

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

Brussels,
REGIO C2/OD/kd D(2013) 177405

Subject: **Audit of the functioning of the management and control systems as required by articles 60 (a) and 60 (b) of (EC) Regulation 1083/2006 and articles 13(2) to 13(4) of (EC) Regulation 1828/2006**
Audit of Transport Operational Programme CCI 2007RO161PO003

Ref.: Mission No. 2011/RO/REGIO/J2/995/1 (to be used in following correspondence)

Your Excellency

I am writing to inform you that the Directorate General Regional Policy has analysed the reply received from the national authorities to the related draft audit report of the audit mission referred to above, namely your replies dated 13 April 2012 (ARES 453630), 6 June 2012, 7-8 June 2012 during the bilateral meeting and 25 June 2012 (ARES 762492).

Please find enclosed the **Annex I** setting out the Commission's final position on all the remaining open findings and related actions and recommendations. This report includes also the audit findings related to the Commission's audit reviews performed in Brussels on 7-8 June 2012 and in Bucharest on 9-10 July 2012.

The irregular expenditure detected during the audit and the proposed financial corrections is presented in **Annex II**. The attention of the national authorities is drawn to the fact that the financial corrections presented in this letter are already included in the Commission's financial corrections letter sent to the Romanian authorities on 3 August 2011 (ARES(2012)944610) and accepted by the Member State on 7 January 2013 (ARES(2013)10009).

His Excellency Mr Mihnea Ioan Motoc
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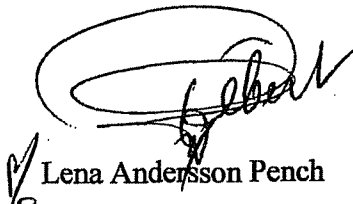
I request that you treat the enclosed audit report as confidential until the follow up procedure set below has been brought to a final conclusion. If the whole or part of the report is transmitted to persons concerned by the audit to enable them to provide comments, please ensure that the information 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.

Given that any suspension or reduction of the Community assistance to the projects may adversely affect final beneficiaries, I therefore formally request that you ensure that these persons are duly informed and placed in a position to effectively make known their views on the information on which the proposed decision is based. I would be grateful to receive any information on this matter.

Furthermore, you are requested 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



Lena Andersson Pench

Enclosures: Annex I – Commission's observations, conclusions and recommendations
Annex II – Summary of irregular expenditure and proposed financial corrections

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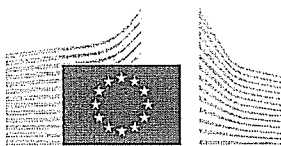
Mr Grant, DG Regional Urban and Policy, Unit B4

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Mr Cipriani – European Court of Auditors

OLAF audit reports



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ANNEX I – COMMISSION'S OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

I. Mission no. 2011/RO/REGIO/J2/995 from 25 July to 29 July 2011 (Draft report sent in English on 19/03/2012 – ARES(2012)318735)

Analysis of the measures taken under the action plan for the remedial of systemic weaknesses in relation to key requirement 4: Adequate management verifications (in particular public procurement verifications)

Observation: Lot 1 of the contract Nadlac-Arad was cancelled in 2012. Nevertheless, for consistency purposes, the comments related to this lot are still presented below as reflected in the draft audit report sent to Member State.

Finding n°1: Tender notice publication: significant number of clarifications requested by the potential bidders

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 - 4 and Design and build Nadlac- Arad motorway – lots 1 and 2

For the contracts audited, there were hundreds of questions sent by the potential bidders to the contracting authority. Due to the high number of questions, the contracting authority extended the deadlines for submitting tenders.

For example for Orastie – Sibiu public procurement procedure, the contracting authority provided 13 clarifications and 11 modifications of the tender documents. It should be noted that the number of questions replied to through clarifications number 8, 9 and 10 were 71, 90 and 105 respectively.

The high number of clarifications requested by bidders raises questions on the quality of the tender documentations prepared by the contracting authority.

A low quality tender process could lead to low quality offers and puts at risk the adequate implementation of the entire project.

