



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

Ref. Ares(2016)4092700 - 03/08/2016

Ref. Ares(2015)1606045 - 15/04/2015

Brussels,
REGIO C2/ [REDACTED] D(2015) 1612372

Subject: Procedure under Article 99(1) of Council Regulation (EC) No 1083/2006
EPM 'To obtain assurance on the functioning of the management and control systems through the audit of Operational Programmes/areas and horizontal themes
Transport Operational Programme (CCI 2007BG161PO004)
Mission 8 - 12 April 2013
Mission no: 2013/BG/REGIO/C2/1198/1 (to be used in all correspondence)

Ref.: Commission Letter Ares(2014)1177232 - 14/04/2014 on the follow up of the recommendations made by the Commission in the Draft Audit Report Ares(2013)2592140 - 08/07/2013
Member State letter of 24/09/2014, (Ares (2014)3137900)
Member State letter of 19/11/2014, (Ares(2014)3859171)

Your Excellency

I am writing to inform you that Directorate-General of Regional Policy has concluded the audit carried out on the Transport Operational Programme (CCI 2007BG161PO004).

Following the analysis of the information provided in the above-mentioned Member State letters, you will find in **annex I** our conclusions in this regard.

The present Final Position Letter concerns the findings which remained open following the previous Commission Letter Ares(2014)1177232 - 14/04/2014, where the Commission closed the findings N° 1, 3, 4, 6, 7, 8, 9 and 10.

As your reply has been analysed by the Commission and your clarifications for the remaining issues have been accepted, no further action will be taken. The audit is therefore closed.

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

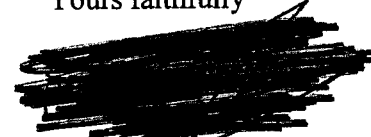
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closure takes place, in case of documents regarding expenditure and audits on operations referred to in 90(2) of the said Regulation.

Yours faithfully



Franck Sébert

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Enclosures:

Annex I - Commission's conclusions

c.c.:



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ANNEX I – DG REGIONAL AND URBAN POLICY’S CONCLUSIONS

Extension of the Sofia Metro – Stage II – Phase 1

Finding n° 2: Works contract 165 – irregular tender specifications (summary)

The finding related to the works contract awarded to Consortium "Metro Mladost" in the amount of BGN 184 975 733. The technical specifications for this works contract included in part 5.6 a requirement to include a specific system built on the [REDACTED] platform (Supervisory Control and Data Acquisition) which enables the dispatchers to monitor and manage remotely the movement of trains and the supply of electricity. The [REDACTED] systems are applied worldwide to control industrial, infrastructure and facility-based processes. It needs to be tailored for specific use.

The existing sections of the metro in Sofia were already managed and controlled by the [REDACTED] software and hardware system built on the [REDACTED] platform. The additional stations needed to be controlled by the same system because it had to be compatible to ensure functionality and safety of passengers. The software and hardware to be delivered and installed had to be tailor-made to be compatible to the existing [REDACTED]-based system. In the tender dossier there were the following parts of the [REDACTED]-based system included:

[REDACTED]	Dispatch system for trains
[REDACTED]	Local control system for the train station manager
[REDACTED]	Electricity dispatch
[REDACTED]	Sanitary and technical dispatch

The [REDACTED] systems built on the [REDACTED] platform mentioned in the tender specification are protected by exclusive rights held by a Bulgarian Company named "[REDACTED]". According to the offer of the winning tenderer for the works contract, the price of the [REDACTED]-based [REDACTED] system is BGN 2 416 013.

Article 34 of the directive 2004/17/EC states that: *Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.*

Article 32 of the Bulgarian Law for the public procurement applicable to the works contract states that: *The technical specifications shall not be determined by indicating a specific model, source, process, trade mark, patent, type, origin or production, which would lead to the provision of privilege or the elimination of certain persons or products. In exclusive cases, where it is impossible for the subject of the procurement to be described precisely and clearly by the order of art. 30, par.1 and Art. 33 such indication is admissible, provided that the words "or an equivalent" are obligatorily added.*

The tender dossier included a specification of a product that is protected by exclusive rights. The tender dossier was therefore in breach of the public procurement rules.

Action n° 2

A financial correction of 25% of the amount declared under this works contract for the ████████ system should be made by the managing authority in accordance with point 8¹ of the 'Guideline for determining financial corrections to be made to expenditure co-financed by the Structural Funds for non-compliance with the rules on public procurement'. The amount of the works under the contract (VAT excluded) is BGN 2 416 013 (EUR 1 235 307). The managing authority is requested to apply a financial correction of BGN 483 203 (= 2 416 013 * 25% * 80%) or EUR 247 061.

Member State reply (summary)

According to the member state, the contracting authority has fully complied with the provisions of Article 32(2) of the Bulgarian Law for public procurement. This public procurement law allows for the indication of requirements based on a reference to trademarks in exceptional cases. A case is regarded as exceptional when it is impossible for the subject of the procurement to be described precisely and clearly. The contracting authority considered this case as being exceptional since the four subsystems in question cannot be described in a satisfactory manner by itemising their specific features without the risk of omitting any of the components that ensure compatibility with the overall ████████ system of the Sofia Metro.

