



REPUBLIC OF BULGARIA
MINISTRY OF FINANCE
AUDIT OF EUROPEAN UNION FUNDS
EXECUTIVE AGENCY

Translation from Bulgarian Language

ANALYSIS
OF THE IRREGULARITIES IN THE AREA OF PUBLIC PROCUREMENTS
ESTABLISHED BY THE BULGARIAN AUDIT AUTHORITY
in the 2015 audits of operations for ERDF, CF, ESF operational programs

INTRODUCTION

This analysis reflects the results of the audits conducted by the Audit Authority in 2015. The analysis can be used as a tool for introduction to the approach applied by the Audit Authority which is based on the European Commission's approach and as a basis for taking appropriate corrective actions by the beneficiaries in conducting their public procurement procedures and by the Managing and Certifying Authorities in performing their functions to ensure verification and certification of legal and eligible expenditure only.

The analysis includes *statistical information, brief description of the approach applied to the audits, determination of the financial impact, summary of the types of irregularities found, and conclusion.*

In addition, we have prepared an appendix to the analysis - *Summary of the infringements of the restrictive requirements encountered in the practice of the Audit Authority and guidelines for their avoidance.* The above appendix has been prepared due to the numerous deviations of the restrictive requirements and based on the recommendations of the European Commission's auditors on provision of full information to all stakeholders on the errors in this area, examples of the financial consequences to which they lead and on providing guidance to correct and avoid these errors in the future. It should also be emphasised that the summary we have draw up is not exhaustive and does not contain all possible deviations representing unjustified restrictions on the participation of the persons in public procurement procedures, since it does not contain all possible methods to avoid the above-mentioned infringements.

I. STATISTICS

The 2015 audit of operations implemented under the eight operational programmes co-financed by the European Regional Development Fund, Cohesion Fund, European Social Fund and European Fisheries Fund include 196 projects. In implementing these audit engagements the auditors of Audit of EU Funds Executive Agency (AEUF EA) audited 326 public procurement procedures conducted under the Public Procurement Act (PPA) and procedures for selection of a contractor conducted under Decree No 55/2007 of the Council of Ministers or Decree No 69/2013 of the

Council of Ministers. As a result of the audits, the Audit Authority has proposed that financial corrections of the expenditure of 154 supply, service or construction contracts concluded upon completion of the audited procedures should be made. Such infringements were not found by the Managing Authorities (MA) in 2014, during the cost verification process, and the errors were not corrected from the certified expenditure.

II. APPROACH

1. Approach applied to the Audits

The Audit Authority has applied a single systematic approach to conduct all audits laid down in its audit engagements and has used detailed checklists and specific quality control procedures. The Audit Authority verifies the legality of expenditure incurred as a result of the public procurement procedures using detailed checklists (also published on the AEUF EA website) which are coordinated with the relevant EC Directorates-General and cover all risk points specified in the Guidelines for determining Financial Corrections to be made by the Commission to Expenditure financed by the Union under Shared Management for Non-compliance with the Rules on Public Procurement adopted by European Commission Decision of 19 December 2013 (*also referred to as the EC Guidelines*), and in the National Methodology for determining Financial Corrections to be made to Expenditure related to Implementation of Operational Programmes co-financed by the Structural Instruments of the European Union, European Agricultural Fund for Rural Development, and European Fisheries Fund (adopted by Decree No 134/2010 of the Council of Ministers) (*also referred to as the National Methodology for Financial Corrections*). Using these checklists, in the course of the audits the Audit Authority has audited in detail the compliance with the rules on: selection of the type of public procurement procedure, manner of announcing the procedure in the Public Procurement Register and Official Journal of the European Union, time limits for receipt of tender documents and tenders, selection criteria, evaluation methodology, technical specifications, clarifications on tender documents and their announcement, removal of tenderers from the procedure, compliance of the selected contractor with all requirements, equal treatment of tenderers, execution of the public contracts signed and amendments to the contracts and requirements initially announced by the contracting authority. Based on the checklists and in connection with the established deviations, the Audit Authority also analyses the existence of fraud indicators in the process of awarding the public contract.

2. Approach applied to determine the Financial Impact of the Infringements

The Audit Authority has determined the financial impact of the deviations found in the 2015 audits of operations in line with the EC Guidelines and National Methodology for Financial Correction.

The financial corrections proposed for the relevant infringements are individualised on the basis of the deviations' severity and principle of proportionality, the highest financial correction provided for the relevant infringement in the EC Guidelines being applied to the most serious infringements. When proposing the amount of financial correction, the Audit Authority has analysed and documented all circumstances relevant to the severity of the deviation and its financial impact. Depending on the type of irregularity found, these circumstances may be: subject, nature, amount and volume of the public contract, level of competition observed at the time the contractor has been selected, number of received tenders, number of ranked tenderers, number of persons who have purchased tender documents, availability of electronic access to the tender documents, etc.

Approach depending on the Estimated Value of the Contracts

As regards contracts with estimated value below the thresholds set out in Directive 2004/18 / EC, in case of infringements under cl. 6, cl. 8-12 and cl. 13-20 of the EC Guidelines, the Audit Authority has proposed 10% reduction of expenditure incurred under the contract concerned as the most severe financial correction.

Moreover, the Audit Authority has analysed all possible facts and circumstances that could lead to 5% reduction in the financial correction.

Approach depending on the Aid Intensity

The Audit Authority has determined the financial impact of the infringements established in awarding operations according to the procedure laid down in Decree No 55/2007 of the Council of Ministers, Decree No 69/2013 of the Council of Ministers and Decree No 118/2014 of the Council of Ministers, taking into account the intensity of funding. For example, in the cases where the grant is equal to or less than 50 percent of the total amount of the approved project, the most severe financial correction proposed was 10%.

Approach to Infringements of Formal Nature

The Audit Authority has not determined financial corrections for infringements of formal nature without actual or potential financial impact. In 2015, it formulated findings in the presence of deviations without financial impact in order to draw attention to the beneficiaries and to improve their understanding of the application of public procurement legislation. For example, in case of incomplete notice (when not all selection criteria are included in the notice, or when part of them are included only in the tender documents) the infringement has no financial effect if the tender documents are freely available electronically on the Internet address specified in the notice.

