

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

Brussels,  
REGIO.C2/MB/kd D(2013) 360336

**Subject:** OP Regional (CCI 2007RO161PO001)  
OP Competitiveness (CCI 2007RO161PO002)  
OP Environment (CCI 2007RO161PO004)  
**Final conclusions on mission n° 2010/RO/REGIO/J2/934/1**

**Ref.:** Member State letter n° 7709, dated September 2011 (Ares(2012) 929840)  
Commission letter of 21 March 2011 (Ares(2011)305556)  
Commission letter of 3 August 2012 (Ares(2012) 944610)  
Member State e-mail, dated 21 December 2012 (Ares(2012)1540246)

Your Excellency

I am writing to inform you that Directorate-General of Regional Policy has concluded the audit carried out on the operational programmes OP Regional (CCI 2007RO161PO001), OP Competitiveness (CCI 2007RO161PO002), OP Environment (CCI 2007RO161PO004). Following the analysis of the information provided in the Member State's letter(s) above-mentioned, you will find in **annex I** our conclusions in this regard and in **annex II** the list of accepted financial corrections by the Romanian authorities in respect of the irregularities identified by this audit.

The financial corrections for OP Environment were accepted by the Romanian authorities following the meeting of 7-8 June 2012 in Brussels. The financial corrections for OP Competitiveness were accepted by the Romanian authorities following the meeting with the Commission services of 14-15 June 2012. Financial corrections for the irregularities identified for OP Regional were implemented by the Romanian authorities in December 2012.

All findings are considered closed in the context of the current audit.

I would like to remind you that under Article 90(1) of Council Regulation (EC) N° 1083/2006, the competent bodies and authorities are required to keep available all relevant documents for a period of three years following the closure of an operational programme as defined in Article 89(3) of the

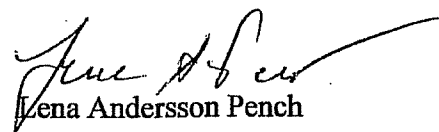
His Excellency Mr Mihnea Ioan Motoc  
Ambassador Extraordinary and Plenipotentiary Permanent Representative  
Permanent Representation of Romania to the EU  
Rue Montoyer / Montoyerstraat 12  
1000 Bruxelles/Brussel

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 298 68 69.

[http://europa.eu.int/comm/regional\\_policy](http://europa.eu.int/comm/regional_policy)

Regulation or three years following the year in which partial closure takes place, in case of documents regarding expenditure and audits on operations referred to in 90(2) of the Regulation.

Yours faithfully

  
Lena Andersson Pench

Enclosures:      Annex I - Commission's observations and conclusions in relation to Audit mission 2010/R0/REGIO/J2/934/1

Annex II - Summary of accepted financial corrections

c.c.:              Mr Surdeanu  
                      Managing Authority  
                      Operational Programme Regional  
                      17 Apolodor Street  
                      Bucharest  
                      Romania

Ms Moga  
Managing Authority  
Operational Programme Increase of Economic Competitiveness  
Str. Dr. Ernest Juvara no. 3-7, sector 6, Bucharest  
Romania

Mr Ghioc  
Managing Authority  
Operational Programme Environment  
Calea Serban Voda, nr 30-32, sector 4, Bucharest  
Romania

Mrs Tarara  
Certifying Authority  
44 Bvd Mircea Vodă, Bloc M-17, sector 3, Bucharest  
Romania

Mr Popa  
Romanian Court of Accounts  
Audit Authority  
6 Stavropoleos Street, Sector 3, Bucharest  
Romania

Mr Seyler, Geographical Director, DG REGIO  
Mrs Martinez Sarasola, Head of Geographical Unit, DG REGIO  
Mr Sebert, Head of Unit C1, DG REGIO  
Mr Merchan Cantos, Director, DG EMPL  
Mr Johnston, acting Director, DG MARE  
Mr G. Cipriani, Director, European Court of Auditors (Chamber II -  
Structural Policies, Transport and Energy) – functional mailbox  
ECAP\_ETE@eca.europa.eu



## **ANNEX I – Commission’s observations and conclusions in relation to Audit mission 2010/R0/REGIO/J2/934/1**

### **Finding 1**

#### **OP Increase of Economic Competitiveness**

##### **Changes of the management and control system due to low quality of management verifications performed by IB SMEs**

###### **i) Withdrawal of delegation for management verifications**

The management and control system was modified during 2010. Due to the low quality of management verifications performed by the IB SMEs (e.g. during re-performed checks). MA found ineligible expenditure not identified by the IB SMEs). MA temporarily withdrew the delegation granted to the IB SMEs for the verification of the payment claims. At the same time, part of IB SMEs' personnel was (temporarily) transferred to the Financial Management and Control Department within MA.

###### **ii) MA Comp / IB SMEs - Staff related issues**

Insufficient staff was allocated to the management verifications for both Managing Authority and Intermediate Body level. Moreover, the organisational set-up of the system does not ensure regional coverage for the on-the-spot checks for the entire country due to the fact that the IB SMEs has low/small number of staff located only at Bucharest headquarters. In order to address staff constraints, both MA and IB SMEs launched tendering procedures for external support.

###### **iii) IB SMEs - Logistics related issues**

At the moment the audit took place, the headquarters of IB SME's were being transferred to the premises of the MA. The audit team encountered difficulties in being provided with the documents related to the selected sample. Some of the checklists and related files were not available for verifications.

##### **Arguments of the Romanian authorities**

For the purposes of implementing the formulated recommendations, the institutions involved in the management of the Sectoral Operational Programme (SOP) “Increase of Economic Competitiveness” have already taken several measures. Thus:

i) Following the withdrawal of the delegation granted for the administrative verification of the payment claims, seven verification officers from the intermediary body for SMEs (IB SMEs) (compared to three officers at the time of the audit mission) were temporarily transferred to the MA SOP IEC. This measure aimed at obtaining a similar standard of verification in the two entities, through workplace training.

MA SOP IEC extended until June 30, 2011 the period of the temporary withdrawal of administrative verification responsibilities of payment claims by IB SMEs. The measure was adopted taking into account the need to ensure a similar standard for the staff of the entities involved in the verification of payment claims, in the context in which IB SMEs finalised the procurement procedure for services of monitoring and administrative verification of payment claims.

- May 9-13 2011 MA SOP IEC held a mission at IB SMEs level in order to assess the ability to perform the delegated duties. The findings of the mission show that, although IB SMEs has started to take some action in order to remedy the critical aspects concerning the performance of delegated duties, those actions do not constitute a firm guarantee for MA SOP IEC.

The assessment team of MA SOP ICE proposed the IB SMEs to draft a realistic action plan for which MA will provide all the necessary support and which should detail the remedial measures with specific responsibilities and feasible deadlines. MA SOP IEC shall monitor and assess the implementation of the action plan by the end of the third quarter of this year, when it shall also draw up the final conclusion on the ability of IB SMEs to perform their delegated tasks.

ii) The temporary transfer of the staff having payment claims verification duties within the IB SMEs to the MA structure aimed at obtaining a similar verification standard in the two entities, through workplace training.

IB SMEs procured external support services for monitoring and on-the-spot verification activities; the contract is currently in its execution phase, with about 50 monitoring and on-the-spot visits already carried out during the month of June 2011. Also, IB SMEs procured external support services for administrative verification activities of payment claims. The period of temporary withdrawal of the administrative verification duty was extended until June 30, 2011 with a special view to ensuring a similar standard for the staff of the entities involved in the verification of the payment claims, in the context in which IB SMEs completed the procurement procedure for monitoring and administrative verification services of payment claims.

iii) The entire IB SMEs staff was transferred to the headquarters of the Ministry of Economy, Trade and Business Environment. IB SMEs also contracted document archiving services and shall also contract archive computerized management services.