Action n°1: (Responsible body: MA; CNADR; Deadline: permanent; Priority: medium):

The Commission strongly recommends better preparation of projects and, subsequently, of the public procurement documentation, as it was already advised in Commission's letter of 29 June 2011 (Ref. Ares(2011)699090 - 29/06/2011). The public procurement process should be launched only when all information necessary is detailed enough for bidders to submit offers.

A high number of clarifications and modifications, even if minor, on the initially published tender documentation, can result into a significant change of the initially published information and mislead the tenderers when preparing their offers. The auditors took notice that, for the audited operations, contracting authority extended the tender submission deadline due to high number of clarifications. Nonetheless, modifications of the tender documentations should be limited during the tender

submission period and it should not significantly modify the initially published tender documentation.

Standardised requirements (criteria, supporting documents, etc) for a certain type of project/contract are recommended to be developed in order to allow bidders to partly anticipate the requirements specific to each tender and to better prepare their offers.

Member State position:

The recommendation presented in **Action 1** was accepted by the Member State.

The clarifications requested by bidders were analysed in the Member State's answer and it was proved that most of the questions were not relevant. For example, regarding Orastie – Sibiu project, only 165 questions were relevant out of 364 questions, and 11 modifications were made to the tender documentation.

Nevertheless, the Member State accepted the Action 1 and since September 2011, a standardisation process of the tendering documentation started.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply.

This finding is considered closed.

Finding n°2: Tender notice publication: modifications of the initial tender documents not published in Official Journal

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 - 4, Design and build Nadlac– Arad motorway – lots 1 and 2 and rehabilitation of National Road 24 from Galati-Vaslui county limit to Crasna and National Road 24B Crasna to Albita

A high number of clarifications and modifications have been operated to the tender documents (Orastie – Sibiu motorway: 13 clarifications, 11 modifications and 2 errata / Nadlac – Arad motorway: 15 clarifications, 11 modifications and 2 errata / DH 24: 9 clarifications, 12 modifications and 3 errata). All modifications have been published in SEAP, the national system for public procurement, but not in the Official Journal of EU(JOUE).

The Commission considers that modifications which significantly modify the initial tender documents should be made known not only to bidders who already requested tender documentation or pertaining to a certain country, but to all potential bidders.

Modifications nos. 1 (modification of the obligatory requirement in the technical design) and 5 (modification of deadlines for works implementation) for Orastie – Sibiu motorway are considered important. The same situation is for modifications nos. 1, 5 (modification of certain factors within the award criteria) for Nadlac-Arad motorway. In addition, due to high number of alterations made to the initial published documentation, the combination of all changes to the tender documents initially published is considered as a significant change.

Action n°2: (Responsible body: MA; CNADR; Deadline: permanent; Priority: medium):

By publishing significant changes of the tender documentation only in the national system, there is the risk that economic operators from other MS were not aware of the modifications. Therefore, the principles of transparency, non-discrimination and equal treatment were not complied with.

Financial corrections of 25% are to be applied to the value of each contract.

Member State position:

The finding 2 and Action 2 are not accepted by the Member State.

Additional clarifications were presented by the Member State and it was proven that the modifications of the tender notice were published in the Official Journal and only the modifications of the tender documentation not related to the tender notice were published only in SEAP and the Internet site of the contracting authority.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply and the confirmation of this position by DG MARKT in the letter of 15 October 2012 (*ARES(2012)1210616*). The MS's position is accepted and no financial correction is applied.

This finding is considered closed.

Finding n° 3 - Evaluation process: inconsistent approach for asking clarifications to the bidders

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 - 4, Design and build Nadlac– Arad motorway – lots 1 and 2 and rehabilitation of National Road 24 from Galati-Vaslui county limit to Crasna and National Road 24B Crasna to Albita

It was noted that the evaluation committee requested clarifications related to the qualification criteria of the tenderers in several stages. Majority of the tenderers were rejected on the grounds of the information submitted after the first round of clarifications or because they could not provide the answers to clarifications in due time. In cases for which the reply provided was not clear, the committee requested additional information as it was considered that the information received could not form a sufficient basis to take a decision on the compliance of the tenderer with the qualifications criteria.

