

**7TH MEETING OF THE EXPERT GROUP ON THE CPR FUNDS (CPR EXPERT GROUP)**

**ONLINE MEETING – 29 NOVEMBER 2022 (10:00 – 13H00)**

**WORKSHOP PUBLIC PROCUREMENT –**

**COMMISSION’S AUDIT FINDINGS, LESSONS LEARNED, GOOD PRACTICES**

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### DISCLAIMER

*This working document was prepared by/expresses the view of the Joint Audit Directorate for Cohesion (DAC) and does not commit the European Commission. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.*

## LEGAL BASIS

EU Treaty principles of transparency, non-discrimination and equal treatment.

EU Public procurement Directives:

- Directives 2014/24/EU, 2014/25/EU and 2014/23/EU (applicable for tender procedures launched as from 18 April 2016 or the date of transposition of the Directives into national law, whichever earlier)
- Directives 2004/18/EC and 2004/17/EC (applicable for tender procedures launched before the above dates)

National public procurement laws.

Rules established at the Member State/programme level, provisions of the calls for project applications, conditions of grant decisions etc. (e.g. condition of requesting 3 independent offers for contracts not subject to public procurement law).

## 1. TENDER NOTICE AND TENDER SPECIFICATIONS

### *Important concepts*

Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition (*Article 42(2) of Directive 2014/24/EU*).

- Proportionality to the subject matter of the contract
- Non-discriminative character (on the basis of national/regional preferences etc.)

### **Finding 1.1** Award criteria not fully transparent

**Award criteria not fully transparent.** Project X aims to increase the number of business creations in the region and in this context, high-level training combined with accompanying individual are organised. The Commission auditors found that in the related public procurement procedure the AA did not verify whether the award criteria and their respective weighting are the ones mentioned in the specifications. The Commission auditors found that in the call for tenders for seminar services under project X, the criteria for awarding the tender are as follows: price, experience in the sector for which training is provided, knowledge of the business creation environment and knowledge of the target public. The weighting of the award criteria is not indicated in the invitation to tender. However, in the bid evaluation report, the weighting of each criterion on the basis of which the bidder was chosen is clearly indicated. This indicates that, at the time of submission of tenders, potential participants were not informed of the importance of each element of the award criteria, and therefore they were not able to adjust their offer. In addition, the deficiency concerning the lack of weighting in the call for tenders raises questions in terms of transparency during the award procedure as well as concerning the fair treatment of participants.

**Finding 1.2** Inadequate description for scoring of a selection criterion

**Inadequate description for scoring of a selection criterion.** The Commission auditors evaluated the EU wide public procurement procedure for a works contract for improvement of flood protection in a town, awarded under the Directive 2004/18/EC. According to the contract notice, the most economically advantageous tender is to be awarded. Criterion one is the price with weight 80% and criterion two is the technical offer with weight of 20%. The evaluation protocol sets out that the lowest price receives always 8 points. Regarding criterion two, a score of zero, one, or two, can be given to the tenders. Beyond the possible scoring, the contracting authority is expected to specify either in the notice or in the invitation to tender a detailed scoring methodology for the evaluation. It should be established in such a way that the bids could be compared objectively. Criterion of technical work includes quantitative and qualitative aspects, out of which the evaluation of the latter one can be subjective. Thus, detailed description of scoring and adequate instruction for the evaluation is indispensable. In the judgment of the *Universal Bau* case (C-470/99), the Court of Justice (CJEU) stated that: if the contracting authority determined the number of criteria for the evaluation of the tenders prior to the publication of the call for tenders or invitations to tender, it is required to make potential bidders aware of it in the purpose of transparency and equal treatment of tenderers. It was also added that in this case bidders could prepare their application according to the highest weighting conditions. For the contract concerned, the Commission could not obtain adequate information about the scoring methodology of criterion two, which could explain the scoring and the ranking as presented in the provided table. Thus, it was not possible to confirm that the principles of transparency and equal treatment of bidders prevailed.

