

ANNEX I – Commission’s observations and conclusions

Finding related to the audit methodology and general approach of the audit authority – Finding n°1

Audit findings

During the audit the checklists used by the audit authority for the audit of tendering procedures were also reviewed. The Commission audit team found that this checklist covered all the relevant aspects related to the compliance with national and Community provisions and was thoroughly completed for each of the audited tenders.

Nevertheless, the Commission auditors consider that the checklist could be improved and it should also include some additional aspects related to the restrictive nature of selection criteria and to the appropriateness of the award criteria and the scoring method applied.

Arguments by the Slovenian authorities

The Audit Authority in its reply explained that the aspects mentioned in the Commission's draft audit report are already covered by the checklist applied for the audit of tendering procedures. Nevertheless, the Audit Authority did not object to finding and committed itself to improve the checklist as recommended.

View of the Commission

The Commission welcomes the effort of the audit authority for the improvement of the checklist and considers the finding **closed**.

Restrictive selection criteria – Compulsory membership in the Slovenian Chamber of Engineers at the tender submission stage – finding n°2

Projects and contracts affected

1. **OP13.3.1.1.02.0001 Reconstruction and electrification of railway line Pragersko-Hodos phase 1**

Contract: works contract – reconstruction – section 2

2. **OP13.3.1.1.01.0001 Modernization of railway line between Divaca-Koper**

Contract: works contract – reconstruction – stage B and C

Audit findings

1. project - OP13.3.1.1.02.0001

The beneficiary launched a Community-wide open procedure for the reconstruction, electrification and upgrading of a railway line (160 km) as well as modernisation of level crossings and implementing underpasses at the affected railway stations. The tender notice was published in the Official Journal of the European Union on 31

December 2010. The contract was to be awarded for the tenderer offering the lowest price.

In the tender documentation it was set out that the engineers to be provided for the execution of works were required to be registered by the relevant (i.e. the Slovenian) Chamber of Engineers, as a condition for the tenderers to prove technical and professional ability. The requirement was to be fulfilled at the time of submission of offers. Acceptance of equal qualifications / registration obtained in the country of establishment of the expert and acceptance of proof of request for recognition of qualification being submitted to the Slovenian authorities were not stated in the tender documentation.

During the first evaluation round there were 2 valid bids and four other bids were excluded. One of the excluded bidders offering the lowest price was excluded for not fulfilling the above mentioned professional suitability criteria for obligatory registration. The foreign engineer chosen by the bidder for the construction site manager position did not fulfill the requirements of professional suitability as he was not registered in the Slovenian Chamber of Engineers until the bid submission deadline.

The tenderer submitting the tender offer with the lowest price appealed against the contracting authority's decision on 25 February 2011 and requested a review due to the breach of principles of economy and efficiency and the equal treatment of tenderers. This appeal was rejected by the contracting authority by decision of 21 March 2011.

In the end of the procurement procedure the tender was awarded to SZ-ZGP Ljubljana d.d. in the amount of EUR 44,931,544.

2. project - OP13.3.1.1.01.0001 stage A, B and C

As regards the contract covering works for the modernization of the existing railway line Divaca-Koper (stages B and C) the Commission audit team found the same requirement related to the obligatory membership in the Slovenian chamber of engineers included in the tender documentation. At the end of the procurement procedure the tender was awarded to the consortium SZ-Z GP in the amount of EUR 40,795,400 without VAT for stages B and C.

It has to be noted that subsequent to the audit an investigation was carried out based on publicly available procurement notices. This revealed that the selection criterion related to the engineer registration was included in some other works contracts co-financed by the structural funds.

In the draft report the Commission presented a detailed legal analysis and concluded that the requirement concerning the proof of registration in the Slovenian Chamber of Engineers requested at the moment of submission of the offer is considered discriminatory, as it discriminates against providers established in other member states or providers using experts established in other member states. Hence, the above mentioned practice represent an infringement of the provisions of Articles 44(2), 46 and 48(2)(e) of Directive 2004/18/EC.

Arguments by the Slovenian authorities

A) Previous audit report of the Commission accepting the use of the selection criterion in question

The national authorities claimed that Commission auditors already presented their position regarding the restrictive selection criteria, namely under the audit of public procurements procedures, mission No. 2006/SI/REGIO/I3/208/1.

The Commission draft audit report of 12 July 2006 (Annex No. 2) under point 6.3 Public procurement of ERDF instruments, subchapter “Use of restrictive selection criteria”, presents Commission auditors’ finding in relation to the requirement on the registration of the responsible expert in the Slovenian Chamber of Engineers.

In relation to the abovementioned audit of public procurement procedures the Commission notified the member state on 24 October 2007 that the audit of public procurement procedures is concluded and that the Commission auditors did not detect any irregular expenditure and accept the explanation of the national authorities, therefore, no financial corrections are required.

As regards this specific selection criterion (finding n°9 Use of restrictive selection criteria) as the Commission final position was the following: “The answer provided by the Member State is accepted. The point is considered closed.”