3. Approach to detect Fraud Indicators

Since 2015, the checklists used in the audits of public procurement procedures contain detailed guidelines to analyse the presence of fraud indicators. The checklists with the full guidelines of the applied approach are available at <http://www.aeuf.minfin.bg/bg/page/24>. According to these guidelines, for each verified procedure in case of any infringement of the public procurement legislation the Audit Authority has also analysed the existence of fraud indicators in the following three directions:

- Are there any fraud indicators in case of conflict of interests?: According to the applicable methodology, conflict of interests may arise when an employee of the contracting authority (manager, member of commission responsible for the procedure, employee involved in the preparation and / or conduct of particular public procurement procedure) is interested in particular contract or contractor / economic operator.
- Are there any fraud indicators when negotiating tender terms and conditions?: Indicators exist when the economic operators from particular geographic area, region or industry collude to eliminate the competition in a long term and to increase the value of the public contract using various schemes when negotiating tender terms and conditions.
- Are there any fraud indicators in case of unjustified assignment of a public contract to one contractor: Such indicators could be identified, for example, in the cases of unlawful division of public procurement procedures, and in case of unjustified application of negotiated procedures.

Specific examples of the listed indicators are available in the instructions to the checklists used in the audit of public procurement procedures which can be found at the link above.

III. TYPES OF IRREGULARITIES ESTABLISHED BY THE AUDIT AUTHORITY

In implementing our audit engagements, we have also identified a number of infringements in the area of public procurement procedures committed by the beneficiaries which were established by the Managing Authorities in the process of verification of the expenditure incurred under the affected contracts and which were corrected before their inclusion in the certification reports. Information on these infringements is not included in the analysis, since these have already been identified and corrected by the Managing Authorities.

We draw attention to the fact that all irregularities with financial impact which the Audit Authority has identified are presented in the analysis. It should be noted that most of the audited procedures contain more than one infringement. According to the principle of non-cumulation of corrections in the reports of control results, we have recommended that a financial correction applicable to the most serious infringement be applied to the contract in question.

The statement below contains data on the types of identified infringements grouped depending on the stages of the public procurement procedure, namely:

- Irregularities relating to the preparation and opening of public procurement procedures;
- Irregularities relating to the evaluation of the received tenders;
- Irregularities relating to the execution of public procurement contracts.

1. Errors in the Preparation and Opening of the Public Procurement Procedure

In 2015, the largest portion of the infringements (about 82%) relate to the preparation of the public procurement procedure and its announcement, in particular to the formulation of its subject matter and selection of procedure to conduct it, establishment of selection and award criteria, technical specifications and evaluation methodology, and to the time limits for receipt of tenders and receipt / purchase of the tender documents.

These errors can be classified as follows:

1.1. Failure to conduct the Statutory Public Procurement Procedure

Most often, these types of infringements are due to the unlawful division of the public procurement procedure in order to circumvent the application of the public contract award procedure provided for by law. We have identified cases in which the relevant activities are assigned by applying the rules of the Ordinance on awarding small public contracts (repealed), Chapter Eight, (a) of the PPA or are freely assigned, regardless of the fact that the total cost of these activities requires that public procurement procedure be conducted under the PPA .

In the one case, the contracting authority has announced two procedures with a similar subject matter only in the Public Procurement Register. The total estimated value of the two procedures, however, required publication of information in the EU OJ.

In the other case, the public contract award procedure was properly selected - according to Chapter Eight (a) of the PPA. The public call, however, was not published on the buyer's profile in the course of the procedure, which is contrary to the applicable legal rules.

1.2. Terms and Conditions which give Priority to or which unjustifiably restrict the Participation of Persons in the Procedure

This type of infringement has the greatest financial impact on the beneficiaries. Most often, the infringements relate either to the manner of formulation of the criteria for selection of tenderers or to the documents which should be submitted to prove the satisfaction of these criteria. The selection criteria are related to the financial and economic situation of the tenderers, and to their

technical capabilities and professional qualifications. In order to be lawful and to ensure the compliance with the principle of equality and non-discrimination, they should be in line with the subject matter, nature, value, amount and volume of the public contract.

- To prove the right to carry out an activity subject to receipt of permits and licences, the contracting authorities often restrict illegally the participation of foreign economic operators, relying on the national regulatory regimes, without providing an opportunity for these operators to submit equivalent documents from the state in which they are established. Examples of this are the requirements for: registration with the Central Professional Register of Builders; registration with the Register of Persons exercising Independent Construction Supervision in the Design and Construction; Registration under the Tourism Act; obtaining permit issued by the Bulgarian Drug Agency; obtaining certificate for wholesale trade in medical devices on the territory of the Republic of Bulgaria; registration under the Independent Financial Audit Act, etc.

- We also found cases where the requirement for certain type of registration does not correspond to the complexity of the contract, for example: the tenderer selected for contractor must submit a copy of certificate of registration with the Central Professional Register of Builders proving that it meets the requirements for implementation of construction works belonging to fourth group, first category, while the contract concerns engineering of second category site. The cases where the tenderer is required to be a licensed Vocational Training Centre, while the scope of the contract is not related to the acquisition of profession or a part thereof are similar ones.
- As regards the financial and economic situation of the tenderers, unlawful requirements to prove available free financial resources from specific source are established again.

We have also found cases where the requirement for general and specific turnover is restrictive, precisely as a result of the relation between these two types of turnover.

The accumulation and confusion of the requirements for financial and economic situation and technical capacity of the tenderers have also restrictive nature: requirement for successfully completed projects of the same nature / complexity as that of the subject matter of the contract, as the tenderer should have implemented 3 projects, and at least one of them should have certain technical parameters and certain value.

- In some cases, the contracting authorities set requirements which are not relevant to the scope of the contract. For example, the experts proposed by the tenderers are required to have experience in the area of environmental protection in the water sector, while the contract concerns construction supervision. In the other cases, specific professional experience, such as provision of consultancy services and coordination of international projects is required, while the scope of the contract lacks an international element.
- We have also found that errors in defining the requirements for technical capabilities of the tenderers have been made. The contracting authorities determine period for acquisition of experience which does not comply with the requirements of Art.51, para.1, cl. 1 and cl. 2 of the PPA. For example, instead of the lawful time limit of 3 years for deliveries and provision of services, a shorter or longer term is set. On the other hand, the period is often determined in calendar years, without taking into account the date of opening of the procedure and the deadline for receipt of tenders (for example, the deadline for receipt of tenders for procedure concerning provision of a service is 20 April 2014, while the contracting authority has incorrectly stated in the notice that two contracts with a similar subject matters should have been executed in 2011, 2012 and 2013, unlawfully excluding the period 1 January 2014 - 20 January 2014). There are also cases where the turnover

requirement does not refer in general to the last three years, but refers to each of the last three years.

We continue to find that the contracting authorities require from the tenderers to prove that the technical equipment which will be used for execution of the contract is owned by them, or, is subject to conclusion of specific type of contract with the owner, without taking into account Art.51a of the PPA which enables the tenderers to use the resources of other physical and legal entities in the execution of the contract. If the tenderers prove in an appropriate manner that they have the opportunity to use foreign resources in the execution of the public contract, the contracting authorities shall allow them to participate in the procedure.