**Finding 1.3** Breach of national public procurement rules

**Breach of national public procurement rules.** Irregular requirement to provide certain documents at submission of tender. The Commission auditors found a breach of national public procurement rules in (a) the open tender for the supply of IT and multimedia classroom equipment to schools, (b) the open tender for the supply of school aids and manuals to schools and (c) the open tender for providing training to project participants, as regards requesting excessive supporting documentation to prove the absence of grounds for exclusion. According to the national public procurement law, at the stage of submission of the offer, the tenderers should submit only a self-declaration regarding the absence of grounds for exclusion. Furthermore, in procurements below the EU threshold, the contracting authority can request further supporting documents from the best-evaluated tenderer only. In the three above-mentioned public procurement procedures, the contracting authority requested self-declarations and further supporting documents confirming that there were no grounds for exclusion from all bidders, at the stage of offer submission. This practice breaches the relevant provisions of the national public procurement law. Infringement of the aforementioned rules could have restricted the access to economic operators.

**Finding 1.4** Disproportionate selection criteria

**Disproportionate selection criteria.** Article 44(2) of Directive 2004/18/EC sets out that *“The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48. The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.”* The contracting authority launched a public procurement procedure for a feasibility study for a project aiming to modernise rail infrastructure (estimated value

1.x million EUR). According to the contract, the service should have been provided in five phases in 60 weeks from the effective date of the contract. The payment conditions were initially concluded in the following way: 35% of the contract price after finalization of the 2nd phase of the project, i.e. in 32 weeks, 65% of the contract price after finalization of the works, i.e. in 60 weeks. However, the payment conditions were subsequently changed following the conclusion of an amendment to the contract. Commission auditors found that according to the contract notice, the tenderer had to fulfil the following selection criteria at the time of the submission of the bid:

*1. Bank loan commitment.* The candidates had to demonstrate a bank loan commitment of minimum 1 million EUR or the confirmation of the bank of availability of funds in this amount for a period of past 12 months. The bank loan commitment did not have to be linked to the particular public procurement. The contracting authority justified the proportionality of this requirement by the estimated price of the contract (the required amount is below 100% of the estimated price of the contract) and by the need to resolve any potential tenderer's future financial difficulties. Commission auditors noted that the subject matter of the contract was not the construction works where the contractor must invest a substantial amount of financial resources to cover the works, but the service (feasibility study). Another selection criterion required the credit standing of the tenderer to be confirmed by his/her bank. The obligation to demonstrate a bank loan commitment is similar to obtaining a credit for the same amount for a period of one year and does not provide any added value for the contracting authority as compared, for instance, with a requirement to provide guarantee. In any case a requirement of a bank loan commitment of 1 million EUR (70% of the value of the contract) for a contract of only 1.x million EUR could limit the number of companies able to receive such a credit. Therefore, the Commission auditors consider this requirement, both in terms of required percentage to the estimated price of the contract and in absolute value, disproportionate to the subject matter of the contract, breaching Article 44(2) of Directive 2004/18/EC.

*2. Specific experience of contracted experts.* Four experts had to demonstrate experience with investment projects planned to be co-financed from the EU (Team manager, Deputy team manager, Expert in economics of transport, Expert in environmental policy). The selection criteria and the technical requirements must relate to and be proportionate to the subject-matter of the contract. It is irrelevant from what budget the contract is financed. The mere fact that the required investment projects were planned to be co-financed by the EU does not in any way guarantee the quality of the service provided by the contractor and that requirement does not provide any 'added value' for the contracting authority in comparison with similar projects financed from other public sources. From the specification of the subject-matter of the contract, it cannot be inferred that the work could have not been carried out by a tenderer with experience from similar projects, albeit not planned to be co-financed from EU funds. Moreover, the contracting authority nominated a JASPERS' expert to the Steering Committee of the project, which could have provided the experience with EU co-financed projects. Therefore, the requirement for the tenderer's expert to have experience with projects to be planned to be co-financed from EU funds is considered disproportionate to the subject-matter of the contract and breaches Article 44(2) of Directive 2004/18/EC.