In light of the fact that the findings on the restrictive criteria concerning the registration of responsible experts in the Slovenian Chamber of Engineers at the tender submission stage were already highlighted by the Commission auditors in the abovementioned audit, and taking account of the conclusion that no irregularity was detected, as well as in light of the fact that the provisions of the directive on public procurement and the directive on the recognition of professional qualifications have not been amended from the time of the abovementioned audit and the Commission audit in progress, the national authorities believe that the Commissions requirement to take immediate actions with financial corrections is unfounded and inconsistent.

B) Requirement was accepted by national judicial bodies

The national authorities also underlined that the National Review Commission, acting as a separate, autonomous and independent public authority of the Republic of Slovenia, which decides on the legality of tendering procedures at all the stages of the public procurement procedures and which is entrusted with carrying out the most important actions in the field of legal protection, especially the repeal of all illegal actions of the contracting authority and sanctions in the field of public procurement, states in its decision No. 018-330/2013 that the requirement of the membership of experts in the Slovenian Chamber of Engineers is not discriminatory.

C) Selection criteria are to be fulfilled until the tender submission date

The national authorities argue that selection criteria, including the criterion contested by the Commission, are to be fulfilled by the deadline for submitting the tender offers.

In general the national authorities explained that in accordance with EU provisions and national public procurement legislation, the contracting authority has to indicate technical specifications, terms and conditions of qualification, award criteria and any other requirements that must be met by the tenderer in the contract notice or tender documentation. The fulfilment of these conditions is verified by the contracting authority in the public procurement procedure, whereby the contract is awarded to the tenderer which has submitted a timely, correct, appropriate and acceptable tender. With the expiry of the standstill period and the possibility of exercising ordinary remedies the contract award decision becomes final and thus cannot be changed or substituted by a new one by the contracting authority.

Considering the above, it is crucial for the efficiency and effectiveness of public procurement and, indirectly, for the efficiency and effectiveness of EU funds absorption that the contracting authority verifies the suitability or completeness of the tender (timeliness, correctness, appropriateness, acceptability) already during the public procurement procedure. To this end, the contracting authority includes into the tender documentation the cut-off date by which tenderers must comply with the requirements and criteria relating to the contract.

This position that the tenderers should fulfil the criteria to participate in the public procurement procedure by the deadline for the submission of tender offers, was confirmed by numerous decisions of the National Review Committee and is also understood from letter of the European Commission Directorate-General for Internal Market (DG MARKT) and Services of 8 April 2014 (Ref.Ares(2014)1105443). In its reply DG MARKT holds the position that the tenderers should provide evidence by the deadline for the submission of the tender offers and not by the actual beginning of the provision of services.

The national authorities also refer to the position of the Court of Justice of the European Union in case C-336/12 (*Ministeriet for Forskning, Innovation og Videregaende Uddannelser vs Manova A/S*), which states that, tender modifications and supplements, for example the subsequent submission of a certificate of professional competence, are permissible. However, they need to show the state no later than on the day of the expiry of the time limit for submission of tenders and should not be such that the supplemented or modified tender would be considered as new. Therefore, the time limit for submission of tenders is considered the cut-off date by which tenderers must comply with the requirements relating to the contract.

D) The compliance of the recognition process with the applicable Community provisions

The national authorities presented arguments to demonstrate that the process of the recognition of professional qualifications is compliant with the provisions of the Directive 2005/36/EC.

The national authorities argue that national and EU legislation sets out the minimum time limit of 40 days for the submission of tender offers. In practice, in Slovenia the procedure for the recognition of professional qualifications for the responsible manager of works is normally completed within 30 days, so tenderers had enough time to obtain relevant supporting documents on professional qualifications and to attach them to the tender before the expiry of the time limit for submission of tenders.

View of the Commission

A) Previous audit report of the Commission accepting the use of the selection criterion in question

The Commission considers that the selection criterion approved in the previous audit of the Commission in 2007 cannot be considered the same as the one contested by the recent audit carried out in 2013.

The selection criterion contested by the Commission auditors in 2006 set out that the tenderer must employ at least one person who fulfils the criteria for the responsible head of works pursuant the Construction Engineering Act (ZGO-1) or another equivalent rule. Further to the enquiry of the Commission the national authorities provided information that Article 78 of the above cited act (ZGO-1) allows that a person may act as a responsible work manager in the Republic of Slovenia if he demonstrates that in the State of which he is a citizen he fulfils the conditions of responsible works manager. The national authorities also clarified in their reply that if a foreign person wishes to act as an authorized engineer in the Republic of Slovenia they should be members of a suitable professional chamber, which can also be located in another member state.

In summary, the information provided by the national authorities in relation to the previous audit implied that the requirement in question could be fulfilled by a person holding a suitable professional certificate issued by a competent body in any member state of the European Union without any further registration process in the Republic of Slovenia. In addition, the requirement in question was further widened by adding the acceptance of equivalent rules formulated in the following way "pursuant the Construction Engineering Act (ZGO-1) or another equivalent rule".

On this basis, taking into account that foreign experts holding suitable certificates were accepted without any further registration in Slovenia and also taking into account the fact that equivalent rules were also allowed the Commission accepted the explanation of the national authorities.

However, it should be underlined that the requirement contested during the Commission audit of 2013 is not equivalent to the above requirement accepted in 2007 since the former included the obligatory registration in the relevant (Slovenian) chamber of engineers.