We have also found an unlawful requirement for existence of service facilities in the country or in certain city in the country at the time of submission of the tender. The requirement for location of the service facilities is relevant itself, but it should only be set for the tenderer selected for contractor, since it is directly related to the execution of the contract. If the contracting authority has used this requirement as a selection criterion in order to comply with the principle of free and fair competition, it should allow the tenderers to prove this circumstance in a manner which does hinder or burden them (for example free-text declaration by a person who has the required rights of the respective facilities, proving that if the tenderer is awarded the contract, it will have at its disposal service facilities in the country / relevant city).

There are still cases where the requirement for the number of executed contracts with similar subject matter is disproportionate, since more than three executed contracts (e.g. ten contracts) are required. We have also found cases where the contracting authority requires that the tenderers' experience should be gained in the execution of contracts funded by the EU, or under a specific operational programme, or in the execution of contracts related to particular type of organisations (e. g. public administration, public / state organisations, municipalities, etc.). It should be borne in mind that the addition of the phrase "or equivalent" to the source of funding of the executed contract does not make the requirement lawful (non-discriminatory), since the source of funding does not affect the quality of the experience gained. For example, the nature of the activities on design of a treatment plant with or without European funding is the same.

- Another group of infringements is related to the requirements for submission of certificates certifying the compliance of the applicant or tenderer with the quality management system standards. In 2015, we identified a case where the contracting authority required from the tenderers to have SA 8000: 2008 certificate or equivalent certificate of social responsibility. This certificate is not relevant to the scope of the contract, does not refer to quality management system standards and does not fall under the scope of Art. 53 of the PPA, and therefore the requirement for its submission in this case unjustifiably restricts the participation of the persons in the procedure
- During the audits, we have also found some gaps in the requirements for professional qualification of the experts set by the contracting authorities:

The key experts are required to have experience which duration does not comply with the statutory requirements for performance of the relevant activity, or with the customary practice in the relevant area.

We have also found cases where the requirements to the experts are unlawful - too high and / or inadequate to the scope and activities that should be performed under the contract. In these cases, the requirement for the level of education, professional qualifications or length of experience is excessively high compared to the responsibilities assigned to the relevant expert involved in the

execution of the contract - these responsibilities could be assumed and fulfilled by experts with lower-skills and experience, without affecting the quality of performance.

There is a practice whereby the contracting authority requires experience of a certain duration and specificity in order to determine whether the particular expert is experienced in the relevant area, while in fact this experience is gained in a different way. For example, in terms of the construction of certain types of facilities (roads, water supply and sewerage systems, treatment plants, etc.), in order to evaluate the expertise of the expert attention is paid to the number of projects in which implementation the expert was involved, rather than to the number of years during which such activities were performed. In these cases, the years of experience required by the contracting authority (for example, at least 10 years of experience in the implementation of infrastructure projects in the water sector, of which no less than 5 years of experience in WWTP construction) cannot be proven, since the documents which demonstrate these facts (such as the expert's service book contains information that the expert occupied the position of site manager in the last 10 years but there is no evidence that he was involved in the implementation of infrastructure projects in the water supply and sewerage sector in these 10 years, 5 of which - in the construction of waste water treatment plants) do not exist.

The same applies to the service contracts (design, training, logistics, IT services, etc.). In view of the above it can be concluded that the contracting authority's requirements are unclear since the tenderers do not know what evidence they must present, and the commission appointed by the contracting authority does not know exactly what evidence to accept. As a result, the commission accepts all documents and allows all tenderers to participate in the procedure, and we often detect an infringement of a financial nature - the selected contractor does not meet the requirements of the contracting authority. In the other cases, the commission accepts certain documents of some tenderers, but not of the others, as a result of which we find unequal treatment and / or improper removal.

We have identified infringements related to the requirements for general and specific professional experience of the key experts which are cumulatively met, for example: 10 years of general professional experience, 7 years of management experience and 5 years of experience in the management or implementation of projects / contracts in the area of human resources. In the other cases, the experts are unlawfully required to perform purely operational functions to gain management experience.

There are also cases where the experts are required to have certain number of years of experience, such as 2 years, but this experience must have been gained over the past three years.

We have also identified requirements to the experts for experience gained in implementation of projects funded by the EU or under a specific operational programme, although the specific activities which the experts will perform are based on skills, standards and rules applicable to the relevant sectors, notwithstanding of the source of funding of the contract.

The cases where the experts are required to have experience in the performance of certain type of activity, but only in public institutions, thereby discriminating the persons who have gained the relevant experience in the private sector, are the same.

The requirement to prove that the tenderers had certain number of employees employed under employment contracts in the past one or three years is also considered as a gap - there is no justification of the number of employees and / or, in case of construction contracts - this number is repeatedly exceeding the minimum number legally required for registration of the economic operators with the Central Professional Register of Builders for the respective category of construction works.

We have also identified cases where all engineering and technical staff is required to ensure the technical management during the construction works in order to meet the requirements of Art.163a of the Spatial Planning Act (SPA). According to the above standard, the builder shall enter into employment contracts with persons who have the required technical skills and shall engage them with the technical management of the construction works. Therefore, to participate in the public procurement procedure, the economic operators must enter into employment contracts with all engineering and technical staff proposed to execute the contract. In this case, the successful tenderer should have been required to comply with Art 163a of the SPA prior to the signing of the public contract.

There are also cases where the beneficiary has required that the key specialists be included in the list of authorised natural persons who perform the activity, according to the list attached to the operating licence. Therefore, the tenderer may apply for execution of the public contract only through the specialists who has used to obtain the relevant licence. This is restrictive, since the licence may have been received by the economic operator long before the announcement of the public procurement.