To illustrate the issue, the table below shows the state of facts for the 4 lots tendered under the project "Design and Build Orastie-Sibiu motorway".

Two rounds of clarifications were requested in relation to assessment of compliance with qualification criteria. The table shows cases where the replies to clarifying questions were not accepted after first round of clarifications and cases where, following the assessment of the replies provided by tenderers, the contracting authority asked additional request. It can be noted the fact that the winning offers, marked in yellow, were requested to provide additional information during the second round of clarifications.

		Lot 1			Lot 2								Lot 3						Lot 4					
Qualification criteria		1	2	3	1	2	3	4	5	6	7	8	1	2	3	4	5	6	1	2	3	4	5	6
Financial criteria	The Average Net Worth of the tenderer	S					R														R			
	Minimum Average Annual road Construction Turnover		R	S	S		R		R						S		S		R	S	R	R		R
	The tenderer shall demonstrate, using a sigle Bank Reference / Letter of Credit						R								S					S				
	Current Ratio/Liquidity for 2009																					R		
Technical criteria	At least 2 projects on road infrastructure		R				R			R						R		R	R		R	R		
	Asphalt station						R	R	R				R		S							R		
	Drilling equipment						R		R						S									
	Levelling works						R																	
	Asphalt works						R		R															
	Authorised laboratory						R																	
	Bridges						R															R		
	Max 3 projects on technical design						R	R																
	Ownership of other equipments						R	R	R						S			R	R	S	R	R		R
	Personnel capabilities	R	R				R	R	R	R		S	R	R	R	R	S	R	R		R	R	S	R
	Certification						R		R													R		
Final decision		R	R	A	A	A	R	R	R	R	A	A	R	R	R	R	A	R	R	A	R	R	A	R

A = Accepted

R = Rejected

S = Supplimentary/additional information requested

Concerning the rehabilitation of the National Road 24 and 24B, two rounds of clarifications were requested for the verification of the minimum qualification criteria, mainly the experience of experts. Some bidders were rejected after the first round of analysis of the clarifications, and for others, clarifications were asked in a 2nd round.

The audit team was informed that the evaluation committee introduced several rounds of clarifications in order to avoid future appeals. The audit team checked the reasons of rejection and confirms that the rejected tenders could not meet the criteria specified.

However, this approach does not allow for a clear view on the evaluation process, as the reason for deciding on asking or not further clarifications to bidders is not explicit enough. Under these circumstances, an external reviewer of the procedure finds difficult to assess the correctness of the tender evaluation process. Even if in the audited cases the auditors did not detect a distortion of the public procurement final results, there is a risk of lack of objectivity and unequal treatment between bidders.

Action n° 3: (Responsible body: CNADNR; Deadline: 60 days; Priority: high):

Due to the fact that the legal framework is not prescriptive (art. 78 and 79 of Government decision 925/2006), the set-up of a clear and concise evaluation procedure/guidance for the evaluation process is recommended.

The procedure/guidance should detail when and if clarifications can be requested to bidders as an essential element to ensure open, transparent and non-discriminatory evaluation process.

Member State position:

The Action 3 is accepted by the Member State.

The Member State underlines the fact that the evaluation committee respected the legal requirements in force at that time. Taking into account also our recommendation, a standardisation process of the evaluation of the offers has started for September 2011 and it was finalised in 2012.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply.

This finding is considered closed.

Finding n° 4: Evaluation process: Reply to clarifications submitted after the set up deadline

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 and 2

It was noticed that tenderer no. 3 for lot 1 and tenderer number 1 for lot 2 (winning bidders) submitted the replies to the additional clarifications requested by the evaluation committee after the established deadline.

The deadline to reply to the second round of clarifications was 30 March 2011, 12:00h. The winning bidders for the above mentioned lots submitted the reply to the clarifications on 1 April 2010 by letters 464/01.04.2011 for lot 1 and 1419/01.04.2011 for lot 2. The information submitted after the initially set up deadlines should not have been taken into account when assessing the compliance with the qualification criteria.

An appeal was submitted for Lot 1 of the project "Design and Build Orastie – Sibiu motorway" on the fact that the winning bidder submitted additional information later than the deadline set out. The appeal was rejected on formal grounds not related to the content of the appeal.