*3. Demonstrate provision of similar services.* The candidates had to demonstrate the provision of similar services in the years 2012, 2013, 2014. Article 48 of Directive 2004/18/EC states that: "*Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services: 1. a list of the principal deliveries effected or the main services provided in the past three*

*years, with the sums, dates and recipients, whether public or private, involved.*" By not allowing the tenderers to provide the list of similar services provided in the 3 years preceding the deadline for submission of tenders, the contracting authority discriminated tenderers who carried out the service in question up to August 2015 (i.e those who showed recent experience) and by doing so breached Article (48) of Directive 2004/18/EC.

### **Finding 1.5 Artificial splitting of service contracts**

**Artificial splitting of service contracts.** The project includes a contract awarded for project management of a construction site to company X via simplified procedure. The contracting authority asked five companies to submit an offer following a call for tender in May 2015. The content of the contract is project management and includes tasks such as project preparation, supervision, implementation and handover. The very same construction site for the same building was also planned and managed by another company Y, following an EU-wide call for tender for a service contract for planning. This contract was awarded in November 2013. The scope of the two planning service contracts for this building cannot not be separated. Moreover, some tasks such as project supervision have been contracted twice. First to contractor Y in 2013, and then to contractor X in 2015. Differentiation into various planning services for the same building is not compatible with Article 9(3) of Directive 2004/18/EC as this relates to a common economic or technical function. The amounts of the two estimated contract values should have been summed up for checking against the EU-threshold. In case additional planning services were to be procured to the EU-wide tendered original contract, the procedures should have followed the relevant legal provisions, e.g Articles 30 or 31 of the said Directive. The cited articles have not been complied with, since (a) there was no publication as required by Article 30 and (b) there was no documentation or justification of any of the cases listed in Article 31(1) by the contracting authority. As the contract was awarded to a different operator than the original planning services contract, Article 31(4) of the said Directive enabling the award of additional works or services is also not applicable in this case.

It is evident that the services contract awarded to company X in 2015 (and any subsequent additional services awarded to the same company) are in breach of Article 9(3) of Directive 2004/18/EC, which states that "no works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive". By not considering these services in the same EU-wide call for tender for a service contract for planning, the contracting authority avoided that those services would be subject to the provisions of the Directive 2004/18/EC.

Artificial splitting of contracts and non-compliance with the publication requirements represent irregularities for which financial corrections of 100% of the value of the contracts are applied in line with the quoted Commission guidelines, namely the type of irregularity No 2 ("*Artificial splitting of works/services/supplies contracts*"), a financial correction of 100% of the expenditure declared to the Commission in regard to the services contract directly awarded to company X in 2015 (and any subsequent additional services awarded to the same company), due to the absence of appropriate publication of the tender notice

Moreover, the legality of any additional services contracts needs to be assessed against Articles 30 and 31 of the said Directive. Where they are found to be in breach of these provisions, the appropriate financial corrections should also be applied to the additional service contracts.

**Finding 1.6** Limitations of sub-contracting

**Limitations of sub-contracting.** The tender notices for the operations refer to National legislation concerning limitation of subcontracting. Article A of National Decree X establishing the public procurement code and article B of Decree Y provide for a limit of 30% for the share of the contract that the tenderer can subcontract to third parties. According to the judgement in Case C-63/18, such a general quantitative limit on subcontracting is not proportionate and therefore, the national rules in question infringe the provisions of Directives 2004/17/CE and 2014/24/UE. Such a provision constitutes an irregularity within the meaning of Article 2(36) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council. In accordance with the Guidelines in the Annex of the Decision C(2019)3452, a correction of 5% should be applied on each operation:

Operation 1: total amount € xxx.

Operation 2 (Issue: irregular limitation of sub-contracting). The objective of this operation is the development, implementation and post-implementation services of new versions of an information system. The project is about an information system aimed at improving patient care and health outcomes available to the professionals of the Ministry of Health, helping in the clinical activity of health professionals, increasing the efficiency of the care process.

