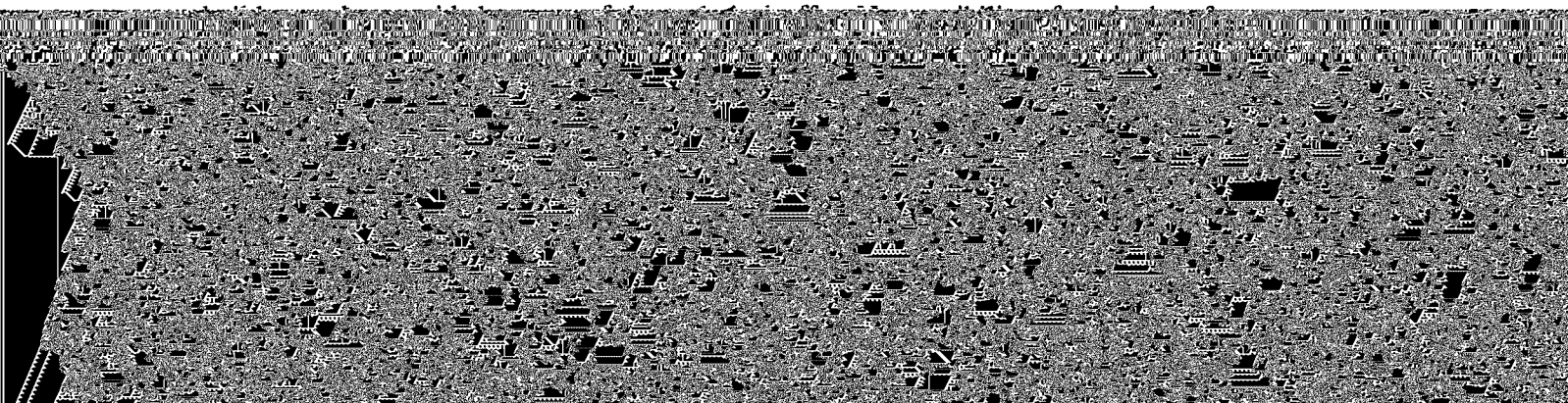
As the finding has been accepted and the related corrective action taken, the finding is **closed**.

#### **Finding n°6:**

##### **Operation No 3: Establishment of a regional system of waste management in the region of Botevgrad (Environment OP)**

##### ***Finding 6: Proof of membership in Bulgarian Central professional register of builders required at the selection stage (no equivalent allowed)***

In relation to the works contract signed on 18 February 2009, the technical specifications required registration of the tenderer in the Bulgarian Central professional register of



another Member State was allowed. This requirement discriminates against foreign bidders. Article 46 of Directive 2004/18/EC states that:

*Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.*

As stated above, the requirement of registration in a professional or trade register in Bulgaria and not in his Member State of establishment discriminates against foreign bidders. The audit authority did not include this finding in its 'mini-report' and did not propose any financial correction in this regard.

**Action n°6 (Responsible body: Audit authority and managing authority; Deadline: 60 days; Priority: High):**

The applicable point of the 'Guidelines' is point 7 'Unlawful selection and/or contract award criteria laid down in the tender procedure'<sup>1</sup>. A 25% financial correction is applicable in this case. The value of the contract affected by the error is to BGN 12 835 319 (EUR 6 562 695) including VAT. The expenditure to be deducted based on a 25% financial correction amounts to BGN 3 208 830 or EUR 1 640 674.

The managing authority is requested to indicate its acceptance of this finding and its agreement to deduct this expenditure in the next payment claim.

The audit authority should quantify the effect of this irregularity and include it in its calculation of error rates reported in the annual control report for 2013.

The audit authority should explain:

- (i) why this finding was not raised in its 'mini-report' and
- (ii) actions taken to improve its procedures for audits of operations and the related quality control within the audit authority following such audits in order to address this weakness.

#### **Member State reply**

The managing authority disagreed with the finding and the recommendations based on the absence of a legal framework to oblige contracting authorities to accept equivalents of registration documents presented by foreign bidders.

The audit authority argued that the finding was not worded in accordance with the relevant facts and the applicable law.

1. The documents relevant to the procedure show the following facts:

On 4 November 2008, by decision No OP-36/4.11.2008, the mayor of Botevgrad launched an open procedure with the scope 'Construction of a regional landfill for non-hazardous waste in Botevgrad, Pravets and Etropole.'

The tender documentation indicates that envelope A 'Technical Proposal' contains:

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<sup>1</sup> Cases in which certain operators have been deterred from bidding on account of unlawful restrictions laid down in the tender notice or tender documents (for example, the obligation to already have an establishment or representative in the country or region, or setting technical standards that are too specific and favour a single operator or the possession of experience in the region, etc.).

*'A certificate of membership in the Bulgarian central professional register of builders issued in accordance with the Construction Chamber Act, promulgated in State Gazette, issue 108/29 December 2008, and the Regulation concerning the entry and keeping of the Central Register of Professional Builders, promulgated in State Gazette, issue 65/10 August 2007)'*

The contract notice did not explicitly rule out the participation of foreign individuals or legal entities in the tender.

Section II Eligibility of the tender documentation (page 4) clearly states that 'Bulgarian or foreign legal persons and consortia thereof is entitled to participate in the tender...'.

The tender documentation does not contain any specific indication that proof of equivalent registration in another Member State is not allowed.

2. In response to the finding, the audit authority again thoroughly analysed the applicable legal framework at EU and national level:

- i. Article 46 and Article 52(5) of Directive 2004/18/EC
- ii. Article 49 and Article 53a of the Public Procurement Act.

2.1. Article 46 of Directive 2004/18/EC states that any economic operator willing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts.

Under Article 52(5) of Directive 2004/18/EC, contracting authorities recognise equivalent certificates issued by bodies established in other Member States. They also accept other equivalent documents.

2.2. The above provisions have been transposed in national legislation as follows:

*'Articles 49 of the Public Procurement Act (1) The contracting authority may require from each candidate or tenderer to prove enrolment in one of the professional or trade registers of its state of establishment, or to present a declaration or a certificate of enrolment, issued by the competent authorities under the national law of the tenderer in question.*

*(2) In procedures for the award of public service contracts, insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'*

(3) For the purpose of eligibility to submit a bid in a procedure, the contracting authority may not be entitled to require a certificate or another document of registration from an administrative body, if the candidate or tenderer established in another Member State of the European Union provides an equivalent document issued in its state of establishment.

*'Articles 53a of the Public Procurement Act (1) A candidate or tenderer may submit a certificate or registration on an official list of approved economic operators of a Member State of the European Union.*



*(2) In the cases referred to in paragraph 1, the contracting authority may not exclude a candidate or tenderer from a contract award procedure or to refuse to sign a contract therewith on the grounds of the candidate or tenderer failing to produce any of the documents referred to in Article 48(2), Article 50(1) and (2), Article 51 and Article 51(3) herein, provided that the circumstance is proved by the certificate produced.'*

2.3 In view of the above considerations, the contracting authority is *not obliged* to use the wording 'or equivalent' when drawing up the requirements for the legal status of tenderers and in particular as regards their ability to prove that they are eligible to perform the activities within the contract scope. Such an obligation was set out only in the wording of technical specifications (Article 23(8) of Directive 2004/18/EC (respectively, Article 32(2) of the Public Procurement Act). Therefore a relevant legal provision has not been put in place and has not been infringed by the contracting authority.

Therefore, the absence of an explicit reference to the acceptance of equivalent documents cannot automatically lead to a conclusion of an unjustified disqualification of foreign entities from the procedure. They are legally allowed to provide equivalent documents of enrolment, and under the relevant legislation the contracting authority is obliged to accept such equivalent document.

2.4. The above legal provisions entitle contracting authorities to request from tenderers to prove their membership in a professional or trade register in order to assess their suitability to carry out the professional activity. Contracting authorities' right to require relevant proof relates to the contract scope. If the activities within the contract scope are regulated activities or profession — i.e. their implementation is conditional upon registration, certification or licensing, the contracting authority should ask the tenderer to prove that it is entitled to perform these activities. The right of the contracting authority to request evidence regarding the suitability of tenderers to perform the professional activity pertains to all types of tenderers, regardless of whether they are local or foreign individuals and/or legal entities.

Without any doubt, in this case the contract scope involves construction, which is a regulated activity performed by economic operators with an appropriate registration. The contracting authority's requirement corresponds to the contract scope and does not unduly restrict the participation of entities in the procedure.

2.5. The provisions quoted above show that where the tenderer is a foreign entity, it may provide an equivalent document issued by its state of establishment. This legal basis corresponds to the obligation for the contracting authority to accept equivalent evidence provided by these entities. Legislation is imperative, i.e. its application is not subject to the contracting authority's discretion. Since the contracting authority is not entitled to disqualify a tenderer which has provided an equivalent document in accordance with Article 49 and Article 53a of the Public Procurement Act, in this case the rights and interests of the participants are protected by law — the contracting authority does not need to take concrete action when drawing up its requirements to ensure protection of all interested economic operators. The absence of the words 'or equivalent' in the tender documentation does not discriminate against potential stakeholders and does not have a dissuasive effect on foreign operators.