- In 2015, we also found that various requirements to individual types of tenderers - natural and legal persons and their consortia which are not registered as legal persons - were set. Usually, such errors relate to determining specific requirements to the tenderers - consortia, such as: requirements for economic, financial and technical capabilities which apply to each consortium member; requirement that the total turnover or 80% of the total / specific turnover should be generated by one of the consortium members (the leading one); requirement that the experience should be entirely gained by one of the consortium members or by each of them, etc.
- The contracting authorities also make errors in determining the requirements for the tenderers' personality - related to their legal capacity - in particular the requirement to have licences or registration with certain professional registers.
- In some cases, the errors made by the beneficiaries relate to the documents required by the tenderers: copies of contracts are required to be submitted, although according to the applicable legislation only a list of the major supply and service contracts executed in the last three years accompanied by recommendations for satisfactory performance may be required; if documents and letters of reference in a foreign language are included in the proposal, they should be accompanied by an official translation into Bulgarian language, although according to the PPA an official translation may be required only for the registration document of the relevant tenderer; declaration as per Personal Data Protection Act is required to be submitted, without a requirement to submit data subject to protection under this Act; signed draft contract is required to be submitted, accompanied by a declaration for acceptance of the terms and conditions laid down in the draft contract; extract from the judicial record is required to be submitted along with the tender, etc. The requirement that the tenderer should submit for each completed contract both recommendations for satisfactory performance and use permit (certificate of commissioning) of the relevant construction site is a specific example of infringement related to the required documents, since the contractors are not included in the process of issuing use permit and are not a party thereto.
- As regards the technical specifications, the most common illegal practice is the use of specific measures and models in the preparation of bills of quantity for construction works or services, without using the phrase "or equivalent".
- We have also identified cases where the contracting authority requires that the delivered goods and equipment should comply with certain standards, without specifying any equivalent ones.

- In 2015, we also found infringements in the formulation of the scope of the public contract. We have found cases where the description made by the contracting authority in the tender documents is insufficient and does not allow the tenderers / applicants to determine the scope of the contract. Such circumstance has also a dissuasive effect on the stakeholders. The definition of contract scope which includes a number of activities that are not identical or similar and require different knowledge has the same effect. The unjustified consolidation of the scope of the public contract limits the opportunities for participation of those who could perform individual groups of activities individually.

1.3. Unlawful Methodology for Evaluation of Tenders

The formulation of unlawful evaluation methodology is, by its very nature, a circumstance which unjustifiably restricts the participation of persons in the procedure, i.e. it has a dissuasive effect on the potential tenderers / applicants in the public procurement procedure. The infringements of the methodology for evaluation of tenders are mainly related to:

- Formulation of evaluation indicators which are not directly related to the scope of the public contract. The following three examples can be given:
 - Opportunity to offer additional activities beyond the technical specifications;
 - Use of evaluation indicators which do not contribute to the quality execution of the contract, and therefore do not contribute to the selection of the most appropriate tender;
 - Use of evaluation indicators whereby the award of points is not related to the scope of the contract but to the tenders of the other tenderers.

Cases of unlawful practice on provision of opportunity to offer additional activities exist when the contracting authority has requested for provision of bonuses or additional services / supplies / installation and construction work which are not specified in the technical specifications but are subject to evaluation as a part of the technical proposal. For example, the contracting authority has specified in the construction contract that additional proposals not included in the construction project (part of the tender documents) will be made and they will be evaluated based on a comparison between the proposals received by all tenderers; the contracting authority has specified in the contract for supply of equipment that each technical parameter not included in the technical specification for the relevant item will be awarded one point, etc. In these examples, the tenderers do not have sufficient and complete information on the scope of the contract and are not placed on an equal footing - they do not know what they are competing for and which of their proposals will receive the highest score.

The following examples can be given for the cases of evaluation indicators which do not contribute to the selection of the most appropriate proposal: risk management, environmental protection measures, tenderer's understanding of the contracting authority's requirements and scope of the contract, detailed description of the manner in which the contract will contribute to meet the needs of the stakeholders, etc. We should pay attention to the definition of the "most economically advantageous tender" of the PPA, according to which the indicators shall be directly related to the scope of the public contract and shall evaluate the characteristics of the scope of the contract in terms of quality, price, technical advantages, etc. In all cases where the contracting authority does not provide for evaluation of specific parameters of the contract scope, but of the description and number of risks, measures, methods, approaches, etc., it sets unlawful evaluation indicators. In these cases, such technical proposal has been prepared only for the purpose to be evaluated, without contributing to the execution of the contract; there is nothing to execute and the contracting authority does not seek for execution of the contract.

Conflict with the legal requirements also exists when the contracting authority has provided for evaluation indicators whereby the award of points is not related to the scope of the contract but to the tenders of the other tenderers. In preparing and submitting its tender, none of the tenderers knows the level of the relevant evaluation indicator reached by the other tenderers, and therefore it is not aware of the score that its tender will receive.

In these cases, the tenders are compared by the members of the commission responsible for the procedure without precise instructions. An example of such an infringement is the use of expressions, such as: "The proposal has lower effect than the proposals with the highest quality effect ...".

- Formulation of evaluation indicators representing requirements to the financial and economic situation, technical capabilities and professional qualifications of the tenderers. There are still cases of illegal combination of selection criteria and evaluation indicators.
- The contracting authority has provided for award of points (even 0 points) for proposals that do not meet the requirements of the technical specification or other terms and conditions set by it. According to Art.69, para.1, cl.3 of the PPA, such proposals are subject to removal.
- The contracting authority has used the so-called "average score methodology", whereby the maximum number of points is awarded to the proposal which is closest to the average one made within the procedure.
- We have also found cases of mathematical errors in the formulas used to calculate the scores by individual indicators and / or in the calculation of the integrated score. We have also identified discrepancies between the weightings of the indicators specified in the notice and those contained in the evaluation methodology.

1.4. Unreasonable Reduction of the Time Limit for Receipt of Tenders and determining too short Time Limit for Purchase of Tender Documents Violation of the Publicity when announcing the Public Contract

- The contracting authority has unlawfully determined shorter time limit for receipt of tenders. Most often, this is due to unjustified reference to any of the circumstances referred to in Art.64 of the PPA. For example, no prior notice containing the statutory information on awarding the public contract has been sent - there is no information on the estimated value of the contract, its amount and volume, although such information was available to the contracting authority at the time of receipt of the prior notice. In some other cases, there is a significant difference between the information contained in the prior notice and that included in the contract notice, and this difference is not due to circumstances unforeseen for the contracting authority.
- We have identified that in providing full and unlimited electronic access to all tender documents on its website, the contracting authority has unlawfully restricted the access, setting a requirement that the purchase of tender documents and submission of document proving such purchase are essential for the eligibility of the tender. In the other cases, the access is limited, since the contracting authority has indicated in the notice that it will remove the tender documents from its website upon expiry of the time limit for their receipt.
- Clause 4 of the Guidelines for determining Financial Corrections to be made by the Commission to Expenditure financed by the Union under Shared Management for Non-compliance with the Rules on Public Procurement of 19 December 2013 stipulates that in all cases where the ratio between the time limit for receipt of tenders and time limit for purchase of tender documents is less than 80%, there is too short time limit for purchase of tender documents. The same is provided for in cl. 4 of the Annex to Art. 6, para. 1 of the

National Methodology for determining Financial Corrections to be made to Expenditure related to Implementation of Operational Programmes co-financed by the Structural Instruments of the European Union, European Agricultural Fund for Rural Development, and European Fisheries Fund (adopted by Decree No 134/2010 of the Council of Ministers). These cases constitute an irregularity and are subject to financial correction. As provided for in the national legislation in force until 2014, any reduction in the time-limit for receipt of tenders, even if justified, results in a ratio lower than 80%. All these cases are considered as deviations with financial effect, without violating the PPA, and therefore the financial correction should not be made at the expense of the beneficiary, unless there is another infringement with the same or higher financial impact in the audited public procurement procedure.