Action n°4: (Responsible body: CNADNR; Deadline: a) 60 days / b) permanent; Priority: medium):

a) The contracting authority should prove that the information submitted by the two bidders after the deadline, could not influence the decision on the compliance with the qualification criteria of those tenderers.

b) The contracting authority should always ensure equal treatment between tenderers and comply with the deadlines

Member State position and Commission's additional analysis:

The Finding 4 and Action 4 are not accepted by the Member State.

The Member State considers that the documents submitted by the two bidders after the deadline are not relevant for the final decision.

Based on the documents presented to the EC during the meeting held in Brussels on 7-8 June 2012, EC considers that for lots 1 and 2 in the project "Design and build of the motorway Orastie-Sibiu" the information provided by the winning bidders after the deadline was important for the evaluation stage as explained below:

- the evaluation committee from the National Road Agency asked on 10.03.2011 from "[REDACTED]" for Lot 1 and from the "[REDACTED]" for Lot 2 documents to prove the "effectively cashed in turnover related to road infrastructure field: e.g. bank statements, other equivalent documents issued/assumed by persons with responsibilities in this area". On the 17.03.2011, [REDACTED] answered to this clarification by a general ledger from the internal accounting system of [REDACTED] which is the third party supporting company for both bidders.

- after the assessment of the documents received from the bidders, the evaluation committee asked once again on 25.03.2011 documents to prove the "effectively cashed in turnover related to road infrastructure field: e.g. bank statements, other equivalent documents issued/assumed by persons with responsibilities in this area". The deadline was fixed on 30.03.2012 at 12 p.m.

- on the 30.03.2012, the bidders submitted the same general ledger, as the one submitted on 17.03.2011, from the cash account of [REDACTED].

- the evaluation committee decided positively on the qualification of the 2 bidders on 31.03.2012 based on the same elements that were available from 17.03.2012.

- on 01.04.2012, 2 days after the deadline, the two qualified bidders submitted to the National Road Agency the bank statements. These are the documents which actually prove the effective cashed in turnover in the construction of road infrastructure.

Based on the situation presented above, the EC considers that the principle of equal treatment was infringed. The winning tenderers of 2 lots could not prove compliance with the qualification criteria in due time. Nevertheless, the lowest prices won the tenders and the criteria was fulfilled, only the supporting documents were not submitted in due time.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply and of the additional documents presented to the Commission on 7-8 June 2012.

In respect to the application of unlawful contract award, a 5% financial correction shall be applied to the value of the two lots (point 6 of the guidelines on the financial corrections) and has been accepted by the Member State.

This finding is considered closed.

Finding n° 5: Evaluation process: excessive requirements for eligibility criteria (financial criterion - proof of turnover related to road construction)

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 - 4 and Design and build Nadlac– Arad motorway – lots 1 and 2

The evaluation of meeting the turnover criterion for two out of the three examined projects ("Design and build Orastie-Sibiu motorway" and "Design and build Nadlac– Arad motorway") was made on the basis of actually paid invoices in the road construction sector. A balance sheet or a report signed by certified auditors were considered not sufficient for proof. This requirement and the relevant evaluation procedure seem to be disproportional to the assurance level it provides. It poses a tremendous and tedious workload for the evaluation committee as they have to check the validity of the invoices, the sums and the objectives of each of them for at least three folders of documents for each tenderer. Moreover, taking into account the fact that the international companies should provide all these documents in translated certified copies, one can make an observation about them being at a disadvantage compared to the native construction companies. It could even be considered as discriminatory.

Moreover, the Commission auditors observed that in the tender notice, the request: the "medium turnover of the last 3 years related to the road transport infrastructure" was interpreted as the revenue collected. It was not set out clearly from the beginning in the tender documentation that the contracting authority asked for the revenue collected and its evaluation would be carried out on the basis of invoices (see tender documentation for both projects, Vol. 1, Section 1, qualification criterion 5.3 "economic and financial situation", and Section 2: Forms 4 & 4a). Requesting such documentation at the stage of clarifications of the evaluation procedure can be an important barrier for the tenderers and specifically for the international bidders to comply with in due time.