2.6. Moreover, the provisions of the legislation are well known, which means that all stakeholders are aware of the option laid down in the Directive and the national law for foreign tenderers to prove their professional suitability by equivalent enrolments. The contracting authority is not obliged to repeat in the tender documentation the wording of the regulations or parts thereof. The reproduction of legal provisions in a non-binding document, such as the tender documentation could pose a risk of inadequate interpretation and confusion for potential tenderers.

2.7. The case law of the Commission for Protection of Competition (KZK) and the Supreme Administrative Court (VAS), the competent bodies to rule on disputes concerning the legality of acts of the contracting authorities, supports the above conclusions (See KZK Decision No 401/2012, KZK Decision No 1158 of 10 October 2012, VAS Judgment No 15480 of 12 June 2012, VAS Judgment No 6692/2012).

*'...With regard to equivalent documents presented by foreign entities, the KZK should note that Article 49(3) ZOP concerning candidates and tenderers established in another Member State of the European Union sets out that the contracting authority may not require proof of registration issued by an administrative body if they provide an equivalent document issued by their State of establishment and hence tenderers are not discriminated against in the procedure as claimed by the complainant. In case of disqualifying a tenderer which meets the requirements set out in Article 49(3) ZOP, by not accepting an equivalent document issued by the State of establishment, it will be entitled to appeal against that decision of the contracting authority before the KZK. To prove the above the contracting authority has indicated in its opinion that if the tenderer asks it for clarification, it will point out that the fulfilment of the requirement can be proved by a valid national licence. In view of the above, the KZK considers that there are no infringements of the law as alleged by the complainant and foreign individuals and legal entities can take part in the contract award procedure so the complaint was found to be groundless...'* (KZK Decision No 401/2012).

2.8 Article 2 of Directive 2004/18/EC obliges contracting authorities to treat all economic operators equally and non-discriminatorily, whether they are individuals or legal entities, local or foreign operators.

Neither the contract notice nor the tender documentation indicates that only local individuals or legal entities are eligible to submit tenders. There is no explicit exclusion of foreigners from the scope of eligible participants. Moreover, as we indicated above, the tender documentation clearly states that foreign entities are eligible to submit tenders. The tender documentation does not include a specific indication that it does not permit the presentation of equivalent proof of registration in another Member State. Therefore, there is no evidence of discrimination against foreign entities, or vice versa. We consider it inadmissible that when detecting the offence of discrimination against foreign entities, presumptions are not based on any available evidence.

In this particular case, the requirement was set out only in the tender documentation. The tender documentation was purchased by 5 persons. Three tenders were received, one of which was purchased by a tenderer, a grouping of four companies. Six economic operators submitted tenders in the procedure.

The above analysis shows that the contracting authority, the mayor of Botevgrad, did not infringe the rules.

3. With regard to the findings of the draft audit report, we asked for the opinion of the Public Procurement Agency and the National Audit Office of the Republic of Bulgaria. The audit authority's final position was based on those opinions, among others.

In conclusion, in view of the above, the audit authority does not accept the recommendations and the underlying finding regarding the measurement of the impact of the detected irregularity and the inclusion of the error in the annual control report for 2013. The audit authority considers that the requirement for registration in the Central Register of Professional Builders was legal, it did not unduly restrict the participation of foreign entities in the procedure, so there was no infringement of Directive 2004/18/EC. As a result, the report on the results of the project inspection (i.e. the 'mini-report') has not made an observation related to the presence of discriminatory requirements to tenderers.

As regards the recommendation for taking action to improve audit procedures and operations and related quality control, please note:

- The audit authority reviewed and analysed thoroughly the methodology in place. It found that the checklist to inspect public procurement included questions as to whether requirements discriminate against entities in the procedure and have a dissuasive effect (ref. questions No 8, 9 and 32 of Annex No 3 — checklist for verification of an open procedure). It gave relevant instructions to auditors. In view of the above, it does not need to add new questions to the inspection checklist.

In response to the recommendation, we designated the audit team leader to ensure in-depth quality control over the performance records of the work of the auditor who carried out the inspection, by re-examining facts and circumstances relevant to the conclusion about the legality of the requirements for tenderers.

- Within the training of auditors of the audit authority (held on 13 and 21 February 2014) this case study was presented and discussed, and particular guidelines were given on how to look for restrictive requirements during inspections.

### **Commission position**

The arguments presented by the national authorities are not accepted. Although there is no requirement to state 'or equivalent', where the actual specifications used provide only for enrolment in the Bulgarian register without specifically mentioning that '*enrolment in his Member State of establishment*' would be accepted, then the term 'or equivalent' should be used. This requirement discriminated against foreign bidders.

The fact that the national legislation provides some safeguards in this respect, as set out in detail in the member state reply, does not alter the fact that the specifications in this particular case were discriminatory.

The applicable point of the 'Guidelines' is point 7 'Unlawful selection and/or contract award criteria laid down in the tender procedure'<sup>2</sup>. A 25% financial correction is

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<sup>2</sup> Cases in which certain operators have been deterred from bidding on account of unlawful restrictions laid down in the tender notice or tender documents (for example, the obligation to already have an

applicable in this case. The value of the contract affected by the error is to BGN 12 835 319 (EUR 6 562 695) including VAT. The expenditure to be deducted based on a 25% financial correction amounts to BGN 3 208 830 or EUR 1 640 674.

The contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State (representing the maximum amount of 152.916.261 BGN – 78.186.042 EUR) by Decision of the Council of Ministers no. 38 of 17 September 2014.

The Certifying Authority withdrew the impact on the financial corrections applied by the Managing Authority in the Payment Claims submitted to the European Commission via SFC on 08/10/2014 and 31/10/2014 for ERDF and 30/09/2014 and 31/10/2014 for the CF.

The Certifying Authority also provided a statement of assurance to the European Commission, certifying that the following financial corrections have been applied:

- All individual financial corrections applied before the re-verification process;
- All individual financial corrections resulting from the re-verification process;
- The extrapolated flat rate financial correction (9,5%) imposed for each of the contracts without individual financial corrections.

As the contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State and the corresponding irregular expenditure was decertified, the finding is closed.

#### **Finding n°7:**

#### **Operation No 3: Establishment of a regional system of waste management in the region of Botevgrad (Environment OP)**

##### ***Finding 7: Incomplete information included in the tender notice***

In relation to the works contract signed on 18 February 2009, the contract notice only includes references to Bulgarian regulations when defining the criteria and the documents to be submitted in relation to the economic, financial and technical requirements for the selection of bidders. In addition, the contract notice does not define the minimum requirements for these criteria.

For example, in relation to the economic and financial standing of the participants, the tender notice only states: 'According to Article 50, paragraph 1, points 2 and 3 of the Public Procurement Act.' Only the tender dossier states the actual criteria and their minimum levels, namely turnover of over BGN 15 million, experience with similar projects of over BGN 10 million and available financing of over BGN 1.3 million.

##### ***Action n ° 7 (Responsible body: audit body Term, 60 days, Priority: Low):***

It is recommended to state in the tender notice the selection criteria and to mention the documents requested from the bidders necessary to prove their economic, financial and technical capabilities rather than including only references to the Bulgaria regulation,

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establishment or representative in the country or region, or setting technical standards that are too specific and favour a single operator or the possession of experience in the region, etc.).

which may be unclear to bidders and especially to international bidders. It is also recommended to include the minimum levels of selection criteria in the tender notice.

In its future audit reports, the audit authority should include this type of finding to raise the awareness of beneficiaries concerning best practices in public procurement.

#### ***Member State reply***

The managing authority agreed to draw beneficiaries' attention to their obligation to include complete information on selection criteria and documents to prove them in the contract notice.

The audit authority has agreed that under the applicable law the contract notice should include minimum selection requirements for tenderers, namely financial and economic standing, technical capabilities and professional qualifications if the contracting authority has formulated such. The audit authority's methodology provides verification of the fulfilment of this requirement (ref. question No 10 in *Annex 3* — Checklist to inspect the open procedure). Auditors are aware of and apply this checklist. In addition, within the training held on 13 and 21 February 2014 auditors were advised to formulate findings when detecting such deviations.

The audit authority pointed out that Directive 2004/18/EC is not directly applicable in the Member States of the European Union. Contracting authorities award public contracts under the applicable national legislation which should be harmonised with the rules laid down in Directive 2004/18/EC. In Bulgaria procurement-related public ties are governed by the Public Procurement Act. It complies with Directive 2004/18/EC. References to the provisions of the applicable regulation are a good practice given the risk of inaccurate quoting in tender documentation and in particular in the contract notice. Stakeholders (local and foreign) are required to be aware of the applicable law (*Ignorantia juris non excusat or nemo censetur ignorare legem*).

#### **Commission position**

As the managing authority has agreed to implement the recommendation, which is considered as good practice, the finding is **closed**.

#### **Finding n°8:**

**Operation No 3: Establishment of a regional system of waste management in the region of Botevgrad (Environment OP)**

#### ***Finding n°8: Mixing of selection and award criteria – use of unlawful award criteria***

In relation to the service contract for supervision signed on 2 February 2009 for BGN162,000 (EUR 82 831), the award criterion was the most economically advantageous tender, with the following weights:

- |                                       |     |
|---------------------------------------|-----|
| • Experience with similar contracts   | 30% |
| • References of past good performance | 10% |
| • Price                               | 60% |

The criteria totalling 40% (experience with similar contracts and references of past good performance) are not linked to the subject-matter of the contract but rather to the tenderer. Such criteria can be only applied in the selection phase and are illegal in the award phase.