The requirement accepted in 2007 by the Commission is considered to be compliant with the relevant Community provisions since the cited national act (ZGO-1) at that time did not impose additional requirements (such as registration in Slovenia) on persons holding equivalent foreign certificates.

In conclusion, as the requirements contested during the Commission audits in 2006 and in 2013 were not the same and therefore Commission's former approval of 2007 is not considered to be relevant for the assessment of the current finding.

Further to this point the Commission services noted that the relevant section of the Construction act was amended and the cited Article n°78 and Article n°126(4) were deleted on 28 December 2009. These provisions made possible that foreign experts

can act as responsible works managers without registration in the Slovenian chamber of Engineers. This change in the law implies that as of the date when the cited amendment entered into force (12 January 2010), a selection criterion requiring compliance with the Slovenian Construction act, at the tender submission date, is also considered discriminatory. It is to be noted that this modification was not only relevant for the responsible work managers but also for project designers and construction supervisors.

B) Requirement was accepted by national judicial bodies

The national authorities are reminded that the Commission is responsible for qualifying irregularities in compliance with the applicable Community legal provisions and in this role the Commission is not bound by the judgments of the national courts.

C) Selection criteria are to be fulfilled until the tender submission date

The Commission services consider that the obligation to enrol in the Slovenian Chamber of Engineers is contrary to Article 46 of Directive 2004/18/EC, as this provision allows tenderers to present documents to prove the enrolment on one of the professional or trade registers or to provide a declaration on oath or a certificate as prescribed in the Member State of establishment, not in the Member State of the contracting authority.

The Commission services consider that this obligation is also contrary to Article 48(2)(e) of the Directive 2004/18/EC in relation to principles of non-discrimination and equal treatment, as stipulated by Article 2 of the Directive 2004/18/EC. This selection criterion, concerning the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work concerns the personnel presented in the tender and could lead to the exclusion of the tenderer, if the indicated person is not enrolled in the Slovenian Chamber of Engineers.

Article 48(2) of Directive 2004/18/EC requires the submission of evidence of qualifications, not evidence of the recognitions of qualifications. The latter is not needed due to mutual recognition of professional qualifications (Directive 2005/36/EC). For participation in a procurement procedure or a design contest, it is not the recognition of the particular qualification but the "evidence of a particular qualification" which is required by this Directive. For those experts already established in Slovenia, evidence covers authorisation to exercise the profession in Slovenia and for those established abroad, evidence means all documents required to prove authorisation in their home Member States.

Concerning the case C-336/12, *Manova*, the Commission services consider, as a preliminary question, that this judgement concerns only tender clarifications and not tender modifications, as indicated by the national authorities. In any case, it is clear that tenderers must fulfil the selection criteria by the deadline for the submission of tender offers. However, according to Articles 46 and 48(2)(e) of the Directive 2004/18/EC, tenderers must fulfil this requirement by a certificate or any equivalent documentation, which proves that they have the necessary qualification and expertise

by this deadline. This includes documents or certificates as prescribed in their Member State of establishment, not just those issued by Slovenian entities. The given foreign expert demonstrates that he/she is competent enough when he/she obtained the applicable national certificate and not when this certificate is recognised by the Slovenian authorities.

Therefore, the Commission services maintain its original position that the technical and professional ability of the tenderer, in line with Articles 44(2), 46 48(2)(e) of the Directive 2004/18/EC, should be assessed on the basis of documents required to prove authorisation in their home Member States and not on the basis of the recognition of the latter authorisation in the Republic of Slovenia.

D) Compliance of the recognition process with the applicable Community provisions

The Slovenian authorities consider that Directive 2005/36/EC applies to this situation. It must be noted that this Directive, and namely, its Article 5(1), 6(a) and 7 (1) and (2) allow only for automatic temporary registration with or for pro forma membership of such a professional organisation or body, provided that such registration or membership does not delay or complicate in any way the provision of services and does not entail any additional costs for the service provider.

In any case, the Commission services underlines that this 30 days administrative deadline is not permitted by the Directive 2005/36/EC. In any case, *quod non*, this deadline can be dissuasive towards tenderers relying on foreign professionals as they would need to launch the registration process in the Slovenian chamber of engineers shortly after the initial publication of the tender. Such deadline for registration or membership could delay or complicate in any way the provision of services, as companies from other EU Member States would have very limited number of working days available to establish their team of experts and collect all the required documentation. This led in a number of cases to the exclusion of these tenderers. In addition, if some documents are missing or not adequate the deadline for the Slovenian Chamber of Engineers can be prolonged over 30 days.

Under those conditions, the Commission services consider that this Directive does not constitute a legal basis for obliging service-providers from other Member States to be registered in a national register as a condition to present a tender. The Commission services also note that in case of some procedures the deadline can be shorter than 40 days (Articles 38(4) to (6) of Directive 2004/18/EC) which would further limit the availability of time for the registration or render it impossible to respect for companies from other EU Member States.

Conclusion

The Commission maintains its original assessment that the requirement concerning the proof of registration in the Slovenian Chamber of Engineers requested at the moment of submission of the offer is discriminatory, as it discriminates against providers established in other member states or providers using experts established in other member states. Hence, the above mentioned practice represent an infringement of the provisions of Articles 44(2), 46 and 48(2)(e) of Directive 2004/18/EC.