#### View of the Commission

The arguments raised by the Romanian authorities have been analysed in the context of the audit mission 2012/RO/REGIO/J2/1084/2. EC will follow-up the effectiveness of the system during future audit missions.

## **Finding 2**

### **OP Increase of Economic Competitiveness**

i) **On-the-spot checks** - Limited on the spot checks performed by the IB SMEs due to lack of staff (3 people for on-the-spot verifications) and budget allocated for mission performing. Delays have been recorded as compared to the initial planning. The MA was re-performing only the administrative management verifications; therefore, a limited number of on-the-spot checks have been performed for expenditure already approved and certified. The procedure foresees that all projects with procurements should be verified on-the-spot, at least once, before the payment of the final reimbursement claim. At the moment the audit was carried out finalised projects had not been verified on-the-spot.

ii) **Administrative checks** - Checks linked to state aid, equal treatment, environment protection and double financing are limited to verifying declarations of beneficiaries.

iii) **Redundancy of the administrative checks performed** - Instead of being an effective method of control, the interpretation of the 4 eyes principle doubles the work with no added value. (i.e. expert and head of unit fills in the same detailed checklist at the level of IB and again at the level of MA). There is a risk for the administrative verifications to become formal and not effective. Moreover, the workflow for the approval of reimbursement claims is a lengthy procedure due to overlapping checks.

iv) **Deadlines for processing addenda to financing contracts**- As concerns the project submitted by [REDACTED] (SMIS code 3755), deadline extension of the financing contract was requested, but, by the time the

addenda was signed (long workflow), the expenditure incurred was already outside the eligibility period. Therefore, part of the declared expenditure became ineligible.

#### Arguments of the Romanian authorities

i) As regards on-the-spot checks, IB SMEs conducted a total of 66 such actions in the first quarter of 2011 (a 50% increase compared to the total number of visits in 2010). The personnel for this activity is currently made up of six verification officers, compared to two officers at the time of the audit. Moreover, after the procurement of external support services for monitoring activities and on-the-spot checks, in June there were carried out about 50 monitoring and on-the-spot checks.

ii) MA SOP IEC and IB SMEs have started to review the specific procedures in order to improve and harmonise the verifications carried out on payment claims. This measure involves, among others, the inclusion of provisions concerning the application of financial corrections under COCOF 07/0037/03 – RO Guide.

iii) The current form of the Funding Agreement contains provisions regarding the period of time during which the beneficiaries can request the conclusion of an addendum (Article 15, Amendments and additions to the agreement). As regards the time necessary for approval at institutional level, this is directly conditioned by the number of specialist services/departments that approve the document at IB SME level, as well as at Ministry level (IB SMEs - SES Department, SCJ Department, Manager, General Manager, Legal Department, Coordinator Secretary of State, In-house Preventive Financial Controller, Minister of Economy, Trade and Business Environment). Instead of being an effective method of control, the interpretation of the 4 eyes principle doubles the work with no added value. (i.e. expert and head of unit fills in the same detailed checklist at the level of IB and again at the level of MA). There is a risk for the administrative verifications to become formal and not effective. Moreover, the workflow for the approval of reimbursement claims is a lengthy procedure due to overlapping checks.

iv) As concerns the project submitted by [REDACTED]. (SMIS code 3755), deadline extension of the financing contract was requested, but, by the time the addenda was signed (long workflow), the expenditure incurred was already outside the eligibility period. Therefore, part of the declared expenditure became ineligible.

#### View of the Commission

As communicated through EC letter Ares(2012)962041 of 9 August 2012, during the audit mission 2012/RO/REGIO/J2/1084/2 carried out in March 2012, it was identified that there are still overlaps between administrative and on the spot checks, which lead to important delays in the flow of the request for payments (up to 6 months). The MA together with the IB was still in the process of adapting the procedures in order to increase efficiency. Administrative checks related to state aid were still based only on the declarations provided by the beneficiaries. Also, during detailed testing, it was noticed that, staff awareness with regard to the checks that need to be performed in order to ensure compliance with general principles of the EU procurement Directive is low.

The outstanding findings will be followed up in the context of audit mission 2012/RO/REGIO/J2/1084/1, therefore for the purpose of the audit mission n° 2010/RO/REGIO/J2/934/1 this finding is considered **closed**.

### **Finding 3**

#### **OP Increase of Economic Competitiveness**

There are still technical issues to be solved (pre-financing, state aid financing rate, decimals reading, etc.) – the contract for SMIS has been extended. The project fiche requested by the audit team to be issued from SMIS for project [REDACTED] did not show the amount considered ineligible following the MA's verifications on the payment claim.

#### Arguments of the Romanian authorities:

As of December 17, 2010, all the fields in the SMIS-CSNR allow the recording of amounts with decimals.

As for Report 304, Subproject Financial Monitoring Fiche, it records the invoices and the payment orders included by the beneficiary in the payment claim under a public procurement contract, broken down into categories of eligible expenditures. The report was not designed to reflect the result of administrative verifications and on-the-spot missions carried out by intermediate bodies or management authorities. Such information is available in ART4SMIS, the additional reporting tool of SMIS-CSNR, which uses the SMIS database in real time.

As regards the payment claim, information can be found in the Adjustment Claims list. The list, which is constantly used to draw up expenditure statements from the management authorities to the Certification and Payment Authority and from the CPA to the European Commission, indicates the eligible amount declared by the beneficiary, the amount deemed ineligible as a result of IB and MA checks, as well as the amount approved for payment.

The information is also available at invoice level in the Contractor Document Eligible list.

#### View of the Commission

As communicated through EC letter Ares (2012)962041 of 9 August 2012, the finding was considered to be under implementation. For the purpose of this report the findings are **closed**. However, the EC will continue to monitor proper functioning of SMIS during future audits.

### **Finding 4**

#### **OP Increase of Economic Competitiveness**

There is no instrument to monitor recommendations/financial corrections proposed by different bodies in relation to a specific project by the different levels of control of IB, MA, Certifying Authority and Audit Authority.

#### Arguments of the Romanian authorities

Updated reply at 30.03.2012 (email MA from 20/04/2012) - IB SME drafted a procedure to detail monitoring of recommendations issued by control/audit structures (no 226719/06.03.201).

---

#### View of the Commission

The EC takes note that a monitoring instrument is in place to monitor the recommendations/financial corrections proposed by different bodies carrying out verifications. The finding is considered **closed**. EC will continue to follow-up adequate implementation of this procedure during future audits.

### **Finding 5**

#### **OP Regional**

#### **Evaluation of the award criteria**

Award criterion for this procurement was "the most advantageous economic offer". Three bidders having lower price offers than the winning bid were excluded in different stages of the procurement procedure. There is an important difference in scores given by the members of the evaluation committee for several criteria included in the evaluation grid of the lowest bid, namely criteria III.1.a, III.2.a and III.2.b for [REDACTED]. (i.e. for criterion III.1.a - 3 members gave 0 points, one 8 and one 9.)

UCVAP requested motivation of the points given by the members of the evaluation committee only after the award procedure ended. In addition, the reply of the contracting authority was sent to UCVAP on 5.02.2010, subsequent to the signature of the contract with the winning company, on 30.01.2010.

#### Arguments of the Romanian authorities

As it results from Procedure Report no. 3.2/339/14.01.2009 (Annex 1 MA POR pp. 1-5), during this procurement procedure, under Article 36(1)(b) of the Government Decision no. 925/2006, as amended and supplemented, two offers that did not meet the minimum qualifications criteria regarding similar experience were ruled inadmissible, namely, the offers submitted by [REDACTED] and the association [REDACTED] and [REDACTED].