The audit authority has rightly identified these criteria as unlawful in its audit report. Nevertheless it did not apply any financial correction because the contract was awarded to the cheapest tender.

**Action n°8 (Responsible body: Audit authority and managing authority; Deadline: 60 days; Priority: Medium):**

The audit authority should apply the 'Guidelines' when determining appropriate rates of financial corrections. In this case, point 23 'Application of unlawful selection and/or contract award criteria'<sup>3</sup> applies. The applicable financial correction is 10% of the value of the contract which may be reduced to 5% depending on its seriousness. The level of seriousness is considered to be moderate to low as there was a reasonable degree of competition given the low value of the contract which attracted three compliant bids. A financial correction of 5% is thus applicable. The contract affected by the error amounts to BGN 162 000 or EUR 82 831 including VAT. The expenditure to be deducted based on a 5% financial correction would amount to BGN 8 100 or EUR 4 142. As a 10% financial correction has been already applied in relation to this contract by the national authorities and because the flat-rate financial corrections are not cumulated, there is no need to apply a financial correction in relation to this finding.

Flat-rate corrections should be applied in all cases when a dissuasive effect is present because punctual financial corrections do not remedy the full financial harm caused by applying unlawful selection and award criteria.

#### **Member State reply**

The managing authority confirmed that it imposed a financial correction of 10 % on the contract in question and, in view of the principle of non-cumulation of financial corrections, it should not impose another financial correction.

The audit authority replied that, as the finding indicates, the audit finding detected the infringement of mixing selection and award criteria. The (audit authority's) draft report on the results from the project inspection presented to the managing authority on 12 August 2013 indicates the same. In this particular case, a revised draft mini-report was not drawn up in view of the 10 % financial correction on the contract in question imposed by the managing authority and the principle of non-cumulation of financial corrections.

The measures taken within the new approach of the audit authority to assess the financial impact of mixing of selection and award criteria and the unlawful methodology was presented.

#### **Commission position**

As the appropriate action has been taken the finding is closed.

#### **Finding n°9:**

**Operation No 4: Preparation of an integrated development project for waste treatment infrastructure management - Panagyurishte (Environment OP)**

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<sup>3</sup> Application of unlawful criteria which deter certain bidders on account of unlawful restrictions laid down in the tender procedure.

Contract audited: Service contract – preparation of a landfill project (above EU procurement threshold) awarded by the Municipality of Panagyurishte. The tender notice was sent to the Official Journal of the EU on 3 August 2009. The contract was signed on 4 November 2009. The contract amount is BGN 1 116 000 (EUR 570 610) including VAT.

***Finding n°9: Unequal treatment of tenderers in the selection phase, other procurement irregularities and red flags***

In relation to the service contract audited, out of the five bids submitted, four were rejected at the selection phase leaving only one bid which was evaluated at the award phase. The evaluation committee did not treat the tenderers equally, as required by the Article 2 of Directive 2004/18/EC which states that:

*Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.*

For this service contract, it was noted that if the winning tenderer [REDACTED] had been treated in the same way as other tenderers it would have been rejected during the selection stage. However, although two tenderers [REDACTED] and [REDACTED] were rejected for failure to provide proof of experience for one of the key expert positions (i.e. lawyer), the winning tenderer was not rejected even though it too did not provide similar proof in respect of its key expert. The evidence of the unequal treatment of tenderers is detailed further below:

The key expert – lawyer of the winning tenderer [REDACTED] did not present proof of experience with FIDIC. He only presented proof of participation in a 2-day FIDIC seminar. There was a non-key team member included in the offer of the winning consortium which fulfilled the requirements for lawyer (ability to practice and FIDIC experience) – both with supporting evidence. Nevertheless this was not relevant according to the tender notice and tender dossier.

One of the two reasons for rejection of the tenderer [REDACTED] was that its key expert (i.e. lawyer) did not prove experience with construction contracts under FIDIC and did not present documents proving his ability to practice law. The CV of this key expert indicates the experience with FIDIC (during employment at the company [REDACTED] and the ability to practice law (membership in the bar association – attorney) but there were no supporting documents provided in this regard. The winning tenderer did not submit any proof of the FIDIC works experience for its key expert lawyer.

One of two reasons for rejection of another rejected tenderer [REDACTED] was that its key expert – lawyer did not prove experience with construction contracts under FIDIC. The CV of the key expert – lawyer did not indicate the experience with FIDIC and there were no supporting documents provided in this regard. The winning tenderer also did not submit any proof of the FIDIC works experience for its key expert lawyer.

The only reason for rejection of another rejected tenderer [REDACTED] was that its key expert – lawyer did not prove experience with construction contracts under FIDIC. The key expert – lawyer has 10 years of experience in preparing tenders for a municipality. The supporting documentation includes a reference of his employer stating that he has taken part in preparation of tender documents including procurements for construction of sewage system and construction of 2 waste water treatment plants.

The winning tenderer did not submit any proof of the FIDIC works experience for its key expert lawyer.

In addition, other procurement irregularities identified in the selection stage are as follows:

One of the two reasons for rejection of one rejected tenderer (██████████) was that one member of the consortium did not generate profit in the last 3 years. Based on the documents reviewed by the Commission auditors, the member of the consortium (██████████) did generate profit in the periods examined. This conclusion should have been reached by the evaluation committee based on the documentation submitted. The evaluation committee instead reviewed the financial statements of (██████████) in the public records and found a cash-flow statement on which they concluded that the company did not have a profit. However the cash flow statement does not include information on profit but only information on changes in the net cash position. This is therefore not a valid reason for exclusion. This means that the evaluation committee undertook additional steps, going beyond its normal operational procedures, resulting in the incorrect rejection of this tenderer.

In respect of another tenderer, two of the three reasons for rejection of another tenderer (██████████) were that:

- (i) the licence it submitted in relation to its key expert in waste management was only valid for 2007 and
- (ii) that the CV of the key expert in geology did not show practical experience with EU-financed projects.

It was noted however that the tender evaluation committee did not check the equivalent supporting documentation in relation to the key expert (lawyer) of the winning tenderer.

In addition, the Commission auditors have identified inconsistent selection criteria for various key experts.

For one of the key experts (i.e. leader of design for cultivation), a master's degree was not required while it was required for all the other key experts. For this key expert position, experience in 10 similar projects was requested, while for all other (similar) key expert positions only experience with 1 or 2 projects was required. For another expert position (geology) experience with EU co-financed projects was required while such a requirement was not specified for any other key expert position (e.g. project teamleader) where it would have been more relevant.

The contracting authority did not provide any justification for these inconsistencies. Therefore, the Commission auditors consider these inconsistencies in the requirements as red flags as they may have been designed to favour a particular tenderer.

The audit authority did not include any of the above points as finding in its 'mini-report'.

**Action n°9 (Responsible body: Audit authority and managing authority; Deadline: 60 days; Priority: Medium):**

Due to the unequal treatment of tenderers detailed above representing a breach of Article 2 of Directive 2004/18/EC a financial correction is proposed. The applicable point of the 'Guidelines' is point 7 'Unlawful selection and/or contract award criteria laid down in the



tender procedure'<sup>4</sup>. The applicable correction is generally 25% of the value of the contract. A financial correction of 100% of the value of the contract may be applied in the most serious cases when there is a deliberate intention to exclude certain bidders.

The contract affected amounts to BGN 1 116 000 (EUR 570 610) including VAT. The expenditure to be deducted based on a 25% financial correction amounts to BGN 279 000 or EUR 142 653. This level of correction is without prejudice to the outcome of any future investigation by the responsible authorities. The managing authority is requested to indicate its acceptance of this finding and its agreement to deduct this expenditure in the next payment claim.

The audit authority should quantify the effect of this irregularity and include it in its calculation of error rates reported in the annual control report for 2013.

The audit authority should explain

- (a) why this finding was not raised in its 'mini-report' and
- (b) actions taken to improve its procedures for audits of operations and the related quality control within the audit authority following such audits in order to address this weakness.

The abovementioned finding provides evidence to suggest that there may have been a deliberate intention to exclude certain bidders from the tender process. The audit authority is therefore requested to assess the risk factors identified in order to determine whether to report the abovementioned issues in relation to this contract to the relevant fraud investigation authorities.

As a general recommendation, in situations where only one bidder is admitted to the award phase, the audit authority should pay particular attention to the reasons for excluding tenderers at selection stage and to try to assess whether selection criteria have been designed to favour a particular tenderer or to exclude other tenderers.

### **Member State reply**

The managing authority had imposed a financial correction of 25 % on the verified expenditure under the affected contract amounting to BGN 279 000 or EUR 142 650.

However, it points out that the Directive does not set a requirement for imposing the same requirements to different types of experts. Therefore, there is no breach of public procurement law and no irregularity and thus no need for a financial correction. As regards the lack of a specific requirement for a master's degree for two of the experts, the managing authority points out that this is compensated for by the requirement for these experts to have a high level of experience (i.e. 10 years and 7 years for the landfill and geology experts respectively).