The Commission identified the following cases which are considered to be discriminatory:

- In the tender notice / documentation it is explicitly required that the expert concerned is registered in the Slovenian Chamber of Engineers at the tender submission date.
- In the tender notice / documentation the expert concerned is required to demonstrate at the tender submission date that he/she can pursue his/her activity in line with national Construction act (ZGO-1). As explained under point A) the latter act required the registration in the Slovenian Chamber of Engineers as of 12 January 2010 for construction managers, construction supervisors and project designers.

As a result the national authorities are requested to carry out the following corrective actions:

- a) National authorities should take immediate corrective measures to discontinue the practice described above and provide adequate guidance to contracting authorities. The managing authority should amend its management verification procedures in the area of public procurement to ensure that the aspects presented in finding n°2 are covered in the future.
- b) Due to the infringement of the provisions of Articles 44(2), 46 and 48(2)(e) of Directive 2004/18/EC a 5% flat rate financial correction is to be applied to the value of the contract, as per rule n°9 of the applicable Commission Guidelines¹. This financial correction is to be applied on the past expenditure incurred and on future expenditure to be incurred in relation to the contract.
- c) Due to the fact that this requirement seems to have been systematically used for construction contracts, the national authorities are requested to carry out an analysis to identify all the CF / ERDF co-financed contracts for which similar restrictive selection criteria were applied. This analysis should identify the tender procedures where the above mentioned two cases of discriminatory requirements were included in the tender documentation.

It is to be noted that the Commission does not consider the registration requirement "in the relevant Chamber" without actually naming the Slovenian Chamber of Engineers as discriminatory as it would formally allow the acceptance of registration issued by other foreign competent bodies. On this basis no correction is proposed for one of the audited rail works contracts (OP13.3.1.1.02.0001 - Modernization of railway line between Divaca-Koper– reconstruction – stage B and C).

However, for the second rail construction contract audited (OP13.3.1.1.02.0001 - Reconstruction and electrification of railway line Pragersko-Hodos phase 1 – reconstruction – section 2) a tenderer nominated a foreign engineer for the

¹ Commission Decision on Guidelines for determining financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement of 19 December 2013 - C(2013) 9527 – rule n°9: Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents

construction site manager position who held a foreign professional certificate. This certificate was not accepted by the contracting authority and having failed to provide an equivalent Slovenian certificate the tenderer was excluded. On the basis of this case, it appears that even if the tender notice formally allowed the acceptance of equivalent foreign certificate in reality it was not the case. Therefore, the national authorities are also requested to review those tender procedures where registration "in the relevant Chamber" was required. Cases when tenderers presented equivalent foreign certificates and these certificates were not accepted by the contracting authority and resulted in the exclusion of the tenderer from the tendering process should also be identified.

The analysis to be performed for the programming period 2007 - 2013 should take into account contracts falling under the provisions of the public procurement Directives 2004/18/EC and 2004/17/EC. The results of this analysis should be conveyed to the Commission in reply to this report.

d) The Commission proposes corrective measures, including appropriate financial corrections, in compliance with Article 99 of Regulation (EC) No 1083/2006, similar to those described under finding n°2 above for all the contracts with discriminatory requirements identified via the above analysis explained under point c).

e) The audit authority is requested to provide the Commission with an audit opinion and report on the implementation of the actions described under paragraphs a) to d).

f) Within the context of future Annual Control Reports, the audit authority is requested to provide the Commission with a summary of the measures taken in the particular reporting year to implement the financial corrections.

g) In line with provisions of Article 92 of Regulation (EC) No 1083/2006, the Commission reserves the right to suspend payments for all affected programmes/priority axes until the member state takes the necessary corrective actions and to apply the financial corrections in compliance with the provisions of the Article 99 of Regulation (EC) No 1083/2006.

In case of an agreement, the Member State may reuse the Community funds concerned in conformity with the second subparagraph of Article 98(2) and 98(3) of Regulation (EC) No 1083/2006.

h) The audit authority also requested to improve its audit methodology so that it can detect deficiencies related to similar restrictive selection criteria and can propose the necessary corrective actions.

Inappropriate scoring method applied for the award criteria - Finding n°3

Project: OP13.1.2.5.01.0001 – Construction and installation of equipment in the new Faculty of Medicine of Maribor University

Contract: Works contract - Building of the Faculty of Medicine

Finding

The beneficiary, the University of Maribor published a tender notice for the construction of the new Faculty of Medicine in the Official Journal of the European Union on 24 September 2009. The tender procedure applied was a restricted procedure. 9 expressions of interest were submitted, 6 thereof were invited to the second phase of the procedure. Five tender applications were submitted in the second stage. The contract was eventually awarded to Begrad d.d. for the amount of EUR 29,096,804.

The auditors observed that the scoring method applied for the different award criteria completely neutralized the effect of price up to the estimated price (EUR 33.8M). This meant that any price offered below the estimated price received the same score (the maximum 60 points). Thus this artificial smoothing of points voided the price competition.

All of the 5 tenderers invited in the second round of the procedure offered a price below the estimate, thus received the maximum 60 points. The offered prices ranged between EUR 21 million and 33 million, notwithstanding these prices received the same points.