The Commission auditors found that for contract XX in operation 2, the tender specifications imposed a limitation of sub-contracting without a relevant justification. Directives 2004/17/EC and 2004/18/EC were not correctly transposed in national law 'Royal Legislative Decree 3/2011' (Public procurement law), as Article xyz limits sub-contracting to 60% maximum. Unjustified limitation of sub-contracting constitutes a breach of the public procurement Directives, as confirmed by the ECJ interpretation in case C- 406/2014 - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju of 14 July 2014. "In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors....." must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract." The audit authority provided a quantification of the impact of the irregular limitation of sub-contracting in the annual control report for the accounting year 20xx/20xx. The Commission auditors note that in this programme, the impact of the sub-contracting issue is an increase of the TER of 0,xx on the accounting year concerned. The Commission auditors note further that the MA/CA has not applied any financial corrections for this issue as it considers that the legal pre-requisites for considering that there is an irregularity are not met.

## **2. SELECTION OF BIDDERS AND EVALUATION OF TENDERS**

### ***Important concepts***

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. (Article 18 of Directive 2014/24/EU)

**Finding 2.1 Award decision before completion of the evaluation**

**Award decision taken before completion of the evaluation.** A works contract was awarded to bidding consortium X for works on renewal of tramline tracks. The public procurement procedure was restricted based on Article 46 of Directive 2014/25/EU following the establishment of a qualification scheme. The award decision was taken on 3 March, when the information was sent to the winning bidding consortium as well as to the four losing bidders. The award criteria were: 95% price and 5% quality. At the time of the award decision, not all documents for the assessment of the quality criterion of 5% were available to the evaluation committee, such as specific evidence of compliance with work security standards and a specific spreadsheet on financial positions. These mandatory documents were missing from the winning bid only. This was documented in the protocol of the evaluation committee. The contracting authority requested these documents on 3 March with a deadline of 8 March in line with the possibility offered under art 56 paragraph 3 of the Directive (“Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.”). At the time of the award decision on 3 March, the contracting authority had also not yet assessed necessary information on potentially abnormally low prices. When evaluating in detail the winning bid, the contracting authority identified several abnormally low-price positions, for which it requested additional information in accordance with Article 84 of Directive 2014/25/EU. The explanations were given to a satisfactory extent according to the protocol of a joint meeting of 9 March. Taken into account the missing documents and information, the Commission auditors consider that the bid of consortium X was not completely available to the evaluation committee at the time of the award decision. The award decision should have therefore not been issued on 3 March but only after having received the necessary documents and clarifications.

**Finding 2.2 Non-compliance of winning tender with selection criteria**

**Non-compliance of the winning tender with selection criteria.** The beneficiary is a private company owned by the municipality and it is subject to a national public procurement act (hereafter “PPA”). The operation is implemented through three supply contracts for electric buses, hybrid buses and diesel buses. The contracting authority launched the procurement procedure and requested the tenderers to comply with the selection criteria listed in Article 32 of the PPA. According to this article, tenderers must demonstrate that no members of the statutory body or the supervisory board have been convicted of corruption, damage of financial interests of the European Communities or an offence of money laundering (as listed in Article 57 of the Directive 24/2014/EU). Commission auditors found that in the selection phase, the winning tenderer submitted all documents required to prove its capacity to participate in the tender, except the criminal record evidence for the members of the supervisory body. The extracts from criminal records should have been issued within the previous three months. However, the tenderer submitted the European Single Procurement Document (ESPD). Therefore, it provisionally fulfilled all selection criteria in this part of the tender process. The Commission auditors note that after winning the tender, the contracting authority did not ask the tenderer to submit the extract of the criminal records for all members of the supervisory body. The contract was signed without the tenderer having submitted these documents. Article 56 of