The audit authority replied that further to the DG Regio letter of 27 November 2013 (ARES (2013)3574478), it decided to carry out an on-the-spot check of this project. The check covered the offers of the winning tenderer and the other tenderers. The check resulted in the following finding:

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<sup>4</sup> Cases in which certain operators have been deterred from bidding on account of unlawful restrictions laid down in the tender notice or tender documents.

*'We reviewed the requirements laid down in the contract notice and tender documentation and the documents supporting the offer of [REDACTED] and thoroughly analysed them. As a result, we found the following:*

*On key expert - lawyer:*

*1. Relevant evidence does not support the professional experience described in the CV as required under Standard Form 6 of the tender documentation;*

*2. There is no evidence that they meet the following requirements:*

- a minimum of two years of relevant work experience;*
- a minimum of two years of experience in preparing documentation under FIDIC contractual conditions;*
- professional experience in preparing procurement documentation;*
- experience in implementing procedures and involvement in ZOP committees;*
- experience in correspondence with competent local, regional and national institutions.*

*In addition, we have examined also the evidence relating to the non-key expert - lawyer.*

*The contract notice and the tender documentation do not contain requirements for a non-key expert - lawyer. He/she does not meet the following requirements for a key expert - lawyer:*

- a minimum of two years of relevant work experience;*
- experience in implementing procedures and involvement in ZOP committees; training in engineering and construction contract management, under the FIDIC contractual conditions.*

*Furthermore, we analysed whether the two experts together meet the contracting authority's requirements for a key expert - lawyer. We detected missing evidence relating to both:*

- for relevant work experience and*
- experience in implementing procedures and involvement in ZOP committees.*

*In view of the above, the audit authority believes that the tenderer has not proved its compliance in relation to the key expert - lawyer.*

*On the key expert - economist:*

*No supporting documents were available to the CV to prove the expert's professional experience.*

*In view of the above, the audit authority believes that the tenderer has not proved its compliance in relation to the key expert - economist.'*

The finding regarding the infringement of Article 69 of the Public Procurement Act (ZOP) was formulated in response to this and on 21 December 2013, the managing authority received a revised draft report on the results of the inspection of project BG161PO005-2.0.01-0048-C0001 of the municipality of Panagiurishte accompanied by a recommendation for a 25 % financial correction under point 7 of the Guidelines (COCOF 07/0037/03 of 29 November 2007). The detected error was taken into account when issuing the final report on the audit of operations for expenditure certified in 2012 under the Environment Operational Programme and was included in the operational programme's annual control report of 30 December 2013 (ref. Annual Control Report for 2013, Table 2 List of Ineligible Expenditure Audited and Identified under Environment

OP in 2013, row 14). Since the check detected signs of favouring the winning tenderer, the audit authority sent the results from the inspection to the Prosecutor General of the Republic of Bulgaria to address the issues within its competence.

The audit authority analysed the reasons for the irregularities. During the on-the-spot inspection, the auditor did not find evidence for the irregularity in the audited public procurement. In this regard, we believe that the regularity resulted from an individual error and fell within the audit risk. The auditor who conducted the inspection made a remark and the audit team leader of Environment OP was replaced.

As regards the recommendation for taking action to improve audit procedures and operations and related quality control, please note:

1. The audit authority reviewed and analysed thoroughly the methodology in place. As a result, it found that the checklist to inspect public procurement included questions as to whether the winning tenderer complies with the contracting authority's requirements, as to whether disqualification of tenderers was legal and whether the principle of equal treatment of tenderers during the selection and award procedure as respected (ref. question 19—24 of Annex 3 Checklist for inspection the open procedure). Auditors were given relevant instructions. In view of the above, it does not need to add new questions to the inspection checklist.

2. Within the training of auditors held on 13 and 21 February 2014, the finding presented in the Commission services' draft report and the irregularities in the public procurement detected during the second inspection by the audit authority, were presented and discussed. They received particular instructions for work in the review of the offer of the winning tenderer and the disqualified ones (if any). Their attention was again brought to the indicators of fraud during contract award (red flags).

### **Commission position**

As the requested corrective action has been taken the finding is considered **closed**.

The outcome of the referral of this issue to the Prosecutor General of the Republic of Bulgaria, to address the issues within its competence, should be notified to the Commission by the managing authority.

### **Finding n°10:**

#### ***Finding n°10: Audit trail***

In relation to the service contract, some tender documentation was not available for the on-the-spot audit carried by the Commission auditors. The documents submitted by one of the tenderers were not available in their entirety. The offer of this tenderer consisted of several binders but only one of the binders was available at the time of the Commission audit.

The Commission auditors requested the beneficiary to submit the relevant parts of the documentation from the missing binders by electronic post. These documents were delivered by the beneficiary. Nevertheless, the unavailability of the supporting documents during the on-the-spot audit limited the assurance the Commission auditors obtained in relation to the integrity of the file.

The audit authority stated that the tender documentation was complete at the time of its audit.

**Action n°10 (Responsible body: Managing authority; Deadline: 60 days; Priority: Medium):**

The managing authority should ensure that complete tender documentation is available on the spot for future audits.

**Member State reply**

The managing authority did not comment on this finding. The audit authority replied that further to DG Regio's letter ARES (2013)3574478 of 27 November 2013, the audit authority decided to carry out an on-the-spot check of this project. The check found that the examination of tenders was irregular as the winning tenderer did not meet the contracting authority's requirements (see finding n°9 above). During the on-the-spot check, the beneficiary presented all tenders and no missing documents were detected.

**Commission position**

The finding is closed.

<b>Findings 11 and 12 relate to operations in the Regional Development OP</b>
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**Operation 7: Improvement of services in the field of culture in Elin Pelin, by updating the related infrastructure (Regional Development OP)**

The operation consisted of partial renovation of seven cultural centres.

Contracts audited: Two works contracts awarded by the Municipality of Elin Pelin:

- (i) works contract (below EU procurement threshold but advertised in the Official Journal of the EU). The tender notice was sent to the Official Journal of the EU on 4 March 2010. The contract was signed on 26 November 2010. The contract amount is BGN 2 577 376 (EUR 1 317 812) including VAT.
- (ii) works contract (below EU procurement threshold). The tender notice was sent to the national procurement gazette on 1 December 2010. The contract was signed on 16 March 2011. The contract amount is BGN 1 396 728 (EUR 714 147) including VAT.

***Finding n°11: Limited accessibility for disabled users***

Seven cultural centres were renovated under the operation. For six cultural centres, the renovation should have incorporated enhanced accessibility for disabled users. For one centre, there were technical constraints rendering accessibility too costly.

DG Regional and Urban Policy's auditors visited three cultural centres, including two which should have been made accessible to disabled users. In one of the two centres, the arrangements were appropriate. In another centre, there was a ramp constructed to the podium in front of the centre but when entering the centre itself, the disabled users faced a step with no possibility of actually entering the facility itself.

**Action n°11 (Responsible body: Managing authority; Deadline: 60 days; Priority: High):**

When implementing renovation projects, the managing authority should ensure that (where technically possible) the renovation takes account of accessibility for disabled

users. This requirement is based on §1(30) of the Additional provisions of the Bulgarian Law for the Public Procurement which states that:

*"Technical specification for construction" (...) shall include a level of fulfilment according to the requirements for protection of the environment, designing, which shall meet all of the requirements, including access for persons with disabilities (...).*

The managing authority should ensure that an appropriate solution for the access of disabled users is implemented in the cultural centre in Novi Khan.

#### **Member State reply**

The managing authority entered an irregularity complaint No 652-1/11.12.2013 in the irregularity complaint register of the managing authority of RDOP and has taken the following actions:

One of the specific objectives of the project proposal of the municipality of Elin Pelin is to facilitate and promote access of disadvantaged groups to the sites included in the project by building wheelchair ramps for disabled users and guaranteeing the necessary standards. Measures to improve the access of disabled users will cover all cultural centres subject to intervention under the project. The scope of eligible activities for the Ivan Vazov cultural centre, in the village of Novi Khan, involved the construction of a wheelchair ramp for the disabled. The bill of quantities which is an integral part of the grant agreement includes BGN 14 200.00 for making an external ramp for access of disabled users.

Based on the Commission's findings from the on-the-spot check, the managing authority drew the conclusion that there was a material but repairable infringement in the physical implementation of project 'Repair and reconstruction of cultural centres in Elin Pelin'. It was noted that the failure to ensure full access for the disabled to the cultural centre would jeopardise the achievement of one of the project's specific objectives. Letter Reg. No 99-00-6-9204/22.01.2014 gave binding instructions to the beneficiary to take measures and remove the detected obstacle at its contribution (a step at the entrance of the site) to the access of disabled users.