For exemplification, as concerns lot 2 of the project "Design and build Orastie-Sibiu motorway", the reason for non-complying with this criterion by 2 bidders was the impossibility to provide authorized translated supporting documents. The extension of the deadline requested by bidder number 2 for the translation was rejected.

As concerns lot 4 of the same project, 4 out of 6 companies could not comply with this criterion for lot 4 of the project "Design and build Orastie-Sibiu motorway". Moreover, 2 of the 4 noncompliant tenderers were rejected as they did not submit the certified translated documents within the deadlines set up for reply to clarifications requested by the evaluation committee.

An appeal was submitted for Lot 4 of the project "Design and Build Orastie – Sibiu motorway" in which the appellant stated that they submitted the requested invoices to prove meeting the turnover criterion but the documents were not taken into account by the evaluation committee as they were not officially translated.

Action n° 5: (Responsible body: CNADNR; Deadline: permanent; Priority: medium):

The contracting authority should clearly stipulate in the tender documentation the type of supporting documents requested during the tenders' evaluation process. Clarification requests and supporting documents to be provided by tenderers should not lead to unequal treatment between tenderers and should be proportionate to the subject matter of the project as stipulated under Articles 2, and 44.2 of Directive 2004/18/EC.

For an efficient public procurement process, deadlines set up for tenderers to reply should be proportionate to the time necessary for bidder to provide the necessary supporting documents.

Please note that the proportionality of the selection criteria to ensure the right intensity of competition was already underlined in point 2 of Commission's letter of 29 June 2011 (Ref. Ares(2011)699090 - 29/06/2011).

A clear definition of the turnover required and, as a best practice, a more adequate and efficient method to prove the fulfillment of this criterion should be foreseen by the contracting authority for future procedures.

Standardised requirements related to the supporting documents to be provided by tenderers for a certain type of project/contract are recommended to be developed in order to allow bidders to partly anticipate the requirements specific to each tender and to better prepare their offers.

Member State position and Commission additional analysis:

The Action 5 is accepted by the Member State.

The Member State underlines the fact that the national legal framework was respected and the result of the procedure was not affected by this finding.

Commission analysis the arguments brought forward and following internal consultation, the Commission considers that a requirement for candidates to provide certified translations of all invoices is not only in contradiction with the principles of proportionality, but also does not comply with art. 47 of the Directive 2004/18/EC. There is a ECJ case law indicating that the list of means of proof of the financial and technical capacity indicated in art. 47 and 48 of the Directive is exhaustive and contracting authorities cannot ask for other means of proof, than the one expressly mentioned in these articles. The article 47 makes no reference to certified translations of invoices. Moreover, such requirements discourage in particular cross-border competition.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply.

Based on the explanations presented above, a 25% financial correction shall be applied to the value of the contracts (point 7 of the guidelines on the financial corrections) and has been accepted by the Member State.

This finding is considered closed.

Finding/Observation n° 6: Evaluation process: high rates of exclusion based on key experts criterion

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 - 4 and Design and build Nadlac– Arad motorway – lots 1 and 2

The contracting authority requested 5 key experts to be provided by the tenderers. Most of the tenderers could not meet this criterion for not having the necessary experience or the necessary documentary proof of the experience stated in the CV.

For example, as concerns project Orastie-Sibiu, the bidders excluded for experience related issues are as follows:

- 2 out of 3 bidders for lot 1
- 4 out of 8 bidders for lot 2
- 5 out of 6 bidders for lot 3

- 4 out of 6 bidders for lot 4.

As concerns lot 1 of project Nadlac-Arad , 6 out of 7 tenderers could not meet the key experts criterion.

Regarding the rehabilitation of National Road 24 and 24B, the bidders excluded for experience related issues are as follows:

- 6 out of 15 bidders for lot 1

- 8 out of 15 bidders for lot 2

- 5 out of 11 bidders for lot 3

The audit showed that most of the participants in the qualification stage (including some of the largest European construction companies), were disqualified from the procedure for non - compliance with the personnel criterion. By imposing such a requirement, the Contracting authority excluded a large number of participants in the procurement procedure.