Directive 24/2014/EU states: *'Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled: (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents...'* Furthermore, Art. 59 (4) of Directive 24/2014/EU states that: *"Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with Article 33(3) or point (a) of Article 33(4), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with Article 60 and, where appropriate, Article 62."* After being made aware of the preliminary finding during the audit, the audit authority obtained extracts of the criminal records of all three members of the supervisory board and submitted them to the Commission auditors. The Commission auditors found that only two of the criminal records fall within the relevant three-month period. The criminal record extract for the third member of the supervisory body is dated after the conclusion of the contract and therefore does not fall within the relevant period. In addition, these records were not requested by the contracting authority and were not submitted by the tenderer before the conclusion of a contract. The contracting authority breached the abovementioned articles of the Directive. First, it did not require the tenderer to submit up-to-date supporting documents, to prove that the members of the supervisory body had not been convicted of any of the crimes listed in Article 57 of the Directive 24/2014/EU. Moreover, it signed the contract without the tenderer having submitted the supporting documents. Therefore, the conditions for the conclusion of the contract with the winning tenderer were not fulfilled.

### **Finding 2.3** Incorrect acceptance of a tender

**Incorrect acceptance of a tender.** The contracting authority launched a procurement procedure for a feasibility study for enhancing safety measures on first-category roads. In the contract notice, the contracting authority requested proof of professional experience or professional qualifications for the expert 'Head of safety auditor'. The expert was required to prove that s/he had drawn up at least 10 expert opinions pursuant to relevant legal provisions in the field of road transport. The successful tenderer demonstrated the requested experience by supplying 10 expert opinions. However, two of these related to electrical engineering and only eight to road transport and consequently did not meet the requirements. Therefore, the successful tenderer did not formally fulfil the selection criterion and was wrongly selected.

### **Finding 2.4** Lack of equal treatment during evaluation

**Lack of equal treatment during evaluation** resulting in the incorrect acceptance of the winning tender. Operation: Improving the quality and efficiency of public services for vulnerable groups on the labour market and employers. Contract affected: Supply contract no. 000&&&/xx.xx.20xx, following public competition procedure 000xxx for supply of multifunctional devices. The estimated value of the contract was EUR xxx.xxx,00 and therefore above the threshold of public procurement Directive 2014/24/EU. The contracting authority is a central government authority (National Employment Agency). The subject matter of the contract is the supply of multifunctional devices for the use of the contracting authority. The contract notice for the open procurement procedure was published in the OJEU on 17 February 20xx under no. 20xx/S 000-xxxxxx. The contracting authority received four bids from economic operators. Initially, the contracting authority rejected all bids as non-compliant. This decision was contested by the participants and the Competition Commission of



the country concerned cancelled the decision. After having reconsidered the bids, in the selection process the contracting authority excluded three of the four bidders, considering that their technical proposals were not compliant with the technical requirements in the tender documentation. Among the reasons for exclusion for one rejected bidder (company X), the contracting authority said that there was no evidence in the product leaflets that it corresponded with the technical specifications that were described in the offer (including supporting a Windows XP (32/64) operating system). The price offer is only known for the bid considered by the contracting authority to be compliant. However, in the case of the winning bidder, the technical specification supporting a Windows XP (32/64) cannot be identified either in the bidder's product leaflets. The Commission auditors highlight that although clarifications were requested from the winning bidder, these did not include questions on the above-mentioned product technical specifications. In doing this, the contracting authority incorrectly accepted the winning tender and did not ensure equal treatment between the participants to the procurement procedure, breaching the provisions of the Directive 2014/24/EU, namely: Article 18(1), according to which "contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner" ; Article 56(1)(a), according to which "contracts shall be awarded on the basis of criteria laid down (...) provided that the contracting authority has verified that (...) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents(...)" .