By letter Ref. No 99-00-6-9204(6)/21.02.2014, the municipality of Elin Pelin provided information showing that the beneficiary had fully implemented the guidelines on time. In line with the guidelines, a concrete ramp was built with a 9 % slope, meant to overcome the step at the entrance and provides full and easy access for disabled users to the site. The documents below presented by the beneficiary give evidence thereof:

- a letter assigning to ~~the beneficiary~~ the construction of a concrete wheelchair ramp of an estimated value of BGN 200, net of VAT;
- delivery and acceptance report of 11 February 2014 showing that the contractor had built a concrete wheelchair ramp in front of the western entrance to the hallway of the cultural centre building, with a 9 % slope and which overcomes the step at the entrance to the building — it provides access to a wheelchair entrance hallway (level 0.00) of the building. The ramp was marked with marking paint;
- pictures of the concrete ramp.

By Order No RD-02-36-124/20 February 2014, the head of the managing authority ordered an on-the-spot inspection of the municipality of Elin Pelin and on 24 February 2014, a team of the managing authority of the Regional Development OP carried out an on-the-spot check to assess the implementation of the binding instructions. Case-handlers found that the step creating obstacles to the free access of persons with

disabilities had been removed. Access was ensured and the recommendation was implemented.

In view of the above, the beneficiary has taken timely and adequate measures to address the irregularity detected. The binding guidelines were implemented, as the municipality of Elin Pelin built at its own expense a concrete ramp, removing the step at the entrance of the cultural centre. The beneficiary provided full and easy access for disabled users to the site.

In view of the above, the managing authority considers that the municipality of Elin Pelin has guaranteed the access for disabled users to the repaired and reconstructed cultural infrastructure. Thus it has wrapped up the investment, achieving one of the specific objectives of the RDOP-funded project 'Repair and reconstruction of cultural centres in Elin Pelin' — social inclusion of persons with disabilities. By these actions, one of the specific objectives of scheme BG161PO001/1.1-01/2007 'Support for the provision of appropriate and effective educational, social and cultural infrastructure, contributing to the development of sustainable urban areas', in particular social inclusion and equal access of disadvantaged groups, was achieved.

By memo No 91-P-174 of 26 February 2014, approved by the head of the managing authority by decision of 27 February 2014, complaint No 652-1 was suspended due to the absence of evidence for an irregularity. By letter (Reg. No 99-00-6-9204/27.02.2014), the beneficiary, the municipality of Elin Pelin, was notified about the managing authority's opinion on the complaint, and about its obligation to comply with the requirements for sustainability of the investment and project results within 5 years from the project completion.

### **Commission position**

As the requested actions have been taken the finding is **closed**.

### **Finding n°12:**

**Operation No 7: Improvement of services in the field of culture in Elin Pelin, by updating the related infrastructure**

### ***Finding n°12: Poor state of investment***

The audit authority proposed several financial corrections in its 'mini-reports' in relation to the poor state of the investment and discrepancies in the capacity of the heating equipment which were identified by its on-the-spot visits carried out in the first half of 2013. These problems were not identified by the management verifications of the managing authority.

***Action n° 12 (Responsible body: Managing authority; Deadline: 60 days; Priority: Low):***

The managing authority should identify the poor state of investments through its management verifications and ensure that the beneficiaries enforce contract conditions (repairs within guarantee period).

### **Member State reply**

The managing authority has registered two complaints for an irregularity: No 652 of 26 August 2013 regarding infringements during the physical implementation of the project and No 653 of 26 August 2013 regarding ineligible expenditure and an indication of fraud.

The following measures were taken to address these issues:

1. Complaint No 652

The complaint contains sufficient evidence of irregularities with financial impact to the EU budget for which the MA has imposed:

- a financial correction in the amount of BGN 186 394.33, including VAT, representing 5 % of the actual contractual expenditure verified under Contract No BG 161RPO001/1.1-01 / 2007/055 'Repair and rehabilitation of cultural centres in Elin Pelin' whose beneficiary is the municipality of Elin Pelin, after deduction of ineligible project expenditure;
- a financial correction in the amount of BGN 29 209.76, including VAT, representing the exact amount of the financial loss of public funds, namely 100 % of the expenditure for 2 boilers ~~Unidentified~~ at the National Cultural Centre 'Ivan Vazov', village of Novi Khan.

Irregularity No OPRR/13/RR/599 was entered in the irregularities register of the MA of RDOP.

2. Complaint No 653

The signal contains enough information about an infringement with financial impact to the common EU budget, for which the managing authority has imposed a final financial correction of BGN 96 896.54, including VAT, representing the exact amount of the financial loss of public funding, namely 100 % of the overall value of the boilers supplied to the cultural centre in the village of Gara Pelin Elin and the cultural centre in the town of Elin Pelin. Irregularity No OPRR/13/RR/598 was entered in the irregularities register of the MA of RDOP.

The beneficiary was notified by letter (ref. No 99-00-6-9204/03.10.2013) with a copy to the Audit of EU Funds Executive Agency. The beneficiary was also informed that under the terms and conditions of grant contract No BG161PO001/1.1-01/2007/055, the municipality continues to be obliged, within five years from the expiry of the contract, to comply with the requirements for sustainability of the investment and the results of the project.

By letter (Reg. No 99-00-6-10864/4.10.2013), the managing authority of the Regional Development OP informed the Audit of EU Funds Executive Agency of the actions taken in response to the audit report, and presented relevant evidence.

By letter (Reg. No 99-00-6-10981/8.10.2013), the managing authority of the RDOP requested the competent authorities of the Regional Prosecution Office — Elin Pelin with a copy to the Supreme Cassation Prosecutor's Office, to examine whether there was an offence (a documentary offence), involving the submission of a document with false statements. A prosecution case was opened in connection with the complaint.

The audit authority replied that it has established and reported on the irregularity in its draft report on the audit of operations for expenditure certified in 2012 in Annex No 6. Before issuing a final report on this audit (11.12.2013), the audit authority followed up the actions taken to act upon the draft audit report and confirmed the information provided by the managing authority.

1. Complaint No 652

- The audit authority inspected the irregularities register under the Regional Development OP and found that the managing authority of the RDOP entered

irregularity No OPRR/13/RR/597. The audit authority examined the accounting reporting of the financial correction — entered by the MA on 3 October 2013 in the amount of BGN 186 394.33. By letter No 99-00-6-9204 of 3 October 2013, the managing authority of the Regional Development OP notified the beneficiary of the financial correction and invited it to recover the funds on a voluntary basis.

- The audit authority inspected the register of irregularities of the Regional Development OP and found that the managing authority of the Regional Development OP entered irregularity No OPRR/13/RR/599. The audit authority examined the accounting financial correction — entered by the managing authority on 3 October 2013 in the amount of BGN 29 209.76. By letter No 99-00-6-9204 of 3 October 2013, the managing authority of the Regional Development OP notified the beneficiary of the financial correction and invited it to recover the funds on a voluntary basis (no financial impact was detected on the expenditure declared in the Commission in 2012)

## 2. Complaint No 653

The audit authority examined the register of irregularities of the Regional Development OP and found that the managing authority of the RDOP entered irregularity No OPRR/13/RR/598. The audit authority examined the accounting reporting of the financial correction — entered by MA on 3 October 2013 in the amount of BGN 96 896.54. By letter No 99-00-6-9204 of 3 October 2013, the managing authority of the RDOP notified the beneficiary of the financial correction and invited it to recover the funds on a voluntary basis.

The audit authority presented the information in the annual control report on the RDOP regarding the errors detected under the project BG161PO001-1.1.01-0095-C0001 of the municipality of Elin Pelin with financial impact on the expenditure declared to the Commission in 2012.

Subsequent audits will follow up the recovery of the adjusted amounts and closing of irregularities.

### Commission position

Although the reply sets out the action taken in respect of the two specific cases, the managing authority has not explained how it intends to address the underlying weakness in its management verifications (i.e. how it will identify cases of poor implementation through its management verifications and how it will ensure that the beneficiaries enforce contract conditions including enforcing any necessary repair work covered by the guarantee period). The finding is **open** pending receipt of information on how the managing authority has improved its procedures in this area.

<b>Finding 13 relates to the general approach of the audit authority</b>
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***Finding n°13: Public procurement irregularities not identified and/or no corrections proposed for public procurement irregularities identified because the Guidelines were not applied***

The Commission auditors audited eight operations, including five operations with contracts above the EU procurement thresholds. In four of the operations with contracts



above EU procurement thresholds, the Commission auditors identified public procurement irregularities justifying financial corrections which were not raised in the 'mini-reports' issued by the audit authority (refer to findings 2, 4, 6 and 9). All four of the procurement irregularities were identified in the Environment OP.

The audit authority has correctly identified unlawful award criteria (e.g. mixing of selection and award criteria) in two of the eight operations subject to re-performance by the Commission auditors (refer to findings 3 and 8). Both cases relate to the Environment OP. In both cases, the audit authority concluded that the applicable financial correction is zero because the tender selected was either the only one or the cheapest. This treatment is not in line with the Guidelines.

The calculations carried out by the audit authority only took into consideration the detriment to the budget of the European Union caused by the unlawful criteria being applied to the bids submitted. It did not take into consideration the detriment to the budget of the European Union caused by the dissuasive effect the unlawful criteria had on potential bidders. The dissuasive effect resulted in a very limited number of bids (one, two or three) being evaluated in the award stage.

This issue was already raised in the DG Regional and Urban Policy audit report for mission 2012/BG/REGIO/J2/1164/1 (Finding 2) and for mission 2012/BG/REGIO/J2/1165/1 (Findings 4, 6 and 7).