As regards the differences between the scores given by members of the evaluation committee, we mention that: Under the provisions of Article 76 (2) and (3) of Government Decision no. 925/2006, as amended and supplemented, the members of the evaluation committee have the right to review and evaluate the documents submitted by bidders individually and/or in joint sessions, but any decision of the evaluation committee requires a minimum vote of at least two thirds of its members. If the winning bid is decided based on the scoring, the vote of the members of the evaluation committee is reflected in the individual score given to each offer. According to Article 76 (4) of the Government Decision no. 925/2006, as amended and supplemented, if the provisions of paragraph (2) are not met due to any difference of opinions between the members of the evaluation committee, the head of the contracting authority or, as appropriate, the president of the evaluation committee shall request the reassessment of the divergent points, in order to complete the tender evaluation stage in a timely manner and to establish the winning bid.

Thus, from the statements above it results that the provisions of Article 76 (4) of Government Decision no. 925/2006, as amended and supplemented, apply when there are differences of opinions between the members of the evaluation committee on the review and evaluation of the documents submitted by the bidders, leading to the impossibility of a decision with the vote of at least two thirds of its members. We believe that in the procurement procedure under discussion this situation does not apply because, although there were differences between the scores given by the members of the evaluation committee to the submitted bids, when deciding the winning bid, the vote of the evaluation committee members, as reflected in the score given individually by each member, was unanimous, in observance of Article 76 (2) of Government Decision no. 925/2006, as amended and supplemented. In other words, even if all members had given the same score, the final classification resulting from the report would have been the same. The different scoring of an offer is a right of each of the members (Annex 1 MA POR pp. 1-5).

By Letter no. 849/03.02.2009, registered at the office of the Contracting Authority under no. 1/1143/03.02.2009, UCVAP requested the Justificatory Notes of each member of the evaluation committee for the justification of the scores given to the technical bids of the three qualified bidders. By Letter no. 1.5/1143/05.02.2009, Tulcea County Council sent to UCVAP the required Justificatory Notes. In the Progress Report no. 170100/874/09.02.2009 (Annex 1 MA POR pp. 9-16), prepared and submitted to the contracting authority after the completion of the verification process of the procurement procedure, UCVAP mentioned that during the procurement procedure "No advisory opinion was issued and no sanctions were applied under Article 10 of Government Emergency Order (OUG) no. 30/2006. ... The evaluation committee answered within the period specified in the letter requesting the justification of the scores given to the technical bids assessed by each member of the committee."

Also, given that in this procurement procedure the award criterion was "the most economically advantageous tender" and the technical proposal had a specific weight of 50% of the total score, the bid submitted by [REDACTED], although offering a low price, received a low score for the technical offer; the score is motivated in the Procedure Report, as well as in the Justificatory Notes of the evaluation committee members sent to UCVAP.

We also mention that, although there were significant differences between the scorings given by the members of the evaluation committee, taking into account the fact that in this procurement procedure the award criterion was "the most economically advantageous tender", such differences did not affect the final classification.

#### View of the Commission

The EC takes notes of the clarifications and accepts the arguments raised by the Romanian authorities. The finding is considered **closed** in the context of the current audit.

#### **Finding 6**

##### **OP Regional**

##### **Specification of the object of the procurement in terms of reference ( [REDACTED] contract)**

The award documents for the request of offers for financial audit services, published on 17.07.2009, did not include sufficient information for the potential bidders to be able to adequately tailor their technical offers. Therefore the range of financial offers presented varied substantially according to the interpretation of each bidder of the information provided in the award documents (caiet de sarcini). See Article 35 (6) of Emergency Ordinance 34/2006.

The published documentation did not provide details on the number of required reports, periodicity for issuing audit reports or workload to be foreseen for each activity. In response to the offer request, 17 offers had been submitted with prices ranging from 6.000RON to 95.000RON. Necessary clarifications were provided by the contracting authority only 2 days before the deadline for submitting the offers (by letter no. 22/7893 on 27.07.2009); namely: "Reports will be requested as many times as considered necessary, but not after periods shorter than 3 months; they will be usually requested before payment claims, intermediary reports and final report."

Due to the high variation of the price offers, and taking into account that the award criterion was the lowest price offered, all bidders were requested to justify their financial offers. The assessment of the offers was done based on the methodology communicated 2 days before the deadline for submitting offers and 7 offers lower than the winning one excluded based on the justification of the price. The evaluation process and the decision for rejection were, therefore, not done in a fully transparent way.

We take notice that the contract in question is under the threshold of the directive and national legislation should be applied on. Nonetheless, the principles of the Treaty such as non-discrimination, equal treatment and transparency should be complied with. Award documents should be sufficiently detailed to ensure an objective and transparent procurement procedure which comply with the public procurement rules.

#### Arguments of the Romanian authorities

By email of 3 December 2012 the ROP managing authority registered with Ares(2012)1444343 presented the following update: 'For the audit contract no. 187/17.09.2009, concluded with [REDACTED], MA accepted the findings from the draft audit report and on 15.11.2012, the Irregularities Offices has issued an irregularity alert regarding the violation of art. 178 (2) of OUG 34/2006, by using restrictive criteria for qualification and selection'.

On 23.11.2012, the Unit for Finding and Irregularities Settlement – ROP within MA has started a mission for establishing the debt to be recovered for the identified irregularities in the suspicions of irregularities, afterwards the Finding Notice being finalized in December 2012. The amounts representing the value of the debt are the following: [REDACTED] contract value 41.900 lei , amount paid by MA 41.900 lei , Financial correction 10% , Debts value(ERDF +state budget without own contribution) 4088,60 lei.

The finding notice was concluded on 9 December 2012 and submitted to the EC by email registered with Ares(2012)1540246 of 21 December 2012 and points out the implementation of the financial correction of 10% of the value of the contract.

#### View of the Commission

The EC takes note that the financial correction of 10% of the value of the contract was accepted and implemented by the Romanian authorities. Therefore the finding is considered **closed** in the context of the current audit.

#### **Finding 7**

##### **OP Regional**

##### **Minimum criteria for qualification not published in the Contract Notice ( [REDACTED] contract)**

The minimum criteria for qualifications, approved through the Note 3883/16.04.2010, were not completely published in the Contract Notice. Specifically, the criteria for qualifications related to the technical capacity of the potential bidders were not included in the Contract Notice. Therefore, the provisions of Article 44 of the Directive/2004/18/EC was infringed:

*1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.*

*2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48. The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract. These minimum levels shall be indicated in the contract notice."*

#### Arguments of the Romanian authorities

By email of 3 December 2012 the ROP managing authority registered with Ares(2012)1444343 presented the following update: For the works contract no. 147/27.07.2009, as well as for the Addendum no. 3/28.05.2010, concluded with [REDACTED], MA accepted the findings from the draft audit report and on 23.11.2012, the Irregularities Offices has issued an irregularity alert regarding the violation of legislation regarding public procurement, respectively:

- Minimal eligibility criteria that have not been published in the Contract Notice;
- Incorrect application of the award criteria;
- Unforeseen circumstances not justified;
- Information notice on exclusion of the tenderers not in line with applicable regulations.

On 23.11.2012, the Unit for Finding and Irregularities Settlement – ROP within MA has started a mission for establishing the debt to be recovered for the identified irregularities in the suspicions of irregularities, afterwards the Finding Notice being finalized in December 2012.

The amounts representing the value of the debt are the following: [REDACTED] contract value 43.269.980,63 lei ,amount paid by MA 40.677.511,71 lei , Financial correction 25%, Debts value (ERDF +state budget without owen contribution) 9.923.278,98 lei. The finding notice was concluded on 9 December 2012 and submitted to the EC by email registered with Ares(2012)1540246 of 21 December 2012 and points out the implementation of the financial correction of 25% of the value of the contract.

#### View of the Commission

The EC takes note that the Romanian authorities implemented a financial correction of 25% of the value of the contract. Therefore the finding is considered **closed** in the context of the current audit.