- In terms of the findings on determining unlawful time limit for receipt of tenders, the Audit Authority applied the approach of the European Commission auditors shared during their audit missions in 2014 and 2015. Following the general understanding of the timely sharing of their experience with all bodies responsible for the compliance with the public procurement rules in the implementation of projects co-financed with EU funds, the Audit Authority has officially notified all Managing and Certifying Authorities, Public Procurement Agency and National Association of Municipalities in the Republic of Bulgaria of the changed approach applied to the audit of public procurement procedures.
- When announcing the public contract, the contracting authorities do not specify all selection criteria and all documents demonstrating their satisfaction, and include in the tender documents additional requirements for the suitability of the tenderers and / or documents which should be enclosed to the tender. This violates Art. 25, para. 2, cl. 6 of the PPA which requires exhaustive list of the criteria and relevant documents and reference to the principle of publicity and transparency.

2. Errors relating to the Evaluation of the Received Tenders

This type of irregularities is directly related to the work of the commission responsible for the procedure. Upon completion of the audits conducted in 2015, we have identified the following irregularities:

- the tenderer selected for contractor does not meet the requirements pre-defined by the contracting authority, but as a result of some gaps in the work of the commission it is admitted to participate in the procedure and to evaluation;
- the commission has improperly applied the selection criteria set by the contracting authority which has led to unjustified removal of tenderers / applicants from the procedure;
- the commission has improperly relied on, or has failed to rely on Art. 68, para. 7-9 of the PPA - in case of any lack of documents, or irregularity in Envelope 1 of the tender the commission has not allowed the tenderer to remedy the irregularity;
- the commission has improperly applied the evaluation indicators set by the contracting authority which has led to improper ranking of the tenders;
- negotiations have been conducted during the public contract award procedure which has led to changes in the initial conditions set out in the contract notice or tender documentation;
- the commission has treated differently the tenderer selected for contractor and the eliminated tenderers - in similar situations, the commission has interpreted in a different way some requirements of the contracting authority and documents demonstrating that they have been met, while in case of equal treatment, it should have removed them from the procedure or admitted all of them to participation;

- the commission has unjustifiably removed tenderers as a result of abnormally low proposal, due to unjustified rejection of the presented justification or requirement for justification without legal basis (lack of abnormally low proposal within the meaning of Art. 70 of the PPA).

3. Errors in the Conclusion and Execution of Public Contracts

During the audit of operations, the Audit Authority has also focused on the conclusion and execution of the public contract. The content of the concluded contract is compared to its compliance with the requirements of the tender documents and to the proposal of the tenderer selected for contractor. The manner in which the public contract is executed and, in particular, whether the performance accepted by the contracting authority meets the terms and conditions laid down in the contract and tender documents is also analyzed.

In 2015, the Audit Authority identified relatively small number (14) of irregularities relating to the conclusion and execution of public contracts. In some cases, we have found reduction in the volume of contract at the expense of preservation of the contract value, while in other cases we have identified unlawful change of the contract term or change in the key experts, as the experts involved in the execution of the contract do not meet the selection criteria. We have also found cases of violation of the requirements and payment terms, and of delivery of equipment which features do not meet the specifications indicated in the contractor's offer.

IV. CONCLUSIONS AND RECOMMENDATIONS

In 2015, the share of irregularities established by the Audit Authority (in 51 % of the audited procedures) was significant. The Audit Authority analyses thoroughly the reasons for the irregularities committed by the Managing Authorities in the verification of expenditure incurred during the public procurement procedures verified and certified in 2014. It can be summarized as follows:

- By decision of 19 December 2013 the European Commission adopted Guidelines for determining Financial Corrections to be made by the Commission to Expenditure financed by the Union under Shared Management for Non-compliance with the Rules on Public Procurement. These guidelines repealed the Guidelines for determining Financial Corrections to be made to Expenditure co-financed by the Structural Funds and the Cohesion Fund for Non-compliance with the Rules on Public Procurement (COCOF 07/0037/03) applied by the end of 2013. As required by the European Commission, the Audit Authority applies the above guidelines from the beginning of 2014. The managing and certifying authorities are notified thereof by letter of 24 January 2014. The new guidelines contain more detailed definition of certain irregularities in the award of public contracts for which financial corrections should be imposed. Moreover, the EC guidelines provide for equal treatment of the public contracts above and below the thresholds laid down in Directive 2004/18/EC, as the contracts below the thresholds are subject to the same types of irregularities. On the other hand, the guidelines provide an opportunity to individualise the financial impact of all irregularities depending on the seriousness of the particular deviation. The new guidelines were not in force at the time the most public contracts which fell within the scope of our work were awarded.
- A significant number of the detected infringements (139) relate to the irregularities described in cl. 3 and cl.4 of the new EC guidelines. These types of irregularities give a new interpretation of the arrangements for determining the time limits for receipt of tenders and time limits for access to tender documents which is not applied at the time the public contracts were awarded. It should also be noted that the Audit Authority has found only irregularity under cl. 4 of the Guidelines (insufficient time limit for access to tender documents) in extremely limited number of audited

public procurement procedures. The other procedures contain both the above irregularity and other types of infringements available in the repealed Guidelines (mostly restrictive requirements, unlawful evaluation methodology, unjustified removal, from the procedure, contractor which does not meet the requirements of the contracting authority, unequal treatment of the tenderers, etc.). In 2014, the PPA was amended and supplemented. As a result, the contracting authorities are required to provide full and free access to the tender documents throughout the entire time limit for receipt of tenders. The new PPA (State Gazette No 13 of 16 February 2016, in force from 15 April 2016) stipulates that the contracting authorities shall provide unrestricted, full, free and direct access by electronic means to the tender documents from the date of publication of the notice. These amendments to the legislation severely restrict the preconditions for commitment of irregularities referred to in cl.4 of the EC guidelines and suggest reduction in the number of irregularities specified in cl.3 of the EC guidelines.