In its letter of 13 November 2013, the audit authority has informed the Commission that it has changed its approach for determining the financial impact of the identified irregularities in the public procurement procedures, consisting of unlawful award criteria (such as mixing of criteria and / or unlawful evaluation methodology) and in all similar cases will apply flat rate corrections, according to the rates in point 6 (and point 23 for public procurement below the thresholds of the Directive, respectively) of the Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural funds or the Cohesion fund for noncompliance with the rules on public procurement (COCOF 07/0037/03) (hereinafter referred as the 'Guidelines').

In the letter of 13 November 2013, the audit authority has also stated that it has informed all the managing authorities and the certifying authority about the change in the audit authority's methodology, recommended to the managing authorities to change also their methodology and to make a review of their checks of public procurement procedures, where verifications have been made and included in certification reports for 2013 and applied the recommended approach in the audits of operations for the expenditure certified in 2012.

***Action n°13 (Responsible body: Audit authority; Deadline: 60 days; Priority: High):***

The audit authority should improve its quality control arrangements in the area of the on-the-spot audits of public procurement.

The audit authority is requested to review its audits of operations for the expenditure declared to the Commission in 2012 in light of the abovementioned public procurement related findings and to reflect any additional errors identified in the error rate to be reported in the Annual Control Report for 2013.

In addition, it should revise its procedures to ensure that the risks identified by the Commission are covered in future audits of operations.

Flat-rate corrections should be applied in all cases when a dissuasive effect is present because punctual financial corrections do not remedy the full financial harm caused by

applying unlawful selection and award criteria and therefore the actions undertaken by the audit authority as described in its letter of 13 November 2013 are appreciated by the Commission.

### **Member State reply**

The audit authority replied that during the mission No 2013/BG/REGIO/C2/1237/1, the Commission auditors reviewed draft audit reports on audits of operations drawn up by the audit authority. They were being communicated to the managing authorities and the beneficiaries.

The audit authority detailed and entirely disagreed with findings 2, 4 and 6 of the draft audit report relating to omissions in the work of the audit authority in public procurement inspection. With regard to other findings, information is on display about steps taken by the audit authority to improve its methodology and guarantee the quality of its work.

In short, further to the European Commission's letters Ares (2013)3274908 of 17 October 2013, and Ares (2013)3574478 of 27 November 2013, and this draft report, the audit authority took following actions:

1. The audit authority informed the Commission in detail by letter No 37-01-51 of 13 November 2013 of the measures taken under the adopted explicit recommendation for a financial correction for mixing of selection and award criteria and unlawful methodology for evaluation of tenders. The change of approach was notified to all institutions involved in the management and control of EU funds by letter No 91-00-4/11.11.2013. To explain the causes and nature of the new approach to assess the financial impact of this type of irregularity, a meeting was held on 18 November 2013 with the representatives of these institutions.
2. The audit authority's auditors were also duly notified of the change of approach and familiarised themselves with the relevant correspondence with the European Commission, namely by the Commission's letter Ares (2013) 3274908 of 17 October 2013 and our letter No 37-01-51/13 November 2013. Information about the measures taken to improve the audit methodology and quality assurance of audit as well as training is available in the opinion of the audit authority regarding specific findings.
3. The audit authority applied immediately the revised approach to the ongoing audits of operations (before issuing final reports) for expenditure certified in 2012 under all programmes. Revised draft reports were issued presenting the results of project inspection with financial impact determined in accordance with point 6 and 23 of the Guidelines. Revised preliminary reports were issued under seven projects of the Environment Operational Programme, the Regional Development OP and Technical Assistance OP for eight infringements involving unlawful evaluation methodology being and the following was proposed:
  - 4 corrections of 25 % under point 6 of the Guidelines and
  - 2 corrections of 10 %, respectively two of 5 % in accordance with point 23 of the Guidelines.

The table below presents the results of actions taken to change the approach of the audit authority in determining the financial impact of identified infringements of this type, according to the European Commission's letter Ares (2013) 3274908 of 17 October 2013.

**Results of actions taken to change the approach of the audit authority in determining the financial impact of infringements involving mixing of selection and award criteria and unlawful evaluation methodology**

No	Project	Draft report presenting the results of project inspection		Revised draft report presenting the results of project inspection		Final report presenting the results of project inspection	
		Finding	Financial impact	Finding	Financial impact	Finding	Financial impact
I.	<b>Environment Operational Programme</b>						
1.	BG 61PO005-3.0.02-001-C0001  National Office for Protection of Nature	Service - mapping and determining the conservation status of habitats and species - unlawful methods for evaluation of tenders	no real financial impact	Service - mapping and determining the conservation status of habitats and species - unlawful methods for the evaluation of tenders	25 % under point 6 of the Guidelines	Service - mapping and determining the conservation status of habitats - unlawful methodology for evaluation of tenders	25 % under point 6 of the Guidelines
II.	<b>Regional Development Operational Programme</b>						
1.	BG161PO001-1.4.05-0015-C0001 Municipality of Troyan	Works - methodology for the evaluation of tenders;	real financial impact	works - methodology for the evaluation of tenders;	5 % under point 23 of the Guidelines	Works - unlawful methodology for evaluation of tenders	5 % under point 23 of the Guidelines
2.	BG161PO001-1-1.1.01-0031-C001 municipality of Dobrich	Works - methodology for the evaluation of tenders;	real financial impact	Works - methodology for the evaluation of tenders;	5 % under point 23 of the Guidelines	Works - unlawful methodology for evaluation of tenders	5 % under point 23 of the Guidelines
III.	<b>Technical Assistance Operational Programme</b>						
1.	BG161PO002-3.2.01-0003-C001  Council of Ministers administration, Central Coordination Unit	Service - preliminary evaluation of the National Development Programme 2020 - unlawful evaluation methodology;	no real financial impact	Service - preliminary assessment of the National Development Programme 2020 - unlawful evaluation methodology;	10 % under point 23 of the Guidelines	Service - preliminary evaluation of the NDP 2020 - unlawful evaluation methodology;	10 % under point 23 of the Guidelines
		Service - analytical support to the preparation of the National Development Programme-illegal evaluation methodology	no real financial impact	Service - analytical support to the preparation of the National Development Programme -illegal evaluation methodology	25 % under point 6 of the Guidelines	Service - analytical support to the preparation of the NDP - illegal evaluation methodology	25 % under point 6 of the Guidelines
2.	BG 161PO002-1.1.01-0002-C0001	Service - assessment of the	Real financial	Service - assessment of the implementation of	10 % under point 23 of	Service - assessment of the	10 % under point 23 of the

	Central Coordination Unit, Programming of EU funds Directorate General	implementation of structural instruments, unlawful evaluation methodology	impact	structural instruments - illegal evaluation methodology	the Guidelines	implementation of structural instruments, unlawful evaluation methodology	Guidelines
3.	BG 161PO002-1.2.01-0002- C0001, certifying authority	Service - provision of airline tickets, unlawful methodology for evaluation of tenders	no real financial impact	Service - provision of airline tickets, unlawful methodology for evaluation of tenders	25 % under point 6 of the Guidelines	Service - provision of airline tickets - illegal methodology for evaluation of tenders	25 % under point 6 of the Guidelines
4.	BG 161PO002-1.1.01-0001- C0002 (2013/2) Council of Ministers administration, Prog of EU Funds Directorate	Service - provision of airline tickets - illegal methodology for evaluation of tenders	without real financial impact	Service - provision of airline tickets, unlawful methodology for evaluation of tenders	25 % under point 6 of the Guidelines	Service - provision of airline tickets - unlawful methodology for evaluation of tenders	25 % under point 6 of the Guidelines

Any errors detected in revised reports were taken into account when drawing up the final reports on audit of operations for expenditure certified in 2012 under these operational programmes and were included in the relevant annual control reports for 2013.

4. To comply with point 3 of the European Commission's letter Ares(2013) 3574478 of 27 November 2013, in early December 2013, the audit authority again checked public contracts which fell within the audit of operations for expenditure certified in 2012 under the Environment OP. The verifiable procedures were individualised after review and analysis of expenditure which fell within the sample for this audit of payment claims.

The inspection covered 40 procedures awarded by the Public Procurement Act in the five risk areas under point 2 of the above letter, namely:

- Unlawful mixing of selection and award criteria;
- Unlawfully shortened deadline for receipt of tenders due to an incomplete prior information notice;
- Restrictive requirements for registration in the Bulgarian Central professional register of builders under the Construction Chamber Act without acceptance of equivalent national registrations;
- Unequal treatment of tenderers in the selection;
- Unlawful extension of the deadline for receipt of tenders due to announcement of the extension only in the Republic of Bulgaria.

A checklist was drawn up and approved to inspect these issues. The second inspection was intended to include the documents made available to the audit authority.

The additional auditing procedures were assigned to a completely new audit team of 10 officials of the audit authority and a lawyer was designated in charge of quality control. The team was briefed on the scope of second inspection and the methodology applicable thereto.