## Finding 8

### OP Regional

#### Modification of the minimum criteria for qualification not published (██████████ contract)

At the request of the winning company, the Contracting Authority accepted to modify one of the minimum criteria for qualification, with only 4 days before the deadline for submitting the offers. Initially, the contracted authority requested that the equipment should not be older than 5 years. At the request of the winning company, it was accepted that the equipment could be older than 5 years if certificates on the level of emissions prove the compliance with environmental legislation. This change was only notified to the companies who already expressed their interest for participation. An erratum to the Contract Notice was not published in order to inform other potential bidders on the market. Moreover, sufficient additional time should have been allowed before the deadline for submitting the offers (minimum 6 days according to the applicable legislation). Contracting Authority submitted the clarifications on 29/05/2010 (Note 5462), while the deadline for submitting the offers was 03/06/2010.

Therefore, the provisions of Article 44 mentioned above (modifications of minimum criteria not published in the Contract Notice) and Article 39 of the Directive/2004/18/EC was infringed:

*1. In open procedures, where contracting authorities do not offer unrestricted and full direct access by electronic means in accordance with Article 38(6) to the specifications and any supporting documents, the specifications and supplementary documents shall be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for the submission of tenders.*

*2. Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities or competent departments not later than six days before the deadline fixed for the receipt of tenders.*

#### Arguments of the Romanian authorities

An economic operator who acquired the tender documentation requested the contracting authority to inform him on the legal grounds for imposing the condition that the equipment involved in the contract should not be older than 5 years, while soliciting, if there are no legal grounds, to also accept equipment older than 5 years.

The contracting authority, after the receipt of the request for clarifications, proceeded to reformulate this requirement in the data sheet, and by its response to question no. 2 in Clarification no. 5462/29.05.2009, published in the SEAP for all possible operators, reformulated the requirement in section 5.4.2. of the data sheet, as follows: "*For equipment older than 5 years, the bidder must submit a technical certificate or an inspection report issued by the competent bodies, stating that the equipment does not release into the atmosphere quantities of pollutants above the admissible limits, according to the environmental regulations in force*"; this is believed not to have restricted the participation in the procedure, but rather to have ensured a wider participation of interested economic operators.

This response was published in the SEAP, in section Documentation and clarifications within the contract notice, on 29/05/2009, 11:43 a.m., with the code [CN75724/108], being made available to all interested economic operators, hence the provisions of Article 39 and Article 44 of Directive/2004/18/EC were not infringed.

We mention that the respective procedure was attended by a total of 38 economic operators who purchased the tender documentation, of which a number of 14 operators submitted bids within the time limit.

As regards the tender documentation, before the bid opening date, over 60 clarifications were requested, for which 12 letters were drafted and published in SEAP, two of which, including Letter no. 5462 of 29.05.2009 containing the reformulation of the requirement in section 5.4.2 of the data sheet, were sent to the operators and were published in SEAP under the provisions of Article 79(2) of OUG no. 34/2006R, according to which: *"If the economic operator has not submitted the request for clarification in a timely manner, thereby rendering the contracting authority unable to meet the deadline set in paragraph (1), the latter has, however, the obligation to respond to the request for clarification to the extent that the period required for the formulation and transmission of the response makes it possible to be received by the economic operators before the deadline for submission of tenders."*

Out of the 14 operators who submitted bids with prices ranging from 35,633,972.59 RON to 69,605,298.25 RON, compared to an estimated value of the works of 60 million RON, a total of 6 bids were declared inadmissible, while the remaining 8 offers declared admissible entered the procedure of calculating the score according to the algorithm for the factors within the award criterion "the most economically advantageous tender."

Regarding the fact that this particular response to clarifications was published in SEAP 4 days before the deadline for submission of tenders, we specify that, pursuant to Article 79 (1) and (2) of OUG no. 34/2006, as amended and supplemented, *"... insofar as the clarifications are requested in a timely manner, the contracting authority's response to these requests must be published/conveyed no later than 6 days before the deadline set for submission of tenders. If the economic operator did not submit the request for clarification in a timely manner, thereby rendering the contracting authority unable to meet the deadline set in paragraph (1), the latter has, however, the obligation to respond to the request for clarification insofar as the period required for the formulation and transmission of the answer makes it possible to be received by the economic operators before the deadline for submission of bids."* We also mention that these clarifications were published in SEAP within the legal period of 3 working days, under Article 78 (2) of OUG no. 34/2006, as amended and supplemented. We do not deem the recommendation for the application of financial corrections to be appropriate.

#### View of the Commission

The EC takes note of the clarifications provided by the national authorities. In view that the procurement process for this contract was been affected by several other irregularities outlined in Findings 7, 9 and 12 for which financial corrections were implemented by the national authorities the finding is **closed**. The Romanian authorities are drawn the attention that modification of the minimum criteria for qualification should be published in compliance with the legal requirements of the public procurement directives.

#### **Finding 9**

##### **OP Regional**

##### **Incorrect application of the award criteria (██████████ contract)**

The award criterion for this contract was *'the most economic advantageous offer'*. Three assessment criteria have been established by the Contracting Authority (Note 3884/16.04.2009), as follows:

- Price of the offer (70%)
- Period of execution (15%)
- Performance bond period (15%)

The winning company estimated in its offer a 7 month period of execution as being sufficient to finalise the works.

The period of the contract has been prolonged with 4 month, through Addenda no 1/25.02.2010 (at the request of the Contractor), followed by a 3 months extension granted by Addenda no. 4/25.06.2010, due to several reasons, including 'exceptional unfavourable weather conditions' which lead to reduction of activities for the winter season.

It is our opinion that this reason cannot be considered as unforeseeable as the Contractor should have been already taken into account (at the moment of the initial offer) the weather conditions during the winter season and the impact on the period of the execution of the works.

This implies as well that this factor of the award criteria had been wrongly assessed and applied by the Evaluation Committee during the evaluation process.

#### Arguments of the Romanian authorities

By email of 3 December 2012 the ROP managing authority registered with Ares(2012)1444343 presented the following update: For the works contract no. 147/27.07.2009, as well as for the Addendum no. 3/28.05.2010, concluded with [REDACTED], MA accepted the findings from the draft audit report and on 23.11.2012, the Irregularities Offices has issued an irregularity alert regarding the violation of legislation regarding public procurement, respectively:

- Minimal eligibility criteria that have not been published in the Contract Notice;
- Incorrect application of the award criteria;
- Unforeseen circumstances not justified;
- Information notice on exclusion of the tenderers not in line with applicable regulations.

On 23.11.2012, the Unit for Finding and Irregularities Settlement – ROP within MA has started a mission for establishing the debt to be recovered for the identified irregularities in the suspicions of irregularities, afterwards the Finding Notice being finalized in December 2012.

The amounts representing the value of the debt are the following: [REDACTED] contract value 43.269.980,63 lei ,amount paid by MA 40.677.511,71 lei , Financial correction 25%, Debts value (ERDF +state budget without owen contribution) 9.923.278,98 lei. The finding notice was concluded on 9 December 2012 and submitted to the EC by email registered with Ares(2012)1540246 of 21 December 2012 and points out the implementation of the financial correction of 25% of the value of the contract.

#### View of the Commission

The EC takes note that a financial correction of 25% was implemented by the Romanian authorities in respect of this contract cumulatively for the deficiencies outlined in finding 7, finding 9 and finding 12. Therefore it is accepted that for the cumulative irregularities at the level of the contract the highest correction of 25% was implemented. The finding is considered **closed** in the context of the current audit.

#### **Finding 10**

##### **OP Regional**

##### **Unjustified modification of the period of the contract (Addenda 4/25.06.2010)**

At the request of [REDACTED] (Note 4861/07.06.2010). the execution period of the contract had been prolonged with 3 month (until 30.09.2010) in order to ensure coordination with works under progress carried out under 2 contracts managed by [REDACTED]

It is the task of the local authorities to ensure appropriate coordination of works between different contracts, so that unjustified delays do not appear.

The same grounds are applicable as well for the Addenda no 1 to the contract, where similar reasons have been raised in order to justify the modifications of the execution period (in addition to the unfavourable weather conditions).