Discrimination and unequal treatment of the tenderers

On one hand, Commission services consider that the *principle of equal treatment* is violated. All bids below a specific price (estimate) receive the same amount of points. This means that a supplier offering a better price gets the same amount of points as a supplier proposing a higher price. Therefore, there is unequal treatment for those suppliers who decided to decrease their margins and make an additional effort in order to win the contract, because this additional effort is not recognised and those less expensive bids are considered the same as other more expensive ones.

On the other hand, the applied method results in unequal treatment as it discriminates against more competitive economic operators. Although a low bid will achieve the maximum amount of points, it will not be fairly evaluated concerning its price compared to some other bids offering a higher price. Such nonlinear criterion may constitute indirect discrimination, since in practice, it could place at disadvantage operators from other Member States, who, as they have different cost structures, may benefit from significant economies of scale or who cut their profit margins in order to enter the market in question more effectively.

Furthermore, in the present case, the award of the contract is not made to the *most economically advantageous tender*. When the contracting authority decides to award a contract to the most economically advantageous tender, it has to, under previously established criteria, evaluate the bids to determine which one offers the best quality/price. This process is not possible if the prices offered by the tenders are "filtered" through a mathematical model by the contracting authority according to which the price is not taken into account in a considerable range of prices.

Non-respect of the principles of sound financial management

The fact the tenderer with significantly higher price could have won the tender results from the scoring method, which seriously distorts the scores awarded for the price. *De facto*, the application of this scoring function resulted in the tender being awarded principally on the basis of the award criteria for the certain guarantees. Even though these award criteria had 40% nominal weight, they were the decisive factors and they outweighed the scores awarded for significantly lower offers. The use of an award criterion where offering a lower price has no impact on the points received is a clear violation of the principle of sound financial management.

On this basis, the Commission services conclude that the principles of the sound financial management as provided for in Article 14 (1) of Regulation 1083/2006/EC were not respected.

Conclusion

Concerning the scoring method used in the present case, Commission services consider that this is contrary to Article 2 of Directive 2004/18/EC, since it does not allow equal treatment of bidders. It prejudices lower priced bids compared to the others, and is contrary to Article 53 (1) (a) of Directive 2004/18/EC, as it does not allow for the award of the contract to the "most advantageous tender".

Furthermore, the award criterion 'price' was underestimated which resulted in that a tenderer offering significantly higher price won the contract. Therefore, the Commission services consider that the award of the contract was contrary the principles of the sound financial management as provided for in Article 14 (1) of Regulation 1083/2006/EC.

However the Commission services acknowledge that there is no direct financial impact of the scoring methodology in this matter, as in a subsequent litigation the initially awarded company was excluded and the contract was stipulated with the company presenting the cheaper offer.

Further to this point the Commission services underline that the scoring system applied is a serious violation of the Directive 2004/18/EC even taking into account the fact that this did not have any effect on the outcome of the tendering procedure and therefore it is justified to impose a financial correction. This was confirmed by the case C-199/03 (Ireland vs. Commission) in which the Court rules that "even irregularities which do not have a specific financial impact may be seriously prejudicial to the financial interests of the Union and to compliance with Community law and for that reason justify the application of financial corrections on the part of the Commission". .

Arguments by the Slovenian authorities

In the reply of the national authorities it was explained that during the audit of the project the Audit Authority detected that the scoring methodology, applied by the beneficiary in determining the most economically advantageous offer, is inappropriate. Due to the fact that this formula did not have any impact on the final award of the contract as it was awarded to the only tenderer with a complete tender application, the audit report did not draw attention to this fact.

The Audit Authority also referred to the Commission audit report, which also acknowledged that the scoring methodology did not have any direct financial impact.

As regards the analogy with the judgement of the Court of Justice of the European Union (Court) and in the Case C-199/03 Ireland versus the Commission of the European Communities the Audit Authority considers that is not comparable and cannot serve as a precedence for the operation at hand, as:

The judgement of the Court, to which the Commission auditors refer, pertains to the use of funds in the framework of three operational programmes over a course of several years and the audit of which also detected systemic irregularities. In the case of the operation, which is the subject of the Commission auditors' draft report, only one irregularity under the public procurement was detected for only one operation.

The judgement of the Court refers to irregularities "which do not have a specific financial impact". In the case of the operation under consideration, the financial impact is clearly identified and equals zero, as also established by the Commission auditors with the Commission services acknowledging that "there is no financial impact of the scoring methodology in this matter".

Furthermore, in its audit the Audit Authority detected irregularities in relation to amending the subject matter of the contract and therefore proposed to the intermediate body to apply a 25% flat rate financial correction to the value of the concluded supplementary contract. Thus, the Audit Authority believes this eliminates the risk of irregular use of funds.

In line with the abovementioned, the Audit Authority believes that an additional flat rate financial correction in the amount of EUR 1,725,583 including the already proposed financial correction would be disproportionate to the severity of the detected irregularity.

View of the Commission

The Commission reiterates its original assessment that the applied scoring method is considered to be the serious breach of the relevant Community public procurement provisions, namely Article 2 of Directive 2004/18/EC, since it does not allow equal treatment of bidders and Article 53 (1) (a) of the said Directive as it does not allow for the award of the contract to the "most advantageous tender".