- Another major reason for commitment of irregularities in verification of expenditure incurred in public procurement procedures is the lack of competence of the employees involved in the audits. In order to improve the knowledge and skills of these employees in 2015, IAEUF EA continued its practice to share the applied approach. The trainings in the Audit Authority approach to audit public procurement procedures conducted in 2015 were attended by a total 149 employees of the Managing Authorities and by the beneficiaries to the operational programmes.

- Part of the errors with financial impact is due to the fact that the audits cover also expenditure for public procurement which are verified in accordance with a methodology that does not correspond to the Audit Authority checklists used in the audit of public procurement procedures distributed as a good practice in March 2015 among the Managing Authorities of three of the operational programmes. In 2015, they did not use these checklists in any verification. The above checklists were partially used in the implementation of the remaining operational programmes - only in respect of public contracts which expenditure is subject to verification for the first time after the introduction of the new checklists as part of the Managing Authorities' procedure.

Given the considerable number of irregularities, we believe that the beneficiaries, Public Procurement Agency, Managing Authorities, Certifying Authorities and other authorities with competence in the management and control of funds under the programmes funded by the EU should strengthen the control of the public procurement procedures, using appropriate methodology and adequate training. In this connection, the Audit Authority shares on a regular basis its approach to audit public procurement procedures approved and recommended to all authorities in the system by the European Commission, (1) publishing and disseminating the relevant checklists and (2) participating in trainings in presentation of examples of irregularities from the EC and Audit Authority practice.

The provision of *appropriate and regular focused trainings* for beneficiaries and employees involved in the process of verification is really of extreme importance. These trainings should be directly related to the irregularities described in the Guidelines for determining Financial Corrections to be made by the Commission to Expenditure financed by the Union under Shared Management for Non-compliance with the Rules on Public Procurement adopted by decision of 19 December 2013 of the European Commission and to their prevention. The authorities of the system to manage and control the EU funds should ensure that the employees involved in the award and control of public contracts funded with EU funds have both thorough knowledge of the findings of EC and Audit Authority auditors and apply strictly the EC and Audit Authority approach to establish these findings. The Managing and Certifying Authorities should establish such infringements and should timely correct them, since according to the regulations applicable to the new programming period 2014-2020 the errors with financial impact found by the national authorities are corrected without any net losses within the year (by the date of issue of the annual accounts and annual control report as of 15 February of the relevant year). If, however, the EC or

European Court of Auditors has subsequently established additional errors with financial impact in the expenditure contained in the submitted reports, the financial corrections for these errors will be net ones for the Member State.

Appendix

SUMMARY

OF THE INFRINGEMENTS OF THE RESTRICTIVE REQUIREMENTS ENCOUNTERED IN THE PRACTICE OF THE AUDIT AUTHORITY AND GUIDELINES FOR THEIR AVOIDANCE

OBJECTIVE: Our objective is to assist all participants in the management and control system in order to achieve uniform understanding of the content of the irregularities of the restrictive requirements depending on the approach of the European Commission and Audit Authority auditors and to take measures to avoid such irregularities.

REFUSAL OF COMPLETENESS:

The summary does not contain an exhaustive list of all possible deviations in the formulation of requirements which unreasonably restrict the participation of persons in the procedure and does not contain all possible manners to avoid the errors we encounter.

The examples to avoid these errors referred to in the text are not all possible variants.

I. RESTRICTIVE REQUIREMENTS FOR FOREIGN ECONOMIC OPERATORS

I.1. Requirements relevant to the Construction Works

1. The tenderer must have valid insurance Professional Liability as per Art. 171, para.1 of the Spatial Planning Act (SPA);
2. The tenderers should have been registered with the Central Professional Register of Builders;
3. The tenderer should have a valid licence for construction supervision (should be registered with the public register to Directorate for National Construction Control as a consultant on construction supervision in performance of construction works for persons registered on the territory of the Republic of Bulgaria;
4. The tenderer should have certificate for performance of activities on assessment of conformity of investment projects and/or exercise of construction supervision or attestation of the right to perform the activities referred to in Art. 166, para.1, cl.1 of the SPA;
5. The tenderer should submit a certificate issued by the Chamber of Architects or by the Chamber of Engineers in the Investment Design proving registration with the registers referred to in Art. 6 of the Chamber of Architects and Engineers in the Investment Design Act for the persons with full design capacity and for the authorised persons under the Cadastre and Property Register Act;
6. The tenderers should submit a certificate of registration with the Central Professional Register of Builders for performance of construction works which scope corresponds to the type of construction works subject to the public contract and to its category pursuant to Art. 137, para. 1, cl. 1 (m) of the Spatial Planning Act;
7. The design team should also include consultant who will prepare the technical passports of the buildings and who has a licence issued by the Ministry of Regional Development and Public Works. The concept "consultant who will prepare the technical passports of the buildings and who has a licence issued by the Ministry of Regional Development and Public Works" should

- be interpreted as "consultant who has obtained a licence by the Minister of Regional Development and Public Works according to the procedure laid down in the Ordinance under Art. 166, para. 2 or "consultant who has obtained a certificate according to the procedure laid down in the Ordinance under Art. 166, para. 2" (according to the amended Spatial Planning Act in force from 26 November 2012);
8. In the cases where the tenderer is consortium which is not a legal person, it should be registered with the register of the Chamber of Architects, or Chamber of Engineers in the Investment Design, respectively.

I.2. Requirements relevant to the Construction Works in the Area of Rail Transport

1. The tenderers shall prove that they are determined as "person for assessment" according to the national safety rules or national technical rules as per Directive 2008/57/EC (interoperability of the rail system within the Community) and that they have received authorisation by the Minister of Transport, Information Technology and Communications;
2. The tenderers shall submit certificates of successfully completed examination under Ordinance No 58 of 2 August 2006 on the rules for technical operation, train traffic and signalling in the rail transport;
3. The tenderers shall submit certificate / certificate of competency according to Ordinance No. 56/2003 on the requirements, conditions and procedures for training of candidates in acquisition of capacity required by the staff responsible for the rail transport safety or recognition of such capacity and on the procedure for conduct of verification examinations of the staff responsible for the safety of transport;

I.3. Requirements relevant to the Tour Operator Activity

1. The tenderers should be entitled to sell airline tickets, including on the territory of the Republic of Bulgaria, according to the legislation of the Republic of Bulgaria in force at the date of notification of the contract;
2. The tenderer should be registered according to the Tourism Act with the Register of Tour Operators and Travel Agents to the Ministry of Economy, Energy and Tourism / Ministry of Tourism;