Action n° 6: (Responsible body: CNADNR; Deadline: permanent; Priority: low):

The contracting authority should be proportionate when setting out criteria to be complied by the tenderers as stipulated under Articles 2, and 44.2 of Directive 2004/18/EC. (see again Commission's letter Ref. Ares(2011)699090 - 29/06/2011).

We reiterate the recommendation on standardising certain aspects of the tender documentation. Criteria represent one of the elements to be standardised depending on the type and complexity of the contract to be awarded.

Member State position:

The Action 6 is accepted by the Member State.

The Member State underlines the fact that the evaluation committee respected the legal requirements in force at that time. Taking into account also our recommendation, a standardisation process of the evaluation of the offers has started for September 2011 and it was finalised in 2012.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply.

This finding is considered closed.

Finding n° 7: Evaluation process: selection criteria / assessment of the tenderer's capacity

Operations: Public procurement procedure for the rehabilitation of National Road 24 from Galati-Vaslui county limit to Crasna and National Road 24B Crasna to Albita

The rehabilitation of the National Road 24 was split in 3 lots and each lot had a different public procurement procedure. The same Romanian company won all 3 lots with 3 different offers based on the same resources (team, raw materials and equipment) for projects starting in parallel.

As the price proposed was below 85% of the estimation price, the contracting authority asked for the justification of the price. The bidder's answer, accepted by the contracting authority, was that the bidders in association own all the machinery and transport equipment, 75% of aggregates for the manufacture of asphalt mixtures and all the amount of ballast needed to execute earthworks. Therefore, there was no need to borrow equipment or to procure those raw materials on the market at the actual prices. This same answer was provided for all three contracts, which means that, by simple deduction, the 75% of the stock

should have been divided between the 3 contracts and the proposed price should have been adopted in accordance with the level of stocks for each contract.

In addition, all 3 offers included an identical team to implement each project. One has to bear in mind that, following the award of all 3 lots to the same company, this team should ensure the management of the 3 projects in parallel. If one can imagine that it can be feasible for the general manager and the quality manager, it is difficult to understand how a site manager can handle 3 sites in the same time.

Action n° 7: (Responsible body: CNADNR; Deadline: Permanent; Priority: medium):

The contracting authority should have taken into consideration the possibility to have the same offer and winner for all 3 lots and should have introduced adequate selection criteria.

It is recommended that the workload of the teams proposed by the bidders should be included in the selection criteria and should be duly analyzed and evaluated, in order to avoid capacity problems during the implementation of the projects.

Member State position:

The Action 7 is accepted by the Member State.

The Member State introduces an additional clause to the contract in order to avoid capacity problems.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply.

This finding is considered closed.

Finding n° 8: Most economically advantageous tender award criteria: evaluation of the technical offer

Operations: Public procurement procedure for design and build Orastie-Sibiu motorway - lots 1 - 4 and Design and build Nadlac– Arad motorway – lots 1 and 2

For 2 projects (6 lots), the award criteria was the most economically advantageous tender. The score was divided as: 70% for the technical offer and 30% for the price.

It was noted that the technical offer was not duly checked by the evaluation committee. The grid for scoring the technical offer was formalistic. The evaluation report does not show any evidence of substantial assessment of the technical offer, although the technical offer has the highest weight in the final score for the award.

The technical offers were evaluated with high scores, as the questions in the relevant checklist referred basically to the completeness of the technical dossier and not to the appropriateness and the quality of the technical proposal (form over substance). This does not seem to be in proportion to the weighting of the technical proposal which accounts for 70% of the total score.

For lot 2 of the project "Design and Build Orastie – Sibiu motorway" a company claimed in their appeal that the winning bidder should not have been scored with the score related to the duration of the technical design of the project (11 points) and the duration of the implementation of the project (11 points) since it was not expressed in days, as explicitly stated in Forms 33 and 34 of the tender documentation. The evaluation committee did not rely strictly on information presented in those forms, but they also accepted information presented in the annex of the winning offer where the duration was expressed in days. This example shows how subjective the scoring of the technical proposal can be. In this way, the weighing

between the technical and the financial proposal for the final award could as well be considered as not being proportional.