The additional auditing procedures confirmed the initial findings of the audit authority except for the additional two cases of infringement of Article 69 of the Public Procurement Act - the winning tenderer did not meet the contracting authority's requirements. These irregularities were not detected during the initial inspections within the audit of operations. The audit authority communicated its findings in revised draft inspection reports on two projects - BG161PO005-1.0.02-0040-C0001 of the municipality of Popovo and BG161PO005-2.0.01-0048-C0001 of the municipality of Panagyurishte. To address these findings, the audit authority gave recommendations for financial corrections in the following amounts:

- 10 % of the expenditure of the affected contract for construction supervision under point 24 of the Guidelines for the municipality of Popovo and
- 25 % of the expenditure of the affected service contract under point 7 of the Guidelines for the municipality of Panagyurishte.

These two errors were included in the final report on the audit of the operations and were presented in Table 2 List of ineligible expenditure audited and identified under the Environment OP in the annual control report for 2013 (see row 4 and row 14 )

5. The checklists used by the audit authority during the audit of operations in 2013 regarding public contracts contain questions verifying all problem areas in accordance with point 2 of the European Commission's letter Ares (2013)3574478 of 27 November 2013, and the findings without financial impact presented in the European Commission's draft report, namely the evaluation:

- whether award criteria include selection indicators;
- whether the deadline for receipt of tenders has been legally shortened, including the use of a prior information notice;
- whether there are requirements that unduly restrict the participation of tenderers in the procedure;
- whether tenderers involved in the procedure are treated equally and in particular, whether the winning tenderer meets all requirements of the contracting authority and whether other tenderers were lawfully disqualified, if any;
- whether the extension of the deadline for submission of tenders was announced in the EU, where the contract is governed by Directive 2004/18/EC;
- whether all selection criteria and the documents proving their fulfilment have been listed in the contract notice;
- whether the deadline for sending information about the awarded contract has been respected.

The audit authority stated that it has formulated detailed guidelines for auditors for each of the questions used in its checklist. To improve the quality of work, the audit authority updated the checklists for inspecting contracts by elaborating on the guidelines for work. Checklists were included in the audit software and have been used in this audit of operations for all programmes.

In addition, the audit authority expanded the quality control to be performed by the team leader in terms of performance records of each auditor. The scope of this review included the requirement for second examination of all issues related to tender announcement and opening and those relevant to the work of the tender committee.

For changes in the methodology for verification of contracts, the audit authority conducted specialised training for all auditors on 13 and 21 February 2014.

### Commission position

The changes made to the audit authority's procedures for auditing the area of public procurement are noted. In case of the Environment OP, the Audit Authority recalculated the error rate reported in the annual control report for 2013 in light of the results of the re-verifications carried out in order to identify the risks outlined by DG REGIO, taking into account the financial corrections identified as a result of the re-verification exercise (including the extrapolated flat rate financial corrections) and reported the results to the European Commission (Ares(2014)3626666 - 31/10/2014). The new extrapolated error rate for ACR2013 is 6, 29% of the population of certified expenditure for 2012. The finding is closed.

## 5. CONCLUSIONS AND RECOMMENDATIONS

In our opinion, based on the work performed and the remaining findings identified as described in section 4 of this report, we conclude that:

**Key Requirement 3 - Adequate audits of operations**, is fulfilled by the audit authority. The key requirement 3 - Adequate audits of operations is thus assessed as **Category 2: Works, but some improvements are needed**.

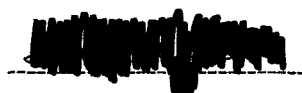
Signatures of the EC audit team and dates:



[Principal auditor]



[Associated auditor]



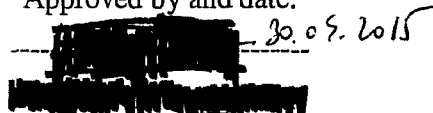
[Associated auditor]

Approved by and date:



[Team leader]

Approved by and date:

 30.09.2015

[Head of unit]

# ANNEX I – SUMMARY OF FINANCIAL CORRECTIONS ACCEPTED BY MEMBER STATE

Finding N°	Contract value in BGN (Basis for calculation of financial correction)	Contract value in EUR (1 EUR = 1.9558 BGN)	% Rate of assistance	ERDF/CF expenditure	% Financial correction	Amount of financial correction in EUR	Date and ARES ref. of letter of acceptance by Member State
4	43 565 721	22 275 141	80%	17 820 112	5%	891.006	Decision of the Council of Ministers no. 38/17.09.2014 provided by Ares(2014)32266 88 - 01/10/2014
6	12 835 319	6 562 695	85%	5 578 290	25%	1 394 573	Decision of the Council of Ministers no. 38/17.09.2014 provided by Ares(2014)32266 88 - 01/10/2014
3	18 557 489	9 488 439	85%	8,065,173	25%	2,016,293	5 March 2014 (Ares(2014)7815 57)
9	1 116 000	570 610	85%	485,018	25%	121,254	5 March 2014 (Ares(2014)7815 57)
<b>TOTAL</b>	<b>76 074 529</b>	<b>38 896 885</b>		<b>31 948 593</b>		<b>4 423 126</b>	

## **ANNEX II - ADDITIONAL FINDINGS FOR THE ENVIRONMENT OPERATIONAL PROGRAMME**

**Project - BG161PO005-1.0.06-0068-C0001 – Nessebar Municipality, Contract № 219 of 4.06.2013, Contract amount 67.648.310, 67 BGN, works, Waste Water Treatment Plant - Nessebar.**

### ***Finding n°1 - Incorrect application of legal provisions on request for additional information with impact on the award procedure***

As a result of a request for clarification made by the Contracting Authority, the winning bidder modified the initial proposal submitted by adding an additional position and an additional expert he failed to offer in the initial proposal.

In the contract notice (2012/S 199-327257 – 16.10.2012), at point III.2.3 the contracting authority required potential bidders to provide a team of experts (designers) in order to implement the contract. The fact that for each key expert and secondary expert positions the participant shall provide an individual expert was also mentioned.

No appropriate positions and experts were nominated in the original proposal submitted by the winning bidder, namely, the team of experts proposed did not have a separate '*road expert*'. In the technical offer, the same expert position was proposed for both "*road and vertical planning*" even though in the contract notice it was clearly specified that for each expert position, individual experts should be provided.

Following the requests for clarifications by the contracting authority, the team proposed for the project by the winning tenderer was modified, the expert initially proposed for the position of '*vertical planning*' was appointed as '*road expert*' and a new expert was added in order to comply with the requirements related to the requirement to have an expert qualified for '*vertical planning*'. This modification was accepted by the contracting authority and the tender offer was allowed to advance to the evaluation stage.

The Commission auditors recognise the right of the contracting authority to request additional information and documentation in order to avoid or mitigate the possibility of contractual non-performance. Bidders are pre-selected based on the selection criteria for example qualifications that are already held by the tenderer at the time of submission of the bids. Given that the underlying facts or conditions which enable an economic operator to meet selection criteria and thus participate in the award procedure cannot change, the co-legislators gave the possibility to contracting authorities to invite the companies to supplement or clarify the certificates and documents that prove the existence or lack of such facts or conditions.

Nevertheless, the use of the possibility provided by the directive should not infringe the provisions of the public procurement directive mentioned under Article 51 of Directive 2004/18/EC on additional documentation and information.

For the contract in question, the award of the contract was based on the economically most advantageous offer with the following criteria: quoted price (weighting 30%) and technical offer (weighting 70%). Among the sub-factors to be assessed in order to decide



on the technical offer there are sub-factors related to the project's proposed team, namely the description of the distribution of the team of designers per activities and time.

Therefore, the Commission auditors consider that, in the above presented case, modifying the project's team initially offered equals to a modification of elements of the offer which come directly under evaluation as award criteria, the modification of the team of experts representing, in fact, a modification of the technical offer which was treated as such by the contracting authority.

Therefore, the contracting authority did not comply with the provisions of Article 51 of the Directive 18/2004/EC as it should not have accepted a modification of the project's team. In this case, the tenderer should have been disqualified for non-compliance with the selection criteria as the additional elements provided were not of a formal nature and modified the technical offer submitted.

***Action n°1 (Responsible body: Managing authority - Deadline: 60 days; Priority: High)***

The managing authority should apply a financial correction in compliance with point 17 of the 'Guidelines' – Modification of a tender during evaluation. A financial correction of 10% of the value of the contract is applicable in this case, as the modification concerned only one expert and one position from the initial proposal.

***Member State reply and final conclusion***

Commission auditors have reviewed the arguments provided by the Member State in the contradictory procedure (Ares (2014)3226688 – 01/10/2014) After the aforementioned review, the Commission is still of the opinion that modifying the project's team initially offered equals to a modification of elements of the offer which come directly under evaluation as award criteria, the modification of the team of experts representing, in fact, a modification of the technical offer which was treated as such by the contracting authority, in breach of the provisions of Article 51 of the Directive 18/2004/EC.

The managing authority should apply a financial correction in compliance with point 17 of the 'Guidelines' – Modification of a tender during evaluation. A financial correction of 10% of the value of the contract is applicable in this case, as the modification concerned only one expert and one position from the initial proposal.

The contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State (representing the maximum amount of 152.916.261 BGN – 78.186.042 EUR) by Decision of the Council of Ministers no. 38 of 17 September 2014.