I.4. Requirements for Registration with Various Registers

1. The tenderer should submit valid permit/certificate for wholesale trade in medical devices on the territory of the Republic of Bulgaria belonging to category 12 - devices for diagnostic and therapeutic radiation issued in accordance with the Medical Devices Act;
2. The consultants should be registered with the single register of mediators to the Ministry of Justice;
3. The tenderers should submit "list - declaration for the technical equipment" for the available mobile cranes accompanied by certificates for periodical control issued by the State Agency for Metrological and Technical Surveillance according to the procedure laid down in the Ordinance on safe operation and technical supervision of movable equipment adopted by Decree No 174/14.07.2006 of the Council of Ministers;
4. The tenderers shall submit a copy of the licence for operation of sources of ionizing radiation under Art. 15, para.3, cl. 4 of the Safe Use of Nuclear Energy Act for the purpose of maintenance, assembly, dismantling, measurement, repair and provision of other services;

I.5. Requirements relevant to Contracts for Supply of Food and Food Products

1. Certificate of registration as per Art. 12 of the Food and Food Trade Act issued by the Regional Directorate of Food Safety (RDFS) depending on the location of the site;

2. Original test report for milk products issued by the laboratory of the National Reference Centre on Safety of Food of Animal Origin;
3. Valid carriage authorisations issued in accordance with the requirements of the Regional Directorate of Food Safety (RDFS) and Regional Health Inspectorate;
4. Certificate of registration of the vehicle issued by RDFS pursuant to Art. 246, para.4 of the Veterinary Activities Act and meeting the requirements of Ordinance No 5/25.05.2006 on the hygiene of foodstuffs for each vehicle;
5. Certificate of registration of the vehicle issued by Regional Health Inspectorate.

I.6. Other Restrictive Requirements

Every Bulgarian natural person may participate in the public contract award procedure.

In all examples listed above (I.1.- I.6.) the contracting authority:

- *has required from the tenderers to meet a requirement which is stipulated in the Bulgarian legislation - requirement for registration, receipt of licence, notification, etc. - on the one hand;*
- *has failed to explicitly specify that the foreign economic operators may prove the right to perform the relevant activity, submitting documents issued in the state in which they are established, on the other hand.*

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. I

To avoid the above deviations the contracting authority should:

- explicitly provide an opportunity for the applicants or tenderers involved in the procedure to be Bulgarian or foreign natural or legal persons or their consortia, and any other entity;
- explicitly indicate that each foreign tenderer / applicant /expert may prove its right to pursue a particular activity submitting documents issued in the state in which it is established;
- make no reference to national registers or Bulgarian regulations when formulating the requirement; for example the correct wording may be:
 - ✓ The tenderer is entitled to perform construction works classified in second category, fourth group of works;
 - ✓ The tenderer should have insurance Professional Liability for construction of sites classified in second category, fourth group of works;
 - ✓ The tenderer should have insurance Professional Liability for the construction supervision activity performed for construction works classified in second category, fourth group of works;
 - ✓ The expert should have full design capacity;
 - ✓ The expert should have the required capacity in terms of the rail transport safety;
 - ✓ The tenderer is entitled to perform a tour operator or travel agency activity;
 - ✓ The tenderer should have valid permit/certificate for wholesale trade in medical devices;
 - ✓ The tenderer should submit a licence for operation of sources of ionizing radiation.

II. DISPROPORTIONATE REQUIREMENTS CONCERNING THE TENDERERS' LEGAL CAPACITY

II.1. Requirements to the Tenderers for Registration, Licence or Authorisation Arrangements which are not Needed to execute the Contract

1. The tenderer should be licensed as Vocational Training Centre (VTC), and should have a licence issued by the National Agency for Vocational Education and Training (NAVET) to the Council of Ministers allowing it to conduct trainings subject to this contract.

The scope of the contract includes conduct of trainings, rather than acquisition of profession or a part thereof within the meaning of Art. 5, para.2 of the Vocational Education and Training Act, and therefore the requirement is not relevant and is not needed for performance of the activities being assigned.

2. The tenderer should be registered auditor according to the Independent Financial Audit Act (IFAA).

The scope of the contract includes implementation of audit procedures in respect of a project, rather than expression of independent audit opinion on the fair representation, in all material respects, of the data in the financial statements, i.e. the requirement is disproportionate and does not refer to the scope of the contract.

II.2. Requirements which cannot be met in the Submission of Tenders

1. The tenderers should have a permit issued by the Regional Health Inspectorate (RHI) for performance of activities on destruction of materials containing asbestos, and a copy of this permit should be enclosed to the tender.

According to the Health Act the procedure for issue of the required permit relates to specific occasion and operation, rather than to the performance of this activity, and therefore the requirement for participation is impracticable at the time of submission of the tender. The submission of the above permit should only be required from the tenderer selected for contractor.

2. The tenderers should submit a copy of the permit referred to in Art.15, para.4, cl. 13 of the Safe Use of Nuclear Energy Act (SUNEA) for imports and exports of sources of ionizing radiation or parts thereof.

The permit for imports of sources of ionizing radiation is issued in connection with the supply of specific equipment for specifically designated person, i.e. in connection with a specific supply. The required permit cannot be issued at the time of submission of the tender.

II.3. Requirements which cannot be met by the Contractors

The tenderers shall submit a copy of the licence for operation of sources of ionizing radiation under Art. 15, para.3, cl. 4 of the Safe Use of Nuclear Energy Act for the purpose of maintenance, assembly, dismantling, measurement, repair and provision of other services. If the contractor is a

foreign entity which does not hold the required licence, it shall submit the said licence within 25 days upon receipt of the decision on its selection for contractor.

According to the Safe Use of Nuclear Energy Act the chairperson of the agency shall issue the licence within a period of up to one month. The requirement has

a dissuasive effect, since the statutory time limit for issue of the relevant licence is longer than the time limit indicated by the contracting authority in the contract notice.

II.4. Disproportionate Requirements for the Category of Construction Works

1. Certificate of registration with the Central Professional Register of Builders for performance of construction works classified in IV group, first category, while the construction site belongs to second category, according to the requirements of the contracting authority.
2. Certificate of registration with the Central Professional Register of Builders for performance of construction works classified in I group, second category, while the construction site belongs to fourth category, according to the requirements of the contracting authority.
3. Certificate of registration with the Central Professional Register of Builders for performance of construction works classified in all groups, second category, while the construction site belongs to IV group, second category, according to the requirements of the contracting authority.
4. Valid insurance Professional Liability for damage caused to other participants in the construction works classified in first category, while the construction site belongs to third category.
5. Registration with the Central Professional Register of Builders for performance of construction works classified in IV group, first category, and in case of foreign entities - document according to the legislation of the state in which they are established for performance of construction works classified in second category.

The requirement is different for the economic operators depending on the state in which they are established. The requirement to foreign entities for performance of construction works classified in second category is not necessary for execution of a contract which construction site belongs to fourth category.