Furthermore, the Commission services consider that the award of the contract was contrary the principles of the sound financial management as provided for in Article 14 (1) of Regulation 1083/2006/EC.

Further to the issue, it is to be underlined that the irregularity identified by the Commission is considered to be a serious breach and not a formal non-compliance as presented by the national authorities. The range of the prices, in which no additional points were awarded for a more advantageous price, was very wide between EUR 21 million and EUR 33 million. In addition, this range was well overlapping with the range of prices where bids were submitted (5 bids received under EUR 33M).

Therefore, it cannot be claimed that erroneous part of the price function only served to neutralize abnormally low bids as all the bids received were falling into this part.

In addition, the pricing methods seems to be contrary to the recent ruling of the European Court of Justice (T 402/06 and T2/07 – Spain vs. Commission) which set out that if all other pertinent award criteria are equal, the contract should be awarded to the tenderer offering the lowest price. Due to the flat price curve this condition could not have been met for the current tender in the wide range of the prices.

The national authorities are reminded that the above factors, and specifically due to the fact that a more advantageous price was not awarded higher points in the evaluation, could have actually influenced the prices offered by the tenderers.

As explained in the report the scoring method applied could have dissuaded potential tenderers which might have had the possibility to implement the contract at lower prices but refrained from submitting an offer as this price advantage was not taken into account. Or alternatively, the tenderers which submitted an offer could have submitted a lower bid if the price competition had been duly taken into account.

In conclusion, the Commission concludes that the scoring method applied breaches seriously the applicable Community public procurement rules. The scoring method as such did not have a direct financial impact as there was only one valid tenderer in the end of the process. However, this scoring method could have had an indirect financial impact due to its dissuasive character and it could also have had an impact on the prices offered by the different tenderers including also the winning tenderer. As these effects cannot be exactly quantified the Commission proposes a flat rate correction to the value of the contract in line with the applicable Commission Guidelines².

These guidelines also specify that the seriousness of an irregularity related to non-compliance with the rules on public procurement and the related financial impact to the Union budget is assessed taking into account the following factors: level of competition, transparency and equal treatment. When the non-compliance at stake has a deterrent effect to potential tenderers this is a strong indicator that the irregularity is serious.

As regards the argument that the contract was already affected by a financial correction resulting from the work of the Audit Authority, the Commission notes that the latter correction was imposed only on the value of the contract amendment. Whereas the correction proposed by the Commission is to be imposed on part of the contract which does not include the contract modification. As the basis for the two corrections are not the same there is no cumulation of the corrections.

Based on the above reasoning the Commission services consider that it is appropriate to apply a financial correction. However, the exclusion of the entire value of the contracts would be disproportionate in relation to the gravity of the irregularities detected. Therefore, keeping the principle of proportionality, and, in line with rule n°9

² Commission Decision on Guidelines for determining financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement of 19 December 2013 - C(2013) 9527 – rule n°9: Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents

of the above cited Commission Guidelines⁴, the Commission considers it appropriate to apply a financial correction of 10% of the ERDF contribution of value of the contracts in question.

It is understood by the Commission services that for part of the contract, notably for the amount of EUR 4,654,136 resulting from two contract modifications not affecting the total contract amount, the audit authority already proposed a correction of 25% for another irregularity. Therefore, if the latter correction is accepted by the national authorities, taking into account the applicable non-cumulation rules, the basis for financial correction is decreased with the amount of these supplementary contracts.

As the grant rate for the project is 100% and the ERDF co-financing rate is 85%, the amount of ERDF co-financing concerned is ((EUR 24,955,116.53 – 4,435,856.21 – 218,280.87) X 100% X 85% X 10% =) EUR 1,725,583.

As the above corrections are calculated on the basis of net contract values the authorities are requested to confirm that the VAT was not co-financed for the two contracts.

Additional works awarded by negotiated procedure without publication of a tender notice - Finding n°4

Project: OP13. 1.2.3.02.0002 – Construction of open broadband network in the municipality of Mokronog – Trebelno

Contract: Works contract – section 2

Audit findings

The beneficiary launched a Community-wide open procedure for the procurement of construction, operation and maintenance of an open broadband electronic communication network in the municipality of Mokronog-Trebelno. The tender notice was published in the Official Journal of the European Union on 10 June 2009.

As a result of the procedure a fixed price contract was concluded on 20 August 2010. The total value of the contract at the time of the publication of the tender notice amounted to EUR 5,761,828.

In 2009 an amendment to the telecommunication law was adopted in Slovenia. On the basis of this amendment the responsible Ministry carried out a new survey to define the areas the economic operators intend to cover. The survey demonstrated that the commercial interest to build broadband networks decreased and as a result the number of white spots increased considerably.

Following the publication of the increased number of white spots on 13 July 2010 the municipality had to initiate a new procedure for a supplementary contract. This contract was concluded via negotiated procedure without prior publication on 5 October 2010. As a result the total value of the contract was increased by 141.8% to EUR 13,872,127.

The auditors were informed that the grant contract would not have been concluded between the managing authority and the final beneficiary if the latter had not modified the works contract taking into account the increased number of white spots.