#### Arguments of the Romanian authorities

MA POR will send the IBs an instruction regarding the obligation of the beneficiaries to coordinate their contracts by also taking into consideration the implementation periods of the project in order to avoid delays, overlaps or low quality works.

#### View of the Commission

The European Commission takes note that the Managing authority undertook actions to guide the beneficiaries. This finding is **closed** in the context of the current audit.

### **Finding 11**

#### **OP Regional**

##### **Unforeseen circumstances not justified [REDACTED] contract - Addendum no. 3/28.05.2010)**

The negotiation report for the addendum 3 (value 2.839.545 LEI) of the contract 147/27.07.2009, is dated 28 May 2010, the addendum is justified in the justification note as necessary due to civil works (water and sewerage networks, electrical and telephone networks) performed between the designing of the road project and the moment when the actual works started.

The auditors are of the opinion that unforeseen circumstances cannot be invoked here, as the contract for the water and waste water sewage network were concluded in 2006 (1 contract) 2007 (4 contracts) and 2008 (3 contracts). In addition the contracting authority should have been aware of planned or on-going (huge) works in the same area as the specific project under consideration.

#### Arguments of the Romanian authorities

By email of 3 December 2012 the ROP managing authority registered with Ares (2012)1444343 presented the following update: For the works contract no. 147/27.07.2009, as well as for the Addendum no. 3/28.05.2010, concluded with [REDACTED], MA accepted the findings from the draft audit report and on 23.11.2012, the Irregularities Offices has issued an irregularity alert regarding the violation of legislation regarding public procurement, respectively:

- Minimal eligibility criteria that have not been published in the Contract Notice;
- Incorrect application of the award criteria;
- Unforeseen circumstances not justified;
- Information notice on exclusion of the tenderers not in line with applicable regulations.

On 23.11.2012, the Unit for Finding and Irregularities Settlement – ROP within MA has started a mission for establishing the debt to be recovered for the identified irregularities in the suspicions of irregularities, afterwards the Finding Notice being finalized in December 2012. The amounts representing the value of the debt are the following: [REDACTED] contract value 2.839.547,45 lei, amount paid by MA 2.246.754,90 lei, Financial correction 25%, Debts value (ERDF +state budget without own contribution) 548.095,87 lei. The finding notice was concluded on 9 December 2012 and submitted to the EC by email registered with Ares (2012)1540246 of 21 December 2012 and points out the implementation of the financial correction of 25% of the value of the addenda to contract.

#### View of the Commission

The EC takes note that the financial correction of 25% of the value of the contract addenda was accepted and implemented by the Romanian authorities. Therefore the finding is considered **closed** in the context of the current audit.

## Finding 12

### OP Regional

#### Information notice on exclusion not in line with applicable regulations (contract)

According to the applicable national legislation, namely Article 206 and Art 207 of Emergency Ordinance no 34/2006: the Contracting Authority has the obligation to inform the rejected bidders, no later than 3 working days on the reasons of the decision, by providing detailed reasons and arguments when considering the offer as non-compliant, including the elements of the offer not in line with the terms of reference.

In case of the contract under discussion, one of the bidders ( ) and ( ) was not informed in detail and in due time on the reasons of rejection and elements of the offer being considered as non-compliant with the terms of reference. The Note for information (no 5630/22.06.2009) specifies vaguely the reasons for rejection, mentioning only that 'some quantities of works are missing'.

The Contracting Authority submitted more detailed information on reasons for rejection only on 3<sup>rd</sup> of July 2009 (Note 32/6848/03.07.2009). The additional information has been sent by the Contracting Authority only after the bidder contested the results to CNSC (through Note 20744/01.07.2009). Moreover, when assessing the detailed reasons for rejection (mentioned in the Note 32/6848/03.07.2009), was observed that the Contracting Authority asked for clarifications only for part of the reasons for rejection. The evaluation process and the decision for rejection were, therefore, not done in a full transparent way.

We take note that the excluded bidder presented a substantial financial offer lower than the winning company. (35.851.582.59 LEI)

#### Arguments of the Romanian authorities

By email of 3 December 2012 the ROP managing authority registered with Ares(2012)1444343 presented the following update: For the works contract no. 147/27.07.2009, as well as for the Addendum no. 3/28.05.2010, concluded with ( ), MA accepted the findings from the draft audit report and on 23.11.2012, the Irregularities Offices has issued an irregularity alert regarding the violation of legislation regarding public procurement, respectively:

- Minimal eligibility criteria that have not been published in the Contract Notice;
- Incorrect application of the award criteria;
- Unforeseen circumstances not justified;
- Information notice on exclusion of the tenderers not in line with applicable regulations.

On 23.11.2012, the Unit for Finding and Irregularities Settlement – ROP within MA has started a mission for establishing the debt to be recovered for the identified irregularities in the suspicions of irregularities; afterwards the Finding Notice being finalized in December 2012.

The amounts representing the value of the debt are the following: ( ) contract value 43.269.980,63 lei ,amount paid by MA 40.677.511,71 lei , Financial correction 25%, Debts value (ERDF +state budget without own contribution) 9.923.278,98 lei. The finding notice was concluded on 9 December 2012 and submitted to the EC by email registered with Ares(2012)1540246 of 21 December 2012 and points out the implementation of the financial correction of 25% of the value of the contract.

#### View of the Commission

The EC takes note that a financial correction of 25% was implemented by the Romanian authorities in respect of this contract cumulatively for the deficiencies outlined in finding 7, finding 9 and finding 12. Therefore it is accepted that for the cumulative irregularities at the level of the contract the highest correction of 25% was implemented. The finding is considered **closed** in the context of the current audit.

## Finding 13

### OP Increase of Economic Competitiveness

#### Type of public procurement procedure used [REDACTED]

All 6 contracts included in the payment request under review were awarded based on the negotiation procedure without prior publication. As it is a research institute the contracting environment is atypical and could be justified in some cases, according to the applicable legislation. The auditors consider that for 3 contracts out of the 6 contracts verified the use of the specific procedure can be accepted. Nonetheless it is not the case for the other 3 contracts presented below.

Supply contracts: [REDACTED] (in value of 21.600 Euro) and [REDACTED] (in value of 34.250 Euro)

From the contracts selected, two of them (mentioned above) relate to the acquisition of specific software equipments.

From the review of the files and discussions with staff involved in the selection procedure, it resulted that for both contracts the supplier invited to submit an offer was not the only potential supplier on the market, but the one who could offer the 'best' product according to the specific requirements set by the Institute, at a reasonable price (after consulting other beneficiaries of these products and from information available on the internet, magazines, and from forums/ conferences in the field).

For example, in the case of [REDACTED], it is clearly specified in the tender documentation (Note 1238/04.08.2009) that this software package has been chosen because it is recommended to be the most precise software on the market (from the research done).

Therefore, it is our opinion that the procurement procedure applied is not in accordance with applicable legislation.

#### Supply contracts: Model CPX-VF probe station (in amount of (147.968 USD)

The negotiated procedure without prior publication has been used based on the assumption of the uniqueness of the equipment/products to be acquired. For this purpose the Contracting Authority made a prior research on the market and identified potential suitable products according to their needs. As described in the Note justifying the procedure chosen, for each of type of equipment several suppliers have been identified.

However, the decision to continue with a negotiated procedure with one of the suppliers is mostly based on the uniqueness of the particular product of that particular supplier (which can be often the case), rather than on proving that the type of the equipment needed is produced by only one potential supplier.

Therefore, we consider that in order to fully justify the use of negotiated procedure (which should be only in exceptional cases) for the contract related to CPX-VF probe station, the Contracting Authority should have thoroughly documented and proved that **the type of equipment** needed can be supplied only by one specific contractor, and not to only justify the uniqueness of a product manufactured by a certain company.