### **Finding 2.5 Bidder excluded due to non-compliance with selection criteria**

**Bidder excluded due to non-compliance with selection criteria.** Contract: XXX. Subject matter: Purchase of specialised vehicles for the control of fishing. For this public procurement procedure, the contracting authority received two bids. During the procurement procedure, one of the two bidders was excluded due to non-compliance with the selection criteria. The reasons for rejection of the bidder were: 1) The template provided by the contracting authority for the submission of offers had a clerical error with incorrect delivery time (7 months instead of 4 months as in the contract notice). Before the submission deadline, the contracting authority published a clarification in this regard on its website, but did not provide an updated template. The excluded bidder did not correct the template and answered for the point in template with 'will comply'. 2) One of the requirements for the bids was that bidders had to declare that they supply new vehicles, putting the manufacturing year in brackets (i.e 20xx, while the public procurement procedure was carried out in 20xx + 1). The excluded bidder did not identify the year (20xx) as requested, but replied with only 'New', implying that it could provide newer (20xx+1) vehicles too. The contracting authority did not request clarifications and rejected the bid. The rejected tenderer appealed against the decision of the contracting authority to authority X. The contracting authority justified the decision on exclusion by saying that during evaluation they did not have the opportunity to ascertain whether the tenderers' answers in the template comply with the requirements of the contract notice. Authority X concluded that the exclusion of the bidder was correct. The Commission auditors consider that the reasons for rejection of the bid are administrative and could have been clarified by asking for additional information from the tenderer. Moreover, the evaluation of this bid would have resulted in a different outcome. The Commission auditors recalculated the award scoring and if the rejected bidder would have been evaluated, it should have been awarded the contract as being the most advantageous, using the award criteria set out under finding xyz. The Commission auditors consider that the contracting authority seriously breached the principles of equal treatment and non-discrimination enshrined in Article 18(1) of the Directive by rejecting the bid on the basis of aspects

that could have easily been clarified by the bidders, if it had been asked. The management verifications did not detect this issue.

## **Finding 2.6 Incorrect acceptance of the winning tenderer**

**Incorrect acceptance of the winning tenderer.** The audit authority found that the winning bidder for project X did not meet all the selection criteria, namely the requirement regarding similar experience. The contract notice (point on Technical capacity) sets out that: "if there is a joint offer, the technical and/or professional capacity will be met cumulatively, indicating the requirements regarding the tasks in the execution of the future contract which must be fulfilled by the associates who, according to the association agreement, were nominated for the execution of those contract responsibilities ". The contracting authority considered that the winning entity fulfilled the selection criteria, although, according to the submitted offer:

a) 50% of the future works contract would be executed by entities that did not demonstrate similar experience, namely Company A and Company B. The two entities did not present proof to fulfil the requirement in the contract notice regarding the similar experience in the field in which the two entities were assigned tasks for the implementation of the contract, i.e the execution of earthworks, construction works and geosynthetics;

b) at least 30% of the future service contract would be executed by Company C. The latter did not present proof of providing similar services in the field in which the entity was assigned tasks for the implementation of the contract, i.e. design works and geosynthetics management. In addition, Company D and Company E, who had designated tasks in the execution of the works, did not declare having the necessary equipment for the implementation of the future contract. Applicable legislation and legal justification. Article 2 of Directive 2004/18/EC states the following: "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way". Article 44(1) of the same Directive reads as follows: "Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52...". As explained above, the contracting authority has not evaluated correctly the requirements to be fulfilled by the winning tenderer, resulting in incorrect acceptance of the tenderer, breaching the provisions of Articles 2 and 44(1) of Directive 2004/18/EC.

The audit authority identified the irregularity and applied a financial correction of 10% in line with point 13 of the Commission Decision C (2013) 9527/19.12.2013. The audit authority justified the level of correction by the fact that 11 tenders had been submitted and that no other tenderer was rejected for not meeting the requirement in the contract notice that all associated entities must prove their technical capacity for the tasks delegated to them.

If all tenders had been treated equally, the outcome of the tender evaluation would have been different, considering that the association Company A should have been rejected and, consequently, based on the elements provided in the tender evaluation report, none of the tenderers should have been declared the winning bidder.

### 3. CONTRACT IMPLEMENTATION

#### ***Important concepts***

##### Substantial modification (Article 72(4) of Directive 2014/24/EU)

A modification of a contract or a framework agreement during its term shall be considered to be substantial, where it renders the contract or the framework agreement materially different in character from the one initially concluded. ...