The audit authority audited the project and considered the supplementary contract as non-compliant with the national and Community provisions and proposed a 100% financial correction for the amount above the 50% threshold of the original contract value. The audit authority provided the explanation that no correction was proposed for part of the contract below 50% as this was considered as a re-measurement contract where changes in the quantities were allowed without being considered as additional works.

The Commission services considered that the substantial increase of the total contract value was not a result of unforeseen circumstances as the contracting authority knew that the number of white spots would change substantially and the tender documentation explicitly stated that the contractor would have to establish all the connections in the area of the municipalities listed in the contract. Therefore, the Commission services were on the opinion that a diligent contracting authority in the tender documentation should have explicitly provided a possibility to amend the respective contract conditions, notably the number of connection, in the original invitation to tender or alternatively a new tender procedure could have been initiated. Detailed rules should have been envisaged in the tender notice which defines the framework in which the procedure must be carried out, so that all the interested undertakings are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders (see to that effect paragraph 118 of Case C-496/99).

According to the available information, neither the contract notice, nor the tender documents provided a precise and unequivocal indication of a possible subsequent modification of the contract such as the amendment of 5 October 2010.

Therefore, unless the unforeseeability of the circumstances can be proven by the national authorities by a document originating *before* the award of the additional works stating the reasons or a clear indication of the possibility of a subsequent negotiated procure that could result in a clearly defined rise of the contract value stated in the original tender notice, the Commission services consider that the provisions of Article 31(4)(4) of Directive 2004/18/EC have been breached.

Arguments by the Slovenian authorities

Rectifications

Firstly, the national authorities indicated that there are factual errors in the Commission's draft audit report. The proportionate increase in the value of the contract is not 141,8% but 140,8%. In addition, the contracting authority awarded the supplementary contract on the basis of Article 31(1)b of Directive 2004/18/EC, as it believed that based on technical reasons the contract can only be awarded to a tenderer with which the contracting authority already concluded a contract.

It is explained also, that the Commission draft audit report wrongly states that the Audit Authority accepted the contract modification up to the 50% of the value of the original contract as it considered the original contract as a re-measurement contract. In reality, the Audit Authority did not accept the explanation of the contracting authority related to technical reasons, but acknowledged that from the point of view of the contracting authority the change in the number of white spots was unforeseeable.

The national authorities also point out that the Commission draft audit report wrongly defined the rule to be applied for the correction of the public procurement irregularity at hand.

Further to the substance of the finding the national authorities argue that the contracting authority was not aware that the number of white spots would change substantially and this was also acknowledged in the Commission's draft audit report.

The national authorities also commented that the project was public private partnership and therefore the Community contribution part of the corrections proposed amounts to EUR 2,594,638, which is lower than indicated in the draft audit report.

As regards the request of the Commission to review all the broadband infrastructure projects whether these were not affected by similar issues, the Audit Authority explained that the irregularity identified was treated as a random error and as such was projected to the total population. As the resulting error rate exceeded the materiality appropriate financial corrections were carried out. In the light of these facts the Audit Authority does not consider that further verification of the known errors were necessary.

Arguments

During the project, which was awarded in a transparent procedure (open procedure), the number of white spots increased after the decision on the contract award became final (the decision on the contract award became final on 16 November 2009), whereas the contents of the contract itself remained unchanged - the contract remained the same in terms of contents. The above facts resulted in the increase of the resources required and, consequently, in the expansion of the area on which the public-private partnership was being performed. The original report of the municipality was based on the list of white spots as published on 28 August 2008, whereas call for tenders was published by the Ministry on 9 July 2010, immediately after that (on 13 July 2010) a new list of white spots was published, which included a larger number of households.

It needs to be emphasized that the decision on the contract award was already final, so in accordance with the provisions of Article 80 of the then applicable Public Procurement Act (ZJN-2) the public partner had no legal standing for not concluding a contract. In the case in question there were no legally acceptable reasons for not signing the contract. The contracting authority could otherwise have serious problems, as defined in Article 31(4)(a) of Directive 2004/18/EC.

The areas of white spots were expanded as a result of the amendment of the Electronic Communications Act, i.e. the Act Amending the Electronic

Communication Act (ZEKom-B) (Uradni list RS, no. 110/09, 109/12-ZEKom-1). Apparently, after legal amendments were enforced and under threat of sanctions against unrealized market interest that was expressed, the operators of electronic communications re-examined the areas on which they had an actual interest to build the network infrastructure; neither the city hall nor the Ministry could be aware of that before. In this way the areas of white spots were considerably expanded.

By extending or expanding the areas of white spots and because the private partner had already been chosen on the basis of the original list of white spots, the municipality of Mokronog-Trebelno was forced to carry out a procedure under ZJN-2 to cover the increased number of white spots in terms of a contract and execution.

It is indisputable that the volume of original public contract was increased because of this increase in the number of white spots. The Ministry and the local community could not know beforehand that the number of white spots would considerably alter. In this respect the national authorities believes that this considerable change in the number of white spots presents an unpredictable circumstance, and does not agree with the opinion of the Commission services that the increase of the total value of a contract is not an unpredictable circumstance.