#### Arguments of the Romanian authorities

Following the conciliation meeting held in 14-15 June 2012 in Brussels with the Managing Authority for OP Competitiveness, the Managing Authority confirmed that the proposed financial correction of 25% for each of the three contracts in the finding are accepted and implemented by the Romanian Authorities.

#### View of the Commission

The EC takes note that the Romanian authorities implemented a financial correction of 25% of the value of the three contracts: [REDACTED], [REDACTED] and [REDACTED]. Therefore the finding is considered closed.

#### **Finding 14**

##### **OP Environment**

##### **Unjustified shortened time limit for receipt of tenders – [REDACTED] contract**

In accordance with the provisions of the *Article 38 of the EU Directive no. 2004/18/EC on the coordination of procedures for the award of public works contracts public supply contracts and public service contracts and Article 75 of Emergency Ordinance 34/2006*:

- In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.
- Where notices are drawn up and transmitted by electronic means the time limits for the receipt of tenders may be shortened by 7 days.
- Additionally, the time limits for receipt of tenders may be reduced by 5 days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, specifying in the text of the notice the internet address at which this documentation is accessible.
- When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days.

However, shortening of the time limits shall be permitted to 36 days provided that the prior information notice has included all the information required for the contract notice, insofar as that information is available at the time the notice is published and that the prior information notice is sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

For this contract, the deadline for the submission of offers is below the minimum period foreseen by Article 38 of Directive 2004/18/EC, specifically:

- Prior information notice was published on 23.02.2008.
- Contract notice was sent for publication on 05.11.2008. and
- Deadline for submission of offers was 11.12.2008.

Therefore, the time limit for bidders to submit offers was 36 days.

Nonetheless, it is our opinion that the prior information notice did not include minimum requirements necessary for beneficiaries to assess their capability to manage such a contract (no qualifying and selection criteria included in the prior notice).

Therefore, the shortening of the deadlines should not have been allowed under these circumstances.

Secondly, in compliance with Article 24(1) in the Government decision 925/2006, ANRMAP carries out verifications on the formal aspects of the tender notices and approves them before being published in the national electronic system for public procurement (SEAP).

Also, according to the activity report of UCVAP (page 3), it has been verified and concluded that the Contracting Authority had respected the relevant legal deadlines.

Based on previous audit work, we take note that unjustified shortened deadlines constitute a recurrent irregularity in Romania for which the Commission has not received proves that adequate measures are being implemented.

#### Position of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

#### View of the Commission

The financial correction of 5% from the value of the contract affected by the irregularity was implemented by the Romanian authorities. Therefore the finding is closed.

### **Finding 15**

#### **OP Environment**

##### **Errata to the Contract Notice – [REDACTED] contract**

One of the qualification and selection criteria, related to the technical capacity of the bidders (approved initially and published in the Contract Notice of 06/11/2008) was modified 20 days after the publication of the Contract Notice and an Errata to the Contract Notice was published on 26/11/2008;

The criteria initially published in the Contract Notice was:

"At least 2 consultancy finalised contracts in the area of water infrastructure and waste water. each contract in amount of at least 1.500.000 Euro."

The modified criteria published in the Errata 26/11/2008 is:

"Maximum 3 consultancy contracts in the area of water infrastructure and waste water. all contracts together in amount of at least 1.400.000 Euro."

After assessing all available information and documents, it is our opinion that several requirements and principles of publicity, access to information, transparency and sound financial management have not been complied with:

- To begin with, this modification of the criteria seems to substantially decrease the experience requirements for the potential bidders which can have a negative impact on the quality of the services to be received.
- Secondly, although the Errata was published locally (in SEAP), the modification was not published in the Official Journal. By this, potential bidders from abroad were not informed.

Finally, the deadline for the submission of the offers (11/12/2008) was not modified, although due to this change a number of other potential bidders could have applied (as the requirements initially set decreased significantly). When the Contracting Authority is modifying substantially the Contract Notice, enough time should be allowed to the potential bidders to prepare the tender documentation (the offers) in order to ensure an adequate level of competition and quality of offers submitted.

#### Position of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

Nevertheless, additional information was received by the Managing Authority from the beneficiary. Based on this information, the Managing Authority decided not to apply any financial correction on this issue.

This additional information was sent to DG REGIO on 13 March 2013 (Ares(2013)702417). After analysis of the additional information, DG REGIO takes into account the fact that this substantial modification of the selection criteria was published in the Official Journal on 29/11/2008 (no. S233-309209). Nevertheless, the deadline for the submission of the offers was not modified and remained on 11/12/2008. Taken into account that this significant modification of the selection criteria, as explained above, gave only 13 days to the potential bidders from abroad to present an offer, DG REGIO maintains the financial correction of 25% according to the COCOF Note no 07/0037/03 Guideline for determine financial corrections, point 2 "Non-compliance with the advertising procedures".

#### View of the Commission

DG REGIO maintains the financial correction of 25% from the value of the contract affected by the irregularity and considers that this financial correction is covered by the proposed extrapolated financial correction of 10% accepted and implemented by the Romanian authorities on 27 November 2012. Therefore the finding is **closed**.

#### **Finding 16**

##### **OP Environment**

##### **Incorrect assessment of the qualifying and selection criteria for the winning company - [REDACTED] contract**

The winner did not fulfil the technical capacity criterion (the same criterion which was changed. mentioned above) and should have been excluded.

According to the Contract Notice, bidders should have been proved their technical capacity in the following areas:

- Procurement consultancy services (CPV code 79418000-7)
- Environmental engineering consultancy services (CPV code 71313000-5)
- Environmental impact assessment services for construction (CPV code 71313440-1)

The winning company could only prove experience in relevant design projects and construction works. However, according to the requirements set by the Contracting Authority, this bidder did not fulfil this specific criterion and should have been excluded.

---

The incorrect application of the rules did not result in the choice of a bidder offering a higher price than would have been proposed had the rules been applied correctly.

#### Position of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

Nevertheless, additional information was received by the Managing Authority from the beneficiary. Based on this information, the Managing Authority decided not to apply any financial correction on this issue.

This additional information was sent to DG REGIO on 13 March 2013 (Ares(2013)702417). After analysis of the additional information, DG REGIO considers that the information presented proves the fulfilment of the technical capacity criterion by the winning bidder.

#### View of the Commission

No financial correction is proposed for this finding. Therefore the finding is **closed**.

## Finding 17

### OP Environment

#### Unjustified shortened time limit for receipt of tenders – [REDACTED]

In accordance with the provisions of the *Article 38 of the EU Directive no. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Article 75 of Emergency Ordinance 34/2006*:

- In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.
- Where notices are drawn up and transmitted by electronic means the time limits for the receipt of tenders may be shortened by 7 days.
- Additionally, the time limits for receipt of tenders may be reduced by 5 days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, specifying in the text of the notice the internet address at which this documentation is accessible.
- When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days.

However, shortening of the time limits shall be permitted to 36 days provided that the prior information notice has included all the information required for the contract notice, insofar as that information is available at the time the notice is published and that the prior information notice is sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

For this contract, the deadline for the submission of offers is below the minimum period foreseen by Article 38 of Directive 2004/18/EC. specifically:

- Prior information notice was published on 19.02.2008.
- Contract notice was sent for publication on 23.12.2008 , and
- Deadline for submission of offers was 27.01.2009.

Therefore, the time limit for bidders to submit offers was 35 days.

Secondly, the contracting authority did not offer unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, specifying in the text of the notice the internet address at which this documentation was accessible in order to reduce the time limits for receipt of tenders by 5 days.

It is our opinion that the prior information notice did not include minimum requirements necessary for beneficiaries to assess their capability to manage such a contract (no qualifying and selection criteria included in the prior notice).

Therefore, the shortening of the deadlines should not have been allowed under these circumstances.

In addition, in compliance with Article 24(1) in the Government decision 925/2006. ANRMAP carries out verifications on the formal aspects of the tender notices and approves them before being published in the national electronic system for public procurement (SEAP).