A modification shall be considered to be substantial if (a) it introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure; or (b) changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement, or ...

##### Unforeseen circumstances (Article 72(1) of Directive 2014/24/EU)

Circumstances which a diligent contracting authority could not foresee (Strict interpretation)

#### **Finding 3.1 Substantial modification of contract terms**

**Substantial modification of the terms of the contract.** According to the contract resulting from the public procurement procedure for a feasibility study, the service should have been provided in five phases in 60 weeks from the effective date of the contract. An amendment was concluded with new deadlines to provide the service in 151 weeks from the effective date of the contract. In the same amendment, the contract price was increased by 15.5% of the initial value of the contract. Moreover, the possibility of terminating the contract in the case where the contractor should be de-registered from VAT was removed from the contract and subsequent changes to the payment terms were made. The amendment is not in line with the contract, as according to Article 2.2 of this contract, the deadlines specified are the latest permissible and cannot be exceeded, with the exception of:

- delays on the contracting authority's side or
- obstacles which arose independently from the contractor's will and could not be reasonably expected to occur.

In such two cases, the duration of the contract shall be extended only after the relevant amendment, by which the contracting parties agree to extend the date of performance came into force (Article 2.3). However, the amendment was concluded after the initial date for the complete delivery of the service. The contracting authority justified the amendment by the need to reflect the comments and observations made by entities whose activities in the project were not initially foreseen. Taking into account the above, the justification and missing assessment of the IB, the Commission auditors conclude that the amendment is considered to be material in light of the applicable CJEU case-law (Judgement of 19 June 2008, Case C - 454/06, Presstext Nachrichtenagentur, paragraphs 34-37). The significant extension (151%) of the completion period and the increase of the contractual price of 15.5% represent a substantial modification of the contract elements. Such a modification renders the implemented contract materially different in character from the one initially concluded, as the

modification " *introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.*" Such a substantial modification of the contract terms represents an irregularity for which a financial correction can be made in line with point 22 (Substantial modification of the contract elements set out in the contract notice or tender specifications) of the Commission 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 (Commission Decision C(2013) 9527 of 19.12.2013).

### **Finding 3.2** Modification of the terms not compliant

**Modification of the terms of a contract not compliant with the selection criteria.** The subject matter of the public procurement procedure was the reconstruction of a road. The tender documentation set, among other things, selection criteria for five experts to be employed under the resulting contract. For the expert in the area of geodesy, one of the requirements was to provide a qualification (authorisation) in line with the national law on geodesy, or equivalent. The expert mentioned in the winning bid and therefore in the concluded contract for works, fulfilled the requirements in the tender specifications. Through an amendment to the works contract, the contracting parties changed 3 out of 5 experts, one of which was the expert in geodesy. However, the newly nominated expert in geodesy did not provide the required authorisation and therefore did not comply with the set selection criteria.

### **Finding 3.3** Substantial modification of contract elements

**Substantial modification of contract elements in favour of the contractor during contract implementation.** In operations A and B, the audited public procurement contract PC1 concerned adaptation of hospital building for needs of handicapped, installing an external elevator and renovating the endoscopy laboratory. The beneficiary is a specialized public hospital called SPH, therefore a contracting authority subject to public procurement rules.

According to Article 144.1(6)(1e) of the public procurement act (PPA): "A modification to a provision of a contract or a framework agreement shall be considered to be substantial if: (2) it does not alter the general nature of the agreement or framework agreement and one or more of the following circumstances apply: [...] (b) the change affects the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement".

According to paragraph 5.3 of contract PC1, under national procurement law, in operations A and B, the payment for works, both for installation of the external lift (part I) and for renovation works (part II), was due upon completion of works confirmed by a reception protocol without remarks. The contract started on 01/12/2016 and the contractual deadline to complete the works was 31/12/2016. Invoice N° XYZ for the lift was issued on 28/12/2016 and paid on 30/12/2016, i.e 1 month before actual completion of the works on 31/01/2017. The payment for that invoice for an amount of € xxx.xx covered the entire part I of the contract, the full amount of which was € xxx.xxx. The payment was made based on the protocol of reception of works containing a statement on the completion of works on 28/12/2016. The date for completion of works in the protocol (28/12/2016) does not match with the date in the construction journal, i.e a completion date of 31/01/2017.