Further to the issue, the national authorities stated that the possible alternation of the contract terms in question was anticipated by the local community as a conscientious and attentive public authority in its public contract and tender documentation. In questions and answers that were published on the portal for public contracts, this possibility was explained and stated as a condition for correctness of tenders submitted. As potential tenderers were informed about that, the authorities cannot agree with the indication of the Commission services in the draft audit report that rules were not specified enough that all the interested companies would know about such possibility from the beginning and would be in an equal position by forming their tenders.

According to the provision of the national public procurement act any information that the contracting authority provides to economic operators which are participating in a contract award procedure is also considered part of tender documentation.

The answers on the portal for public contracts have, in that way, become part of tender documentation, so the tender documentation in fact anticipated the award of the contract for additional works that are similar to the original contract on the basis of the open procedure. By this, all the conditions mentioned above were fulfilled. The purpose of including the value of these works into the estimated value is to be able to choose the correct procedure and to ensure the correct publication of the contract notice. Considering this, it cannot be stated that the municipality of Mokronog - Trebelno did not act correctly.

View of the Commission

The Commission services consider that Article 31(4)(a) of the Directive 2004/18/EC is infringed as three of the cumulative criteria indicated in this provision are not respected by the following reasons:

- The fact of approving a new legal instrument (in this case, the Act amending the Electronic Communication Act, increasing the number of white spots, published on 29 December 2009) cannot be considered by itself as an unforeseen circumstance (see points 86, 87 and 94 of the Case T-540/10, *Spain/Commission*).

- In any case, the Commission services consider that additional works could have been technically or economically separated from the original contract without major inconvenience to the contracting authority. It should be noted that the notion of 'major inconvenience' should be interpreted in a strict way and detailed information is requested as to why these additional works could not have been carried out by another contractor. Under those conditions, the approval of a new law does not extend automatically the subject-matter or the scope of the initial contract. In any case, the Commission services do not see any reason why these additional works approved by the new law cannot be the object of a new tendering procedure.

- The amount of the complementary works exceeds 50% of the amount of the initial contract.

- The fact that the possibility of the change in the scope of the contract was included in the questions and answers section of a dedicated website is not enough for respecting the above-mentioned provision, by the reasons indicated in points 60 and 61 of the case T-540/10, *Spain/Commission*

Therefore, the Commission services maintain their original position and consider that the correction of 100% on the certified amount of additional works (EUR 8,110,299) in line with rule n°3 of the applicable Commission Guidelines³ is justified.

As the audit authority already proposed a correction for the part of the contract modification exceeding 50% the additional correction proposed by the Commission services amounts to EUR 635,662 (only ERDF contribution). This is calculated by the deducting from the total additional works (EUR 2,594,683.78) the value of the corrections already imposed (EUR 1,959,021.77) only taking into account the ERDF contributions.

The Commission also confirms that it considers the correction proposed by the audit authority as justified.

Incomplete information included in the tender notice – Finding n°5

During the audit it has been observed that in several cases the selection criteria related to the economical / financial and technical / professional suitability are not included in the tender notice published on TED. This information is incorporated in the tender documentation accessible via an internet link included in the tender notice.

³ Commission Decision on Guidelines for determining financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement of 19 December 2013 - C(2013) 9527 – rule n°24: Illegal award of additional works/services/supplies contracts

In addition, the tender notices often only include references to Slovenian regulation when defining documents to be submitted in relation to the economic, financial and technical requirements for the selection of bidders.

The national authorities are recommended to include the minimum levels of selection criteria into the tender notice published on TED. It is also recommended to state which are the documents requested from the bidders necessary to prove their economic, financial and technical capabilities besides including references to the Slovenian regulation which may be unclear to potential foreign bidders.

In reply to this observation the Audit Authority committed itself that in all the future audits, where such deficiencies are detected, it would be recommended to the contracting authorities to insert into the individual fields the actual required data and not provide merely the internet link for accessing these data. The Audit Authority shall also recommend that instead of providing references to Slovenian regulation, it is preferable to specify, where applicable, which documents the bidders should submit as proof of the economic, financial and technical capabilities.

The AA shall also recommend to the managing authority to include these requirements into its guidelines and to inform other entities, taking part in the management and control system, of such requirements.

Thereby the finding is **closed**.

ANNEX II – Requested financial corrections⁴

Finding Nr.	Project name / Contract name	Contract / cost item value	EU contribution %	Financial correction in %	Financial correction in €
2	OP13.3.1.1.02.0001	44,931,544	85	5	1,909,590
3	OP13.1.2.5.01.0001	20,300,979	85	10	1,725,583
4	OP13.1.2.3.02.0002	1,986,913	32	100	635,662
TOTAL					4,270,835

As regards finding n°2 the table includes only corrections related to the audited contracts. The national authorities are nevertheless requested to identify all the contracts affected by similar deficiencies as explained under the finding.

As regards finding n°3 the table above contains the contract value adjusted with the value of previous corrections on the same contract (explained under Commission position in finding n°3).

As regards finding n°4 the table contains corrections additional to the ones proposed by the audit authority. The audit authority is requested to verify the correctness of the data.

⁴ These corrections are additional to the corrections proposed by the audit authority for the audited contracts.