Also, according to the activity report of UCVAP (page 4), it has been verified and concluded that the Contracting Authority had respected the relevant legal deadlines.

Based on previous audit work, we take note that unjustified shortened deadlines constitute a recurrent irregularity in Romania for which the Commission has not received proves that adequate measures are being implemented.

According to the same EU Directive mentioned above, *'when fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders'*.

Therefore, for complex tender procedures as is the case for this contract, sufficient time period should be allocated in order to ensure that the principles of sound financial management are complied with.

#### Arguments of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

#### View of the Commission

The financial correction of 10% from the value of the contract was implemented by the Romanian authorities. Therefore the finding is closed.

### **Finding 18**

#### **OP Environment – [REDACTED]**

##### **Errata to the contract without publication -**

The tender procedure for the award of this contract was highly contested. Following appeals submitted by tenderers, deadlines for submitting offers have been postponed from 23.04.2009 to 15.05.2009.

This change was only notified to the companies who already expressed their interest for participation. An erratum to the Contract Notice was not published, in order to inform other potential bidders on the market.

After assessing all available information and documents, it is our opinion that several requirements and principles of publicity, access to information, transparency and sound financial management have not been complied with as the extension of deadline for submitting offers was not published in the Official Journal.

#### Arguments of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

Nevertheless, additional information was received by the Managing Authority from the beneficiary. Based on this information, the Managing Authority decided not to apply any financial correction on this issue.

This additional information was sent to DG REGIO on 13 March 2013 (Ares(2013)702417). After analysis of the additional information, DG REGIO takes into account the fact that the contracting authority acted in goodwill trying to respect the principal of equal treatment by informing about the extension of the deadline only the bidders which had previously expressed an interest about the procedure. Nevertheless, DR REGIO considers that the extension of the deadline should have been published by erratum in respect with Articles 2, 38, 44 and 48 of the Directive 2004/18/CE. According to Article 26 in Government Decision 925/2006, the notices issued after corrections/omissions of the initial tender notice should be considered as new tender notices and be submitted to the same publication rules as the initial tender notice.

#### View of the Commission

A financial correction of 5% from the value of the contract affected by the irregularity is proposed according to the guidelines (COCOF 07/0037/03-EN) for incorrect application of certain ancillary elements of the public

procurement procedure. DG REGIO considers that this financial correction is covered by the proposed extrapolated financial correction of 10% accepted and implemented by the Romanian authorities on 27 November 2012. Therefore the finding is **closed**.

## **Finding 19**

### **OP Environment**

#### **Set up of the public procurement control system**

Due to several complaints submitted by bidders, the selection process for this specific contract had been cancelled twice subsequent to decision of the National Council for Solving Appeals (CNSC). UCVAP's had designated representatives to observe the procurement procedures launched by the contracting authority.

Nevertheless, the report of UCVAP was issued only after CNSC / Appeal Court issued an official decision, instead of feeding the decision of these institutions with details on the evaluation process.

#### Arguments of the Romanian authorities

In response to the recommendations in the audit report, MA SOP Environment will perform the appropriate review of the procedures and checklists, which shall be correlated with the recent legislative changes in public procurement.

UCVAP activity takes place during the course of the tender procedure and results, if nonconformities are found, in the issuance of real-time Interim notes, which include, besides findings, recommendations on how to remedy the nonconformities observed. If the contracting authority fails to remedy the nonconformities described in the interim notes, UCVAP issues an advisory opinion. The Activity Report is a summarizing, statistical document.

A tender procedure verified by observers and for which no advisory opinion was issued is a procedure free of any significant violation of procedural aspects during the stages following the publication of the contract notice and before the signing of the contract which could affect the principles for awarding contracts set out in Article 2 (2) of OUG 34/2006 and the European Directives.

Also, in order to establish clear and unambiguous powers of each institution with control/verification responsibilities in the process of awarding public procurement contracts, as well as to formalize the necessary modifications in the existing legislation, these measures provided in the Priority Measures Plan resulted in:

1. Publication in the Official Gazette of Romania, Part I, no. 411 of June 10, 2011 of Government Emergency Ordinance no. 52/2011 amending Government Emergency Ordinance no. 30/2006 on the verification function of the procedural aspects related to the process of awarding public procurement contracts, public works concession contracts and services concession contracts.
2. Standardization of documents: Minutes of the Tender Opening and Procedure Report, documents related to the procedures for awarding public procurement contracts, public works concession contracts and services concession contracts.

The main changes introduced by Government Emergency Ordinance no. 52/2011 are:

- The possibility to select for verification any procurement procedures, regardless of their estimated value. This provision reinforces and expands the preventive and proactive role of the function of procedural verification, in that the contracting authorities will benefit from the necessary expertise during the course of the procurement procedures, eliminating blockages and delays in the public procurement process, while allowing the real-time rectification of nonconformities noted by observers by applying their recommendations.
- Verification of all negotiated procedures without publication covered by Article 122 (i) and Article 252 (j) of OUG 34/2006, that is, the procedures organized by the contracting authorities for the procurement of

additional/ supplementary works or services, which were not included in the initial contract, but which, due to unforeseen circumstances, have become necessary for the execution of that contract.

- Registration of the MFP-UCVAP/DGFP-CVAP opinion in the Procedure Report before concluding the procurement contract.

This provision strengthens the ex-ante preventive character of the function of procedural verification and eliminates bureaucracy because the notes of the observers are recorded in a single document.

### View of the Commission

Finding 19 is not relevant any more given the changes in the set-up of the public procurement control system since the date of the audit.

## **Finding 20**

### **OP Environment – [REDACTED]**

#### **Unjustified shortened time limit for receipt of tenders – [REDACTED]**

In accordance with the provisions of the Article 38 of the EU Directive no. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Article 75 of Emergency Ordinance 34/2006:

- In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.
- Where notices are drawn up and transmitted by electronic means the time limits for the receipt of tenders may be shortened by 7 days.
- Additionally, the time limits for receipt of tenders may be reduced by 5 days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, specifying in the text of the notice the internet address at which this documentation is accessible.
- When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days.

---

However, shortening of the time limits shall be permitted to 36 days provided that the prior information notice has included all the information required for the contract notice, insofar as that information is available at the time the notice is published and that the prior information notice is sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

For this contract, the deadline for the submission of offers is below the minimum period foreseen by Article 38 of Directive 2004/18/EC specifically:

- Prior information notice was published on 12.05.2009.
- Contract notice was sent for publication on 6.04.2010. and
- Deadline for submission of offers was 12.05.2010.

Therefore, the time limit for bidders to submit offers was 37 days.

Secondly, the contracting authority did not offer unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, specifying in

the text of the notice the internet address at which this documentation was accessible in order to reduce the time limits for receipt of tenders by 5 days.

It is our opinion that the prior information notice did not include minimum requirements necessary for beneficiaries to assess their capability to manage such a contract (no qualifying and selection criteria included in the prior notice).

Therefore, the shortening of the deadlines should not have been allowed under these circumstances.

In addition, in compliance with Article 24(1) in the Government decision 925/2006. ANRMAP carries out verifications on the formal aspects of the tender notices and approves them before being published in the national electronic system for public procurement (SEAP).

Also, according to the activity report of UCVAP (page 3), it has been verified and concluded that the Contracting Authority had respected the relevant legal deadlines.

Based on previous audit work, we take note that unjustified shortened deadlines constitute a recurrent irregularity in Romania for which the Commission has not received proves that adequate measures are being implemented.

According to the same EU Directive mentioned above, 'when fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders'.

Therefore, for complex tender procedures as the case of this contract, sufficient time period should be allocated in order to ensure that the principles of sound financial management are complied with.

#### Arguments of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

#### View of the Commission

The financial correction of 5% from the value of the contract affected by the irregularity was implemented by the Romanian authorities. Therefore the finding is closed.