Action n° 8: (Responsible body: CNADNR; Deadline: a) 60 days / b) permanent; Priority: medium):

a) The Commission took note that a formal assessment of the technical offers had been carried out. Nevertheless, the evaluation committee should assess the content and the appropriateness of the technical offers presented by bidders. Proof of a thorough assessment of the technical offers should be provided.

b) For the future, the contracting authority should consider a revision of the assessment grid for the technical evaluation in order to take into account all the substantial technical parameters that affect the appropriateness of the technical solution proposed.

Member State position and Commission additional analysis:

The Action 8 is accepted by the Member State.

In their answer, the Member State indicated that the "contracting authority have no more used the most economically advantageous tender award criteria since November 2011". It should be clarified that the Commission's recommendation was to adopt the appropriate award criteria in respect with the type of project (design and build for example) and not to suggest the utilisation of only the "lowest price" award criteria.

The Commission services required a proof of a thorough assessment of the technical offers. No such proof was presented to the Commission; the only proofs submitted in June 2012 comforted the position of the Commission that the technical evaluation was not performed in depth. Or, without thoroughly evaluating one of the main award criteria, the award decision becomes completely arbitrary. From a legal perspective, this represent a violation of the principle of equal treatment and of paragraph 46 of the Directive 18/2004 which requests that offers be evaluated in an objective way.

FINAL POSITION OF THE COMMISSION:

Commission's services take note of the Member State's reply.

Based on the explanations presented above and taking into account that the lowest bids won the tenders, a 10% financial correction shall be applied to the value of the contracts (point 6 of the guidelines on the financial corrections) and has been accepted by the Member State.

This finding is considered closed.

II. Review meeting held in Brussels on 7 – 8 June 2012

During the review meeting of 7 – 8 June 2012, a sample of 10 contracts from the Priority Axes 2-4 were selected for review by the EC in order to assess the management re-verifications performed by the Managing Authority. Out of the 10 contracts, Managing Authority already had identified irregularities for 5 contracts, leading to a total percentage of errors of 21%. Following the review of the documents, the Commission had additional findings with regard to: modifications of the award criteria without extension of deadline for submitting bids and different opinion on the percentage of financial corrections to be applied.

For some contracts, the Commission found that the Managing Authority did not implement the correction proposed by the Audit Authority following the audit of operations carried out in the second part of 2011. This issue was followed during the analysis of the Annual Control Report 2012.

FINAL POSITION OF THE COMMISSION:

The Commission obtained a similar percentage of errors of about 21% as those quantified by the Managing Authority for the 10 projects sample. The percentage of errors was calculated by reporting the financial impact of the errors found to the value of the 10 selected contracts.

Therefore, no additional financial correction is proposed for the priority axes 2-4.

The findings resulting from this review meeting from 7-8 June 2012 are considered closed.

III. Follow-up audit review held in Bucharest on 9 – 10 July 2012

During an on-the-spot visit carried out on 9-10 July 2012, the Commission services examined 5 public procurement contracts concluded in the second semester of 2011 and verified by the Transport managing authority at the beginning of 2012. The Commission services identified significant irregularities for 2 out of 5 verified contracts. The 2 contracts were tendered under the same procedure organised by the Rail Agency, under key area of intervention 2.2 "Modernization and development of national railway infrastructure and passenger service".

The irregularities regarding the 2 contracts, no. 90/15.09.2011 "Modernisation of railway station Giurgiu Oras" (Lot 1) and no. 122/04.11.2011 "Modernisation of the railway station Slobozia Veche" (Lot 2), are the following:

- use of discriminatory selection criteria: bank guarantee to be issued only by Romanian banks or banks with subsidiaries in Romania (Article 10 and 52 of Directive 2004/17/EC - "Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way" – "Qualification and qualitative selection – Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence)
- unjustified exclusion of bidders based on formal errors without requesting further clarifications. The bidders were excluded because they had quoted different prices in the tender submitted. The error was partly due to the fact that the contracting authority provided poor tender documentation. The evaluation committee did not ask for clarifications of this inconsistent information in the tender thus breaching Article 80(3) from the National Government Decision 925/2006 ("The arithmetic errors shall be corrected as follows: b) if there is a discrepancy between letters and figures, the values as expressed in letters shall be taken into consideration, and the value expressed in figures shall be corrected accordingly). It should be noted that 2 members of the selection committee drafted a note to the file disagreeing with the decision taken;
- for one of the contracts, the winning bidder did not fulfil the minimum qualification criteria: the tender documentation requested bidders to submit different key experts for each lot. The winning bidder submitted the same team for all 3 lots. Subsequently to clarifications request, the winning bidder modified the initial offer by replacing experts in the teams (Article 51(3) of Directive 2004/17/EC: Contracting authorities must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders).

The Commission services consider that the above mentioned irregularities which were not detected by the managing authority infringe the public procurement Directive 2004/17/EC, (Articles 10, 51(3) 52 and 54) and the National Government Decision 925/2006 (Article 80(3)).

FINAL POSITION OF THE COMMISSION:

Based on the explanations presented above, a 25% financial correction shall be applied to the value of the contracts mentioned above (points 6 and 7 of the guidelines on the financial corrections) and has been accepted by the Member State.

The findings resulting from the follow-up audit review performed between 9 – 10 July 2012 are considered closed.

All the financial corrections proposed in this final report are already included in the Financial correction letter sent to the Member State on 3 August 2012 (Ares(2012)944610) as the audited contracts presented above were launched in SEAP before October 2011. As the Romanian authorities accepted the proposed financial corrections on 7 January 2013 (Ares(2013)10009), all the findings presented in this final report are considered closed.

LIST OF ACRONYMS

AA	Audit Authority
CA	Certifying authority
CF	Cohesion Fund
CNADNR	National Company for Motorways and National Roads in Romania
DG	Directorate General
EC	European Commission
ECA	European Court of Auditors
ERDF	European Regional Development Fund
KR	Key requirement
MA	Managing authority
OP	Operational Programme

ANNEX II – Final financial corrections

1. Final financial corrections related to the audit mission 995 performed between 25 and 29 July 2011

Obs: The lot 1 of the contract Nadlac-Arad was cancelled in 2012. Consequently, the financial corrections related to this lot are no more presented in the table below.

Finding Nr.	Project name / Contract name	Contract / cost item value in lei	EU contribution %	Financial correction in %	Financial correction in lei	Financial correction in EUR ¹
Design and build Orastie - Sibiu motorway (2010RO161PR010)						
2	Lot 1	551.041.792,37	85%	25%	117.096.380,88	27.630.756,01
2	Lot2	377.780.208,81	85%	25%	80.278.294,37	18.942.942,11
2	Lot 3	604.791.600,00	85%	25%	128.518.215,00	30.325.919,68
2	Lot 4	484.839.529,89	85%	25%	103.028.400,10	24.311.191,89
Design and build Nadlac – Arad motorway and connecting road (2010RO161PR011)						
2	Lot2	411.489.216,05	85%	25%	87.441.458,41	20.633.204,75

2. Final financial corrections related to the follow-up audit review held in Bucharest on 9 – 10 July 2012

Finding Nr.	Project name / Contract name	Contract / cost item value in lei	EU contribution %	Financial correction in %	Financial correction in lei	Financial correction in EUR ¹
Modernisation of railway stations Giurgiu Oraş, Slobozia Veche şi Călăraşi Sud (POS-T/2011/2/2/003)						
	Lot 1 – Giurgiu	11.708.575,88	85%	25%	2.488.072,38	587.100,30
	Lot2 - Slobozia	21.950.043,80	85%	25%	4.664.384,31	1.100.635,77

All the financial corrections proposed above and described in the final report are already included in the Financial correction letter sent to the Member State on 3 August 2012 (Ares(2012)944610) as the audited contracts presented above were launched in SEAP before October 2011. As the Romanian authorities accepted the proposed financial corrections on 7 January 2013 (Ares(2013)10009), all the financial corrections above are considered accepted and implemented by the Romanian authorities.

¹ Applied exchange rate EUR 1 = 4.2379 (average exchange rate for 2011)