Therefore the contracting authority referred to the specific components of the ████████ based systems, but they also made the necessary provisions in order to enable tenderers to propose alternatives. In 'Volume 4b, part 22, paragraph (2)' of the tender dossier for the public procurement contract, the following provision can be found:

'(2) Any reference made in the Contracting Authority's Specifications to any trademarks, products and producers to allow for alternatives which are compatible with the existing systems, equipment and components, and for similar characteristics which ensure performance and quality at least equal to the specification. The Contractor may propose alternative standards for materials or facilities which should be equal to or better in terms of quality than the ones indicated in the specification'.

The text quoted above proves that the contracting authority expressly provided for the possibility for every product included in the specifications to be replaced by an equivalent or better one.

Commission position

The Commission accepts the incentives of the contracting authority to consider this part of the project as an exceptional case as described in Article 32(2) of the Bulgarian Law for public procurement. Based on the available information and the given situation, there is indeed a risk of incompatibility with the overall ████████ system of the Sofia Metro when the features would have been described without reference to the system that is already in place for the already existing part of the Sofia Metro. Furthermore it is clear

¹ Point 8: Insufficient or discriminatory definition of the subject-matter of the contract. Under this point, a 25% of the value of the contract. This amount may be reduced to 10% or 5% depending on seriousness. In line with the principle of proportionality, the correction is not proposed on the whole contract but on the SKADA part. A reduction of the applicable percentage would thus be disproportional.

that the tender dossier for the public procurement contract contained provisions in order to enable tenderers to propose alternatives to the products protected by exclusive rights referred to.

Based on these arguments, the Commission concludes that the ~~XXXXX~~ system as part of the works contract is not in breach of Article 34 of the directive 2004/17/EC which states that "*Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition*" and Article 32 of the Bulgarian Law for the public procurement. Therefore this finding is **closed**.

All projects implemented by the Road Infrastructure Agency

Finding n° 5: Limited time taken for technical evaluation of the offers

For the works contracts, the time taken for the evaluation of the technical part of the proposal (Envelope 2 – Proposal to perform the contract) was very limited according to the minutes of the evaluation committee.

For example, for the Kurdjali – Podkova project, the tender opening session was held on 5 April 2011. Following the examination of the documents submitted by the bidders in the Envelope 1 (Documents for selection) the evaluation committee decided to request several clarifications from bidders. The deadline for submission of clarifications was 17 May 2011. The evaluation committee met on 18 May 2011 to analyse the clarifications. Following this analysis (which could not have happened before the clarifications were submitted), the evaluation committee proceeded to open Envelope 2 (Proposal to perform the contract) of the compliant bids. The session on 18 May 2011 was held from 14:00 to 19:30, as stated in the minutes of the evaluation committee. Five and half hours is considered as insufficient time to check eight complex technical offers.

Action n° 5

The managing authority should ensure that evaluation committees perform the technical evaluation of the bids in sufficient detail and that an adequate period of time is taken for the technical evaluation.

The managing authority is requested to introduce procedures to verify in its management verifications:

- a) That evaluation committees perform the technical evaluation of the bids in sufficient detail;
- b) That sufficient time is being taken by evaluation committees to properly evaluate technical offers.

Member State Reply (summary)

According to the Member State, standard evaluation forms need to be filled in by the evaluation committee for each offer. The time necessary to check the documents enclosed in the envelopes is directly linked with the criterion for evaluation by the contracting authority (e.g. most economically advantageous tender (MEAT), lowest price, etc.). In this case the evaluation criterion was 'lowest price' and, as a result, the technical proposal was not an indicator subject to evaluation by the committee. Therefore

it was sufficient for the committee to check for the presence of the documents as per the standard templates, with the layout form and content as required on the tender dossier, in order to determine the eligibility of the project proposal by the participant.

Furthermore the procedure for performing ex-ante control has been modified in the meanwhile with an amendment to Article 20a of the Article 32 of the Bulgarian Public Procurement Law (SG N° 93 of 2011). For the purposes of obtaining reasonable assurance of the legality of the public procurement procedures financed in full or in part under OP 'Transport', the manual of procedure for implementation and management of OPT (PNUIOPT) states that at the discretion of the Head of the OPT, an observer, a representative of the MA, may be designated to attend the meeting of the evaluation committee (for public procurement procedures performed for contracts financed in full or in part with EU funds, with an estimated value above certain thresholds as determined in the Public Procurement Act, Article 19(2)(22)). The observer monitors the compliance of the evaluation committee assessment with the requirements of the Public Procurement Act. The observer of the managing authority assists in the formulation of the conclusion of the managing authority and their opinion as to the legality of the procedure.

Commission position

The Commission is of the opinion the necessary procedures are in place in order for the managing authority to verify the actions of the evaluation committee. Therefore this finding is **closed**