### **Finding 21**

#### **OP Environment**

##### **Unjustified shortened time limit for receipt of tenders – [REDACTED]**

In accordance with the provisions of the *Article 38 of the EU Directive no. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Article 75 of Emergency Ordinance 34/2006*:

- In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.
- Where notices are drawn up and transmitted by electronic means the time limits for the receipt of tenders may be shortened by 7 days.
- Additionally, the time limits for receipt of tenders may be reduced by 5 days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, specifying in the text of the notice the internet address at which this documentation is accessible.
- When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days.

However, shortening of the time limits shall be permitted to 36 days provided that the prior information notice has included all the information required for the contract notice, insofar as that information is available at the time the notice is published and that the prior information notice is sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

For this contract, the deadline for the submission of offers is below the minimum period foreseen by Article 38 of Directive 2004/18/EC, specifically:

- Prior information notice was published on 23.02.2008.
- Contract notice was sent for publication on 14.11.2008, and
- Deadline for submission of offers was 18.12.2008.

Therefore, the time limit for bidders to submit offers was 36 days.

Nonetheless, it is our opinion that the prior information notice did not include minimum requirements necessary for beneficiaries to assess their capability to manage such a contract (no qualifying and selection criteria included in the prior notice).

Therefore, the shortening of the deadlines should not have been allowed under these circumstances.

Secondly, in compliance with Article 24(1) in the Government decision 925/2006. ANRMAP carries out verifications on the formal aspects of the tender notices and approves them before being published in the national electronic system for public procurement (SEAP).

Also, according to the activity report of UCVAP (page 3). it has been verified and concluded that the Contracting Authority had respected the relevant legal deadlines.

Based on previous audit work, we take note that unjustified shortened deadlines constitute a recurrent irregularity in Romania for which the Commission has not received proves that adequate measures are being implemented.

#### Arguments of the Romanian authorities

During the meeting held in Brussels on 7-8 June 2012 between the Managing Authority for OP Environment and DG REGIO auditors, the irregularity outlined in the finding was accepted by the managing authority.

#### View of the Commission

A financial correction of 5% from the value of the contract affected by the irregularity has been implemented by the Romanian authorities, therefore the finding is considered closed.

### **Finding 22**

#### **OP Environment**

##### **Addenda to the contract – replacement of key and experts –**

Out of the 10 addenda signed for this contract up to the date of the audit mission. 6 of them relate to changes of the key experts due to different reasons (medical resignation or refusal of the Contracting Authority of the expert). Without challenging that such requests for replacement might be fully justified, it is our opinion that in case of frequent replacement of the key experts for one contract there might be negative impact on the efficiency and effectiveness of the services/works to be provided, thus potentially altering the principles of sound financial management.

#### Arguments of the Romanian authorities

The tender documentation includes requirements regarding the availability of key experts (Statement of exclusivity and availability). Also, the contract clauses specify the situations in which such experts may be replaced (resignation, death and disease) with other experts having at least the same experience and qualification as the experts they replace. Please note that the introduction of a requirement like the one recommended by the COM auditors would not solve the problems that arise during the performance of public procurement contract, as cases such as those listed above may occur whether or not this statement is made, the more so as such situations are not determined by the participation of the experts involved in several projects. Also, the mere statement of the experts regarding their participation in other projects cannot constitute grounds for rejecting the bid.

In order to strengthen preventive control and to improve the public procurement process, as of February 2011, ANRMAP has taken measures to analyse the content of notices on more than a formal level; ANRMAP operators even carry out an analysis of the qualification and selection criteria, as well as the award criteria, to avoid the application of restrictive criteria and the distortion of competition. In addition to this measure, which is already adopted and implemented, ANRMAP shall issue a guide containing instructions for filling in the notices published by the contracting authorities; the instructions shall also include explanations on the information to be found in the prior information notice in case authorities wish to benefit from the shortening of the time limits for submission of tenders.

#### View of the Commission

The EC takes note of the clarifications provided and considers this finding **closed**.



## ANNEX II

### Summary of accepted financial corrections

Finding N°	Contract	Description of finding	Amount the contract for which irregularities have been detected (Basis for calculation of financial correction)	% Financial correction	Amount of financial correction (C4xC5)	Accepted and implemented by the Romanian Authorities
1	2	3	4	5	6	7
OP Regional Development (2007RO161PO001) – County Council Tulcea						
Finding 6		Insufficient description in the tender documents	41.900 Lei	10%	4.088 Lei	Yes, Ares(2012)1540246 of 21 December 2012
Finding 7		Minimum criteria not published in the Contract Notice	40.313.299 Lei	25%	9.923.279,98 Lei	Yes, Ares(2012)1540246 of 21 December 2012
Finding 9		Incorrect application of the award criteria	40.313.299 Lei	10%	- (see Note)	Yes, Ares(2012)1540246 of 21 December 2012
Finding 11		Unforeseen circumstances not justified	2.246.754 Lei	25%	548.095,87 Lei	Yes, Ares(2012)1540246 of 21 December 2012
Finding 12		Information notice on exclusion not in line with applicable regulations	40.313.299 Lei	10%	- (see Note)	Yes, Ares(2012)1540246 of 21 December 2012
OP Increase of Economic Competitiveness (2007RO161PO002) – INCDFM						
Finding 13		Use of negotiated procedure without publication	21.600 Euro	25%	5.400 Euro	Accepted by MA during conciliation procedure of

Finding N°	Contract	Description of finding	Amount the contract for which irregularities have been detected (Basis for calculation of financial correction)	% Financial correction	Amount of financial correction (C4xC5)	Accepted and implemented by the Romanian Authorities
1	2	3	4	5	6	7
						7-8 June 2012
Finding 13	[REDACTED]	Use of negotiated procedure without publication	34.250 Euro	25%	8.562 Euro	Accepted by MA during conciliation procedure of 7-8 June 2012
Finding 13	[REDACTED]	Use of negotiated procedure without publication	147.968USD	25%	36.992 USD	Accepted by MA during conciliation procedure of 7-8 June 2012
OP Environment (2007RO161PO004) - [REDACTED]						
Finding 14	[REDACTED]	Unjustified shortened Unjustified shortened time limit for receipt of tenders	7.072.360 Lei	5%		Accepted by MA during conciliation procedure of 7-8 June 2012
Finding 15	[REDACTED]	Significant modification of the selection criteria in the context of non-compliance with the advertising procedures	7.072.360 Lei	25%		Based on the additional information provided (Ares(2013)702417)
Finding 16	[REDACTED]	Incorrect assessment of the selection criteria	7.072.360 Lei	0%		DG REGIO accepts the arguments of the Managing Authority (Ares(2013)702417)
Finding 17	[REDACTED]	Unjustified shortened time limit for	27.605.330 Lei	5%		Accepted by MA during conciliation procedure of

Finding N°	Contract	Description of finding	Amount the contract for which irregularities have been detected (Basis for calculation of financial correction)	% Financial correction	Amount of financial correction (C4xC5)	Accepted and implemented by the Romanian Authorities
1	2	3	4	5	6	7
		receipt of tenders				7-8 June 2012
Finding 18		Errata to contract without publication	23.895.934Lei	5%		Based on the additional information provided (Ares(2013)702417)
Finding 20		Unjustified shortened time limit for receipt of tenders	39.790.050Lei	5%		Accepted by MA during conciliation procedure of June 2012
Finding 21		Unjustified shortened time limit for receipt of tenders	9.721.922Lei	5%		Accepted by MA during conciliation procedure of June 2012
TOTAL						

**Note:** When several deficiencies are found in the same system, the flat rates of correction are not cumulated, the most serious deficiency being taken as an indication of the risks presented by the control system as a whole. (Guidelines on the principles, criteria and indicative scales to be applied by Commission departments in determining financial corrections under Article 39(3) of Regulation (EC) No 1260/1999.

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 27 November 2012, all the financial corrections above are considered accepted and implemented by the Romanian authorities.