In addition, the construction permit for the works in question was granted only on 1/3/2017, i.e after completion of the works. The invoice should not have been paid before the construction permit was granted, as it was a winning bidder's contractual task to obtain it. Therefore, the Commission auditors conclude that the conditions of the contract, in particular the terms of payment, were modified in favour of the contractor during contract implementation as the invoice was paid before all contractual conditions for this payment were met. The contractor was paid in full before completing the works. The construction permit was obtained 2 months after the payment was made and the duration of works was extended by one month beyond the contractual deadline. This constitutes a substantial modification of the contract in breach of Article 144.1(6)(1e) of the PPA. A 25% financial correction for the affected contract can be made on the basis of point 23(2) of Commission Decision C(2019) 3452 for breach of the national public procurement law.

### **Finding 3.4** Modification of an essential contract element

**Modification of an essential element of a contract.** The project pertains to carrying out evaluations in accordance with EU standards. The beneficiary, the Ministry for Innovation and Technology initiated a national public procurement procedure on 18/12/2017 for the summary of the results of the 2014-2020 Structural Funds and the support of the negotiations of the future of cohesion policies. The tender foresaw 380 expert days to prepare three studies and set the maximum framework amount at € xxx.xxx net of VAT. Five bidders were invited, and three of them submitted a bid for the procurement. Two out of three bidders were excluded on the basis of point e) of section 73.1 of the Member State Public Procurement Act ('PPA').

On 17/05/2018, the beneficiary signed a framework contract with Company A for the maximum framework amount of € xxx.xxx net of VAT, and 380 expert days. The contract described the task as the assessment of three areas relating to the Cohesion Policy, resulting in three 30 pages studies, each of them in the Member State language and in English. A number of 380 consultant days was estimated for the task. The signed contract reflects the task that was described in the invitation sent to the bidders, which also indicated 380 days and a framework amount of € xxx.xxx.

The required studies:

- Analysis of international capital flows and foreign trade processes in the context of the Cohesion Policy.
- Sustainability in the context of Cohesion Policy with focus on indicators.
- Analysis of the different tools of delivery systems in the context of the Cohesion Policy, Member State experiences.

On 21/08/2018, a purchase order was signed for the above-mentioned studies, though allowing for 931 consultant days. The expected output did not change. However, the required expert days increased by 145% of the originally estimated days in the public procurement procedure and the contract, allowing to use the maximum amount of the contract.

On 01/04/2019, the beneficiary submitted a note to the file describing the reasons for the increase in the number of consultant days, citing the planned changes by the EU after 2020 in the Cohesion Policy and the related allocation models, which required a further and deeper level of research in the topics and researching other Member States as well.

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The Commission auditors consider that the reasons for the change in the number of expert days do not justify the 145% increase. The task description in the contract estimating 380 days already included the analysis of the Cohesion Policy after 2020, as well as the focus on the V4+4 countries. The end result did not include analysis of countries other than the V4, which does not show an extension of the original scope.

The Commission auditors consider that the contracting authority fundamentally changed an essential element of the contract, also changing the economic balance in favour of the contractor, hence breaching Article 141 of the PPA of the Members State concerned. The contract part for the consultant days required for the studies changed from 380 days in the tender and in the contract to 931 in the purchase order. That is a 145% increase, which is substantial. This might have had an impact on the outcome of the public procurement procedure. For with a significantly higher amount of consultant days, other bidders could have tendered (2 economic operators did in fact not submit a bid).

The price of the procured services has changed from originally € xxx.xxx + VAT to €xxx.xxx + VAT.

Based on the above, in line with irregularity no. 239 of Commission Decision C(2019) 3452 of 14 May 2019, a 25% financial correction should be applied to the contract. The management verifications did not detect this irregularity.