The Certifying Authority withdrew the impact on the financial corrections applied by the Managing Authority in the Payment Claims submitted to the European Commission via SFC on 08/10/2014 and 31/10/2014 for ERDF and 30/09/2014 and 31/10/2014 for the CF.

The Certifying Authority also provided a statement of assurance to the European Commission, certifying that the following financial corrections have been applied:

- All individual financial corrections applied before the re-verification process;

- All individual financial corrections resulting from the re-verification process;
- The extrapolated flat rate financial correction (9,5%) imposed for each of the contracts without individual financial corrections.

As the contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State and the corresponding irregular expenditure was decertified, the finding is closed.

**Project - BG161PO005-1.0.12-0003-C0001 – Sofia Municipality, Supply of metro cars (wagons), Contract value BGN 80,091,240.**

***Finding n°2(a) – Request of technical specifications defined in relation with national and/or European standards without providing for an equivalent***

The contracting authority requested in the technical specifications that potential tenderers should provide for the supplied products certificates to prove their conformity with certain standards defined in relation with national and/or European standards without providing for an equivalent (e.g.: EN DIN 5510-2, EN DIN 14041, EN 50153 UIC, EN 50264).

This is an infringement of the provisions of Article 23 3. (a) of Directive 2004/18/EC, according to which:

*"Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:*

*(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent'"*

Furthermore, the contracting authority also requested that the supplied products should have specific features necessary for compliance with the existing wagons (e.g.: mechanical and pneumatic coupling with the existing wagons of type: 81/717.4; 81/740.2 – types of wagons supplied in the past by the same supplier) which in the opinion of the Commission auditors were insufficiently described in terms of the actual technical characteristics of the necessary features the new wagons should have in order to comply with the old ones.

***Finding n°2(b) – Potentially discriminatory technical specifications – to be confirmed***

The contracting authority requested in the tender documents that the supplied metro cars (wagons) should fulfil very detailed technical characteristics (e.g.: exact width of the wagon-2712 mm, change from the height of the rail when the train is loaded-60mm, capacity – 6 people/m2, electric or pneumatic door opening system, height and width of

the doors (the part with the window) – 1875 mm and maximum 1200 mm, length of the axis for coupling – 795mm+/- 3 mm, maximum static mass – 13t).

In relation to the above mentioned technical requirements, we note that, for the public procurement under discussion, five companies purchased the tender documentation and only one company submitted a bid. The bidder who submitted the bid and subsequently won the contract is the same supplier as in the past for another public procurement procedure implemented by the same contracting authority for the delivery of 18 metro trains with 72 wagons (launched on 27 October 2010) with the exact same technical requirements. In the case of this public procurement procedure, out of 15 companies which purchased the tender documentation only 2 companies submitted bids).

As there might be a dissuasive effect of the above mentioned detailed technical characteristics, Commission auditors asked an independent technical external expert for an analysis of the proportionality of the technical specifications against the subject matter of the contract.

***Action n°2 (Responsible body: Managing authority - Deadline: 60 days; Priority: High)***

The managing authority should apply a financial correction of 5% of the contract value for the *Request of technical specifications defined in relation with national and/or European standards without providing for an equivalent* in compliance with point 11 of the 'Guidelines' - Discriminatory technical specifications, because the dissuasive effect of the afore mentioned technical requirements at the level of the potential bidders is limited.

Depending on the results of the analysis of the above mentioned external expert, the level of the financial correction proposed for this contract may increase to 10% in case the technical requirements are disproportionate or 25% in case the technical requirements are custom made.

***Member State reply and final conclusion***

Commission auditors have reviewed the arguments provided by the Member State in the contradictory procedure (Ares (2014)3226688 – 01/10/2014) After the aforementioned review, the Commission is still of the opinion that the request for technical specifications defined in relation with national and/or European standards without providing for an equivalent represents an infringement of the provisions of Article 23 3. (a) of Directive 2004/18/EC, according to which:

*"Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:*

*(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent'"*

For this particular infringement, the managing authority should apply a financial correction of 5% of the contract value for the *Request of technical specifications defined in relation with national and/or European standards without providing for an equivalent* in compliance with point 11 of the 'Guidelines' - Discriminatory technical specifications, because the dissuasive effect of the afore mentioned technical requirements at the level of the potential bidders is limited.

No additional financial correction is required, as the potential irregularity concerning the discriminatory technical specifications was not confirmed.

The contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State (representing the maximum amount of 152.916.261 BGN – 78.186.042 EUR) by Decision of the Council of Ministers no. 38 of 17 September 2014.

The Certifying Authority withdrew the impact on the financial corrections applied by the Managing Authority in the Payment Claims submitted to the European Commission via SFC on 08/10/2014 and 31/10/2014 for ERDF and 30/09/2014 and 31/10/2014 for the CF.

The Certifying Authority also provided a statement of assurance to the European Commission, certifying that the following financial corrections have been applied:

- All individual financial corrections applied before the re-verification process;
- All individual financial corrections resulting from the re-verification process;
- The extrapolated flat rate financial correction (9,5%) imposed for each of the contracts without individual financial corrections.

As the contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State and the corresponding irregular expenditure was decertified, the finding is closed.

**Project - BG161PO005-1.0.12-0004-C0001– Sofia Municipality, Supply of Trams, Contract value BGN 66,077,181.**

***Finding n°3 - Disproportionate selection criteria with dissuasive effect on the potential bidders***

In the contract notice, the contracting authority requested potential bidders to present an ~~equivalent quality assurance measures implemented at the level of their organisation.~~ without allowing potential bidders to provide equivalent quality assurance measures implemented at the level of their organisation.

~~is an initiative led by the~~ is an initiative led by the ~~and largely supported by four of the largest system manufacturers on the market. The aforementioned standard is not a standard developed by an authorised certification body established at national, European or international level.~~ and largely supported by four of the largest system manufacturers on the market. The aforementioned standard is not a standard developed by an authorised certification body established at national, European or international level.

The requirement was reinforced through a clarification issued by the contracting authority which clearly stated that this is a mandatory condition which should be met by the potential bidders in order to be able to participate in the public procurement procedure. The clarification was asked by a potential bidder who argued that he could provide proof that he implements equivalent quality assurance measures at the level of his organization and the contracting authority maintained the obligatory condition of providing an International Rail Industry Standard.

The above mentioned practice represents an infringement of the provisions of the principle of equal treatment under Article 2 and the provisions of Article 49 and of Directive 2004/18/EC which states:

*"Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators"*

The requirement to present an [REDACTED] without accepting equivalent certifications infringes the abovementioned provisions for the following reasons:

- ✓ The contracting authority did not refer to a quality assurance system based on the relevant European standards series (the EN series);
- ✓ The contracting authority did not provide a possibility for the economic operators to submit evidence of equivalent quality assurance measures (internal operational procedures and other quality assurance measures).

**Action n°3 (Responsible body: Managing authority - Deadline: 60 days; Priority: High)**

The managing authority should apply a financial correction of 25% in compliance with the points 9 - Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents and 10 - Selection criteria are not related and proportionate to the subject matter of the contract, of the 'Guidelines' as a very limited level of competition was achieved (only one bidder was evaluated).

#### **Member State reply and final conclusion**

Commission auditors have reviewed the arguments provided by the Member State in the contradictory procedure (Ares (2014)3226688 – 01/10/2014). After the aforementioned review, the Commission is still of the opinion that the requirement to present an [REDACTED], reinforced by means of a clarification issued by the contracting authority which clearly stated that this is a mandatory condition which should be met by the potential bidders in order to be able to participate in the public procurement procedure, represents an infringement of the provisions of the principle of equal treatment under Article 2 and the provisions of Article 49 and of Directive 2004/18/EC which states:

*"Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators"*

The requirement to obligatory present an [REDACTED] infringes the abovementioned provisions for the following reasons:

- ✓ The contracting authority did not refer to a quality assurance system based on the relevant European standards series (the EN series);
- ✓ The contracting authority did not provide a possibility for the economic operators to submit evidence of equivalent quality assurance measures (internal operational procedures and other quality assurance measures).

For this infringement, the managing authority should apply a financial correction of 25% in compliance with the points 9 - Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents and 10 - Selection criteria are not related and proportionate to the subject matter of the contract, of the 'Guidelines' as a very limited level of competition was achieved (only one bidder was evaluated).

The contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State (representing the maximum amount of 152.916.261 BGN – 78.186.042 EUR) by Decision of the Council of Ministers no. 38 of 17 September 2014.

The Certifying Authority withdrew the impact on the financial corrections applied by the Managing Authority in the Payment Claims submitted to the European Commission via SFC on 08/10/2014 and 31/10/2014 for ERDF and 30/09/2014 and 31/10/2014 for the CF.

The Certifying Authority also provided a statement of assurance to the European Commission, certifying that the following financial corrections have been applied:

- All individual financial corrections applied before the re-verification process;
- All individual financial corrections resulting from the re-verification process;
- The extrapolated flat rate financial correction (9,5%) imposed for each of the contracts without individual financial corrections.

As the contract concerned falls within the scope of the flat rate financial correction proposed by DG REGIO and accepted by the Member State and the corresponding irregular expenditure was decertified, the finding is closed.