In all listed examples the contracting authority has required a category and/or group of construction works which do not conform to that required for performance of the construction works.

II.5. Other Restrictions related to the Legal Capacity

The tenderers shall be authorised by the producers of the medical devices to participate in this public procurement procedure.

The contracting authority has restricted the economic operators' rights to use in principle authorisation for supply of equipment.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. II

To avoid the above deviations the contracting authority should:

- formulate requirements which are directly related to the scope of the public contract. If permit / licence/ registration is not needed to legally perform the activities under the contract, the contracting authority is not entitled to require its submission;
- not formulate requirements for the legal capacity of the tenderers which can be met only by the tenderers selected as contractors - when the permit / licence / registration is issued for specific activity which will be performed under the public contract, the contracting authority is not entitled to require from the tenderers to have these documents in the submission of tenders, since their issue is in principle impossible;
- not formulate requirements for receipt of permit / licence/ registration by the tenderer selected as contractor within time limits and/or under terms and conditions which do not comply with the legal requirements;
- formulate requirements which comply with the requirements for execution of the contract, such as:
 - ✓ In case of construction works classified in IV group, second category according to the building permit or other documents (investment / work plans, etc.) the tenderers should be required to prove that they are entitled to perform construction works classified in IV group, second category;
 - ✓ In case of construction works classified in third category according to the building permit or other documents (investment / work plans, etc.) the tenderers should be required to prove that they have insurance Professional Liability for construction works classified in third category;
- formulate requirement for authorisation by the manufacturer for supply contracts / service contracts in principle, without requiring the authorisation to relate to the specific procedure.

III. REQUIREMENTS RELEADING TO UNEQUAL TREATMENT OF THE VARIOUS TYPES OF TENDERERS

1. The total turnover of the tenderer for the last three financial years shall be not less than BGN 1,000,000. The total turnover of the tenderer generated in the last three financial years from execution of activities similar to those covered by the scope of the contract shall be not less than BGN 400,000. In case of consortia, the requirements apply to each member of the consortium.

These requirements violate Art.25, para.5, in conjunction with Art.2, para.1, cl. 3 and Art. 9 of the Public Procurement Act, since they impose different requirements for the suitability of the various types of tenderers - natural and legal persons and their consortia - which restrict the participation of the persons in the procedure, on the one hand, and violates the principles of equal treatment and non-discrimination of various types of tenderers referred to in Art.2, para.1, cl. 3 of the PPA, on the other hand.

2. Each consortia member should cover at least 33% of the general and special turnover requirements for the past three years and the leading consortia member should cover at least 67% of them.

The contracting authority has unlawfully restricted the participation of persons in the procedure, restricting the right of the consortia - unincorporated companies to negotiate the terms and conditions for their participation in the procedure between them. Thus, the contracting authority has sets different requirements for the suitability of the various types of tenderers - natural and legal persons and their consortia.

3. The tenderer should have completed a volume of installation and construction work in each of the last three years in the amount of not less than BGN 740,000 (seven hundred and forty thousand leva). If the tenderer is a consortium, the minimum volume of installation and construction work performed by the leading partner in each of the last three years shall amount to at least BGN 518,000 (five hundred and eighteen thousand leva).

The above requirement imposes different requirements for the suitability of the various types of tenderers - natural and legal persons and their consortia - which restrict the participation of the persons in the procedure, on the one hand, and violates the principles of equal treatment and non-discrimination of various types of tenderers referred to in Art.2, para.1, cl. 3 of the PPA, on the other hand.

4. In case of consortium, the leading partner should have completed in the last 3 years construction and installation work with a total volume of at least BGN 1,000,000. Tenderers which are not consortia shall prove that they have completed in the last 3 years construction and installation work with a total volume of at least BGN 1,000,000.

The turnover requirement refers to one of the consortium members, rather than to the entire consortium. Therefore, the turnover of the consortium must exceed the minimum one required for other types of tenderers. This undermines the right of the persons to pool their efforts to participate in the public procurement procedure. The contracting authority has set different selection criteria to the various types of tenderers (consortia and tenderers other than them), requiring from one of the consortium members to generate the specific turnover, rather than from all of them altogether.

5. The contracting authority has required turnover from activities similar to those covered by the scope of the public contract - construction supervision and exercising of control during the implementation of installation and construction work - in the last 3 (three) years in the amount of not less than:

- BGN 111,000 for lot 1;
- BGN 26,700 for lot 2;
- BGN 78,000 for lot 3.

In case of consortium, the leading member of the consortium should have turnover amounting to at least 70% of the amounts specified above.

The contracting authority has formulated different requirements for the tenderers natural and legal persons and for the members of consortia which are not registered as legal persons, i.e. the contracting authority does not treat equally the various types of tenderers under Art. 9 of the PPA.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. III

In order to avoid the above-mentioned deviations, the contracting authority should not formulate specific requirements for the tenderers - consortia.

IV. DISPROPORTIONATE REQUIREMENTS FOR THE ECONOMIC AND FINANCIAL SITUATION OF THE TENDERERS

1. The tenderers should have generated turnover from provision of independent financial audit services in the last 3 (three) financial years - 2009, 2010, 2011 - in the amount of not less than BGN 80,000.

The financial reports and activities of Municipality X, including the implementation of projects funded with EU funds, are not subject to independent financial audit by registered auditors within the meaning of the Independent Financial Audit Act, i. e. the requirement for specific turnover is not related to the scope of the contract.

2. The tenderers shall have available funds on their credit line or free financial resources to fund the activities in an amount of not less than 20% of their price quotation value.

The tender evaluation committee could not assess whether the criterion is met, if it is not aware of the relevant price quotation.

3. The tenderers should have generated annual turnover of BGN 50,000.00 in each of the last 3 (three) financial years.

The turnover requirement applies to each of the last three years, rather than to the last three years as a whole.

The contracting authority has limited the participation in the procedure of the persons who have generated a total turnover greater than or equal to BGN 150,000 in the last three years, in a ratio different from BGN 50,000 for each of the three years.

4. The tenderers should provide information on the turnover from construction activities similar to those covered by the scope of the contract performed over the last 5 years.

This requirement is unlawful with respect to the reference period, since information for a period of 5 years is required, rather than information for the statutory period of 3 years.

5. The tenderers should have generated total turnover of not less than BGN 900,000 (nine hundred thousand leva), excluding VAT, in the last 3 (three) years from activities similar to those covered by the scope of the current contract.

The total estimated value of the contract is BGN 275,000, excluding VAT, and is broken down by lots, as follows: BGN 150,000, excluding VAT; BGN 75,000, excluding VAT and BGN