



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY
Audit
Director

Brussels,
REGIO C2/1/1 D(2013) 2726872

Subject: Final audit report on audit of the Transport Operational Programme
CCI 2007 BG 161 PO 003
Bulgaria – ERDF and Cohesion Fund (2007 – 2013)
Audit mission of 5 – 9 March 2012
Mission no: 2011/BG/REGIO/J2/943/1

Ref.: Your letter 30-05-52/090912 of 3 November 2012 (Ares(2012)1157310)

Your Excellency

I am writing to inform you that the Directorate General Regional Policy has concluded the audit carried out between 5 and 9 March 2012.

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

As no irregular expenditure has been detected by my services, I am pleased to inform you that no financial corrections are to be applied as a result of the audit. 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 closure takes place, in case of documents regarding expenditure and audits on operations referred to in 90(2) of the Regulation.

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Yours faithfully





Lena Andersson Pench

Enclosures: I - Final audit report

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ANNEX I – FINAL AUDIT REPORT

General findings

Finding n°1: Public procurement complaints – Lack of audit trail

The complaints linked to the public procurement procedures were stored separately from the remainder of the procurement documentation for all the tender procedures verified. There is no comprehensive document in the agency that lists all the complaints received for a particular procurement procedure to ensure the completeness of the audit trail.

The complaints are an integral part of the procurement file and should be stored with it. An efficient way of ensuring completeness of the audit trail would be to establish a document listing complaints for each tender procedure.

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

To ensure the completeness of the audit trail in relation to complaints regarding public procurement procedures, the beneficiary should establish a document listing all the documentation regarding complaints for each tender procedure. A copy of all the complaints and related documentation should be stored with the procurement file.

Member State reply

The Road Infrastructure Agency (RIA) accepts the finding and the corresponding recommendation as necessary to ensure the completeness of the audit trail. Follow-up actions will be undertaken to amend and supplement the RIA's Internal Regulation on the organisation and implementation of public procurement procedures by including the requirement to attach copies of the complaints received for each public procurement procedure to the relevant procurement file. Having asked the beneficiary to draw up a list of all of the documentation regarding complaints for each tender procedure, a list of the complaints received for the tender procurement procedures for Trakia Motorway and Maritsa Motorway was submitted to the managing authority of the Transport OP and is also attached to our present letter. The managing authority has also forwarded the instruction to implement the recommendation also for all other projects of the Transport OP.

Commission position

The recommendation has been accepted and adequate remedial actions have been made. The finding is **closed**.

Trakia Motorway project (CCI 2010BG161PR002)

Finding n°2: Elimination of tenderers based on formal reasons

In relation to the works contract for the Lot 4, two out of thirteen tenderers were eliminated because they did not submit conflict of interest declarations for the representatives of the consortium. For one of the tenderers (██████████), the non-submission of these declarations was the only reason for rejection.

Both excluded participants submitted declarations from each of the consortia members but they were nevertheless excluded due to non-submission of a separate declaration for the leader / representative of the consortium. We noted that the tender documentation only required such declarations from the representatives of each consortia member. As the participants were rejected based on a criterion (non-submission of a document) which was not required by the law or by the tender documentation, these rejections were not justified.

We note that the tender procedure remained competitive, with seven out of thirteen bids evaluated. The award criterion was lowest price. It was not possible to determine if the excluded bidders were lower in price than those remaining as, under Bulgarian law, the price offered by the tenderers who were not admitted to the award stage, remains secret because under article of Article 69a of the Bulgarian Law for public procurement (SG 94/08), their price offer letters remain unopened.

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

The rejection of a tenderer described in the finding is considered unjustified. The managing authority should quantify the financial impact of the unjustified rejections. To do so, the envelopes with the price bids of the unjustifiably rejected candidates should be opened. A financial correction should be implemented if there is prejudice to the EU budget resulting from the unjustifiable rejection. The amount of any correction made should be communicated to the Commission.

The final beneficiary should ensure that no unjustified rejections of tenderers will take place in future public procurements.

Member State reply

~~XXXXXXXXXX~~ Consortium was eliminated from the public procurement procedure in accordance with the contracting authority's decision based on Article 69(1)(1) of the Bulgarian Law on Public Procurement (ZOP) as the person representing the consortium failed to submit the two required declarations under Article 47(1)(2) and 47(5) of the ZOP, in compliance with Appendix No 7.1 and Appendix No 7.3 of the tender specifications. This is also stated in the tender evaluation report.

The Road Infrastructure Agency provided an interpretation of the relevant articles of the ZOP to justify the decision of the evaluation committee to reject the tenderers in question.

The Road Infrastructure Agency referred to the Decision No 827/15.10.2010 of the Commission for the Protection of Competition on file No KZK-451/16.06.2010 which supports its reasoning.

The Road Infrastructure Agency indicated other reasons (not raised by the tender evaluation committee) which should also have led to the rejection of the two tenderers rejected because they did not present the relevant declarations signed by the representatives of the consortium but only by the representatives of the members of the consortium.

The Road Infrastructure Agency also stated that an amendment to the ZOP was adopted in July 2010 (State Gazette, issue 52/2010) authorising the commission to forward a statement of findings to the tenderers regarding the admissibility (including omissions) of

the documents submitted by tenderers in envelope No 1. According to the new amended version of Articles 68(7) to (10), the commission shall give tenderers a deadline for submitting missing documents or remedying non-conformities identified in the tender. Only after that deadline has expired will the commission examine the documents in envelope No 1 as to their conformity with the selection criteria. The legislator's aim is to restrict the practice of eliminating tenderers for formal reasons and to create opportunities to implement the principles of competition and equality among tenderers to an even greater extent.

Commission position

The documentation to be submitted in relation to the Article 47 was stated in the "Conditions for participation" section of the tender notice as follows: *"Information and formalities which are necessary to evaluate whether conditions were met: 1) The bidder should comply with the requirements under Articles 46, 47 and 48 of the Public procurement law, which he proves with documents and declarations included in the tender documentation."* The tender documentation includes in annexes 7.1, 7.2 and 7.3 the templates of declarations to be used. The templates in annexes 7.1, 7.2 and 7.3 state that: *"In cases where the bidder is a consortium of several entities, the declaration should be presented by each of the entities forming the consortium."* The requirements under annexes 7.1, 7.2 and 7.3 of the tender dossier indicate that the contracting authority considered the members of the consortium and not the consortium itself as the legal entity which had to prove circumstances (or lack thereof) as required by the Bulgarian Law on Public Procurement.

The tender notice also specifies that *"when signing the contract, the contractor should present the following documents: 1) Documents proving the lack of conditions under Point 10 of the tender documentation (Article 47(1) and (2) of the public procurement law) issued by a competent body or a transcript of a court register or equivalent document of a court or an administrative body issued by a country where the bidder is situated. When the bidder is a consortium, the documents are presented by each of the partners in the consortium."* The tender notice thus does not require submission of the declarations under Articles 47(1) and (2) for the representatives of the consortium.

On the other hand, point 10 refers to grounds for elimination from the tender procedure. It contains a list of elimination ground and documents to be submitted. Point 11 corresponds to Article 47 (4) of the ZOP and clearly refers to the fact that in all other cases, these requirements (to submit the documents) apply to the persons that represent the tenderer. The mention in the templates in annexes 7.1, 7.2 and 7.3 (in case of a consortium, the documents need to be submitted by all partners) needs to be understood as a cumulative requirement, in addition to the requirements in point 11.

On this basis the Commission accepts that the contracting authority in this particular case did not misapply the requirements in the tender dossier by requesting the representatives of all the members of the consortium as well as the representatives of the consortium itself to submit the declarations under Article 47.

Based on the additional information provided by the Member State, a financial correction is no longer deemed necessary.

Nevertheless, in order to avoid misunderstandings in the future, in case a requirement is formulated which goes beyond the requirements of the ZOP, the contracting authority

should clearly formulate that this is an additional requirement, which does not free the bidder from submitting the documents requested under Article 47(4)(6).

The finding is closed.

Finding n°3: Elimination of tenderers based on formal reasons

For the supervision contract for Lot 2, three tenderers – 1) ~~XXXXXXXXXXXX~~, 2) ~~XXXXXXXXXXXX~~ and 3) ~~XXXXXXXXXXXX~~ – were rejected on the basis of not providing information on the 'type of employment contract' for the key experts. The template imposed in the tender dossier for providing information about the key experts did not include a dedicated place to provide this information. We noted that the information on how the template form should be filled was subsequently provided during the questions and answers session.

The three tenderers who did not provide the information on the type of the employment contract were excluded. We note that the tender procedure remained competitive, with five out of eight bids evaluated.

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

We consider that clarification should have been sought by the evaluation committee in order to ensure maximum competition. The rejection of the tenderers described in the finding could have been avoided through clearer clarifications and better designed templates. The managing authority is requested to improve the quality of the tender dossiers to avoid such issues in the future.

Member State reply

The Road Infrastructure Agency accepts the recommendation regarding more clarification for tenderers participating in public procurement procedures.

According to Article 29(1) of the ZOP, up to 10 days prior to the expiry of the deadline for submission of tenders or requests to participate, tenderers can request in writing that the contracting authority provide clarification with regard to the tender specifications. The additional information provided under that article concerning the parameters and conditions for implementation of the contract is binding and the tenderer must comply with it. In this context, the instructions from the contracting authority on how to complete the tender template with regard to information concerning the main experts are obligatory and must be followed by all tenderers.

The tenders of three of the tenderers participating in the supervision procedure for Lot 2, namely ~~XXXXXXXXXXXX~~, ~~XXXXXXXXXXXX~~ and ~~XXXXXXXXXXXX~~, did not comply with the instructions provided by the contracting authority in the FAQs in that they did not provide information on the 'type of labour agreement' to be signed with the main experts. Their tenders were therefore rejected as they did not meet the requirements of the contracting authority.

Commission position

The section 'Technical capabilities' of the tender notice clearly specified that "a list of the persons (...) should include name, education, professional experience and qualification and the position which the person will hold for the contract, information about the type of contract relationship of these persons with the bidder (labour, civil or other contract) and as applicable also information about work permit and visa." The requirement was thus explicitly mentioned in the tender notice.

In addition, the beneficiary accepted the recommendation to provide clearer clarifications in future tender procedures to avoid unnecessary rejections of the participants.

The finding is closed.

Finding n°4: Requests for clarifications

Article 68(8) of the Bulgarian Law on public procurement (SG 94/08) allows a request for clarification to be sent to tenderers. Clarifications sent by the contracting authority were, in several procedures, not formulated in a clear way and the actual problem with the documents submitted was not raised. Subsequently, the tenderer provided a general reply which did not address the actual problem. The reply was not deemed appropriate by the tender evaluation committee and the tenderer was rejected.

An example of such approach was identified in the procurement of works for Lot 2 where the consortium '~~XXXXXXXXXXXX~~' submitted an offer where the number of days for stage 15 of the works differed in two separate parts of the documentation submitted. Furthermore, there was a discrepancy between the length of a line in the flowchart for the works progress and the number of days for that particular stage. The request for clarification sent by the evaluation committee stated: 'There is a discrepancy between the stages as per the technical offer and the flowchart attached to the offer.' There was therefore no clear reference to the particular problem in the request for clarification.

Another example of such approach was identified in the procurement of works for Lot 4 where a request for clarification was sent to the consortium '~~XXXXXXXXXXXX~~'. The contracting authority accepted only part of the references for previous works but failed to explain the problem sufficiently in the request for clarification.

Action n°4 (Responsible body: Managing authority; Deadline: 60 days; Priority: High)

The contracting authority should ensure that it better formulates its requests for clarification in order to obtain the precise information it requires. This should help to ensure that competition is not limited by unnecessary exclusions of tenderers.

Member State reply

The RIA accepts the recommendation regarding the requests for clarification pursuant to Article 68(8) of the ZOP. In order to prevent the unnecessary exclusions and to ensure competition between tenderers, it will comply with the recommendation, which requires the contracting authority to ensure that it formulates better its requests to tenderers for clarification.

In addition, the managing authority has in its letters to the beneficiary explicitly issued recommendations for making greater use of the possibilities offered by Article 68(7) of the ZOP.

Commission position

The beneficiary accepted the recommendation to be clear and specific while requesting clarifications from the tenderers in future tender procedures to avoid unnecessary rejections of the participants. The finding is **closed**.

Finding n°5: Compulsory membership in the Bulgarian chamber of constructors

All the successful tenderers for Trakia Motorway were required to become members of the Bulgarian chamber of constructors in order to be eligible to sign the works contract. Membership in an equivalent body in other EU Member States was not allowed. This may restrict the possibility of the entities from the rest of the EU (who comply with their national regulation and are members of the relevant bodies in other Member States) to participate and can lead to discriminatory/unequal treatment.

The final beneficiary stated that the requirement stems from the Bulgarian legislation. They also stated that this requirement does not discriminate against foreign bidders as the certificate can be obtained from the responsible authorities within two weeks while the deadline for signature of the contract is one month.

Action n°5 (Responsible body: Managing authority; Deadline: 60 days; Priority: Medium)

The final beneficiary is requested to provide a detailed description of the procedure to register with the chamber of constructors including explanations of the time and costs involved.

Member State reply

In this specific case, the contracting authority has included a requirement for all successful tenderers for Trakia Motorway to register with the Bulgarian Chamber of Constructors to enable them to sign the construction works contract. As of 23 February 2010, inclusion in the register of another EU Member State has been equivalent to registering with the Bulgarian register. Prior to that date, which is the relevant period in this case, a special legislative act was in effect, namely the Chamber of Constructors Act (ZKS). Article 3(2) of the ZKS requires contractors for specific construction works to be registered with the Central Professional Register of Constructors. Consequently, the contracting authority is obliged to include the requirement to register with the Bulgarian Chamber of Constructors as a requirement for the procedure. The contracting authority does not provide information about the specific content of the requirement as it is an imperative legal rule. The requirement to register with the national register is not discriminatory and does not restrict foreign tenderers as it must be met by the successful tenderer prior to signing the contract. In this context, the requirement for the successful tenderer to be registered with the Bulgarian Chamber of Constructors register does not put tenderers that are not registered or any foreign tenderers at a disadvantage as it is not a selection criterion or requirement.

Commission position

As specified by the Member State authorities, the requirement to register with the national must only be met by the successful tenderer prior to signing the contract. As such, it was not a selection criterion or requirement and did not put any tenderer at disadvantage. We also note that as of 23 February 2010 the procedure has been further improved as the inclusion in the register of another EU Member State is deemed equivalent to registering with the Bulgarian register. The finding is **closed**.

Maritza Motorway project (CCI 2011BG161PR004)

Finding n°6: Elimination of tenderers based on formal reasons

In relation to the works contract for Lot 2, tenderers were rejected because their bid did not indicate the deadline for completion in the defined section of the annex 5 of the technical offer¹. For these tenderers, the deadline was specified in other parts of documentation submitted, including the graphic timeline and in the narrative regarding the various stages of completion in the annex 5. Article 68(8) of the Bulgarian Law for the public procurement (SG 94/08) allows a request for clarification to be sent to tenderers.

As the deadline for completion was indicated elsewhere in the tender offers, the rejection of tenderers on this basis is unjustified. If the evaluation committee was in any doubt, it should have sought clarification from these tenderers. This would not have involved the submission of new information as the completion dates were already included in the documentation submitted by the tenderers.

We note that the tender procedure remained competitive, with ten out of fourteen bids evaluated. It was not possible to determine if the excluded bidders were lower in price than those remaining as, under Bulgarian law, the price offered by the tenderers who were not admitted to the award stage, remains secret because under article of Article 69a of the Bulgarian Law for the public procurement (SG 94/08), their price offer letters remain unopened.

Action n°6 (Responsible body: Managing authority; Deadline: 60 days; Priority: High)

The rejection of the tenderers described in the finding is considered unjustified. The managing authority should quantify the financial impact of the unjustified rejections. To do so, the envelopes with the price bid of the unjustifiably rejected candidates should be opened. A financial correction should be implemented if there is prejudice to the EU budget resulting from the unjustified rejection. The amount of any correction made should be communicated to the Commission.

The final beneficiary should ensure that no unjustified rejections of tenderers will take place in future public procurements.

¹ The reference to Lot 2 was mentioned in the draft report due to a technical mistake. There was one such tenderer for Lot 2 (██████████). There were two such tenderers for Lot 1 (██████████ and ██████████).

Member State reply

The company ██████████ was eliminated for a number of reasons. In envelope No 2 of the technical tender (Proposed implementation of the contract), for instance, the deadline was filled in for the implementation of the contract in accordance with the attached Template No 5.

Additional reasons that led to the company's elimination include the fact that Appendix No 5, Point II.4 of the technical tender was not completed in accordance with the template provided in the tender specifications: the types of works were not described for each individual stage, nor was their location given. The tender just states 'Works', without the detailed description, quantity or location required by Template No 5.

In Appendix No 5.1, Implementation Schedule (Linear), the tenderer included Information and Publicity Measures as Stage 18 of the implementation process. The submitted schedule includes a column entitled Utilisation of funds (%) of the value of the construction works and the figure given for the Information and Publicity Measures is 0.05% (zero point zero five percent) of the total value of the contract. In accordance with the requirements of Point 27.11.1 of the tender specifications, the contracting authority has projected that a specific stage must be envisaged for the implementation of the information and publicity measures under Chapter XVII of the public procurement contract to the amount of exactly BGN 100 000 (one hundred thousand) excluding VAT.

The tender specifications include a clarification in which the contracting authority clarified that 'for the stage regarding the implementation of the information and publicity measures under Chapter XVII of the public procurement contract in Appendix No 5.1, only the column specifying the type of activity (Type of Construction Works) should be completed. For this stage the column must not be completed with a percentage of the value of the works'.

In light of the above, the evaluation committee decided that specifying a percentage for the information and publicity measures, which amount is fixed, namely BGN 100 000, makes it possible to calculate the tenderer's price of that stage represents 0.05% of the total price of the contract and the contract price was thus revealed. In this context, the committee considers that the tenderer's tender does not comply with Article 57(2)(3) of the ZOP as the final price for the contract can be calculated when examining the documents included in envelope No 2, which is inadmissible and contradicts the principles of Article 2 of the ZOP.

Therefore, the committee decided that the tender did not comply with the requirements laid down by the contracting authority in the notice and the tender specifications and proposed eliminating the tenderer from the procedure on the grounds of Article 69(1)(3) of the ZOP without opening its financial tender. All of the additional reasons for eliminating the tenderer were outlined in the minutes of the evaluation committee's meetings. Copies of all of the minutes are attached (Attachment No 4).

Commission position

The additional information provided by the managing authority includes other reasons for the rejection of the tenderer ██████████ than the non-inclusion of the deadline for implementation in the defined section of the annex 5. The rejection of the tenderer is thus

no longer considered unjustified and no financial correction is deemed necessary by the Commission in this respect in relation to Lot 2.

Although the draft report only referred to the Lot 2 of the project, a rejection as described in the finding was also made for two tenderers in the works tender for Lot 1, namely ~~Amnition Building Services Ltd and Bannan Grand Services and Consortium~~ ~~Rebuilding Ltd~~. For these two tenderers, the non-specification of the deadline in a defined section of the bid (while clearly indicated in other parts of the bid) was the only reason for rejection.

The required information was indicated in the other sections of the submissions of the rejected bidders (linear implementation schedule and draft contract) and available to the contracting authority. Nevertheless, it can be also agreed with the contracting authority that the two bidders who did not indicate this information in the Annex 5 (technical offer) breached the requirements of the tender specification, namely by not submitting "Deadline for implementation of the works - indicated in the technical offer (Annex 5)" as specifically requested in point 27.10. of the tender dossier.

Although there was no breach of the public procurement Directives in this case, in order to ensure the maximum level of competition and value for money the contracting authority should have considered requesting clarification of the offers from the two rejected tenderers for what amounted to a formal breach of the tender dossier requirements.

The managing authority is requested to ensure that in future tender procedures clarifications are requested in cases of relatively minor formal non-compliance with the requirements of the tender dossier to ensure the maximum level of competition and effective use of EU funds.

The finding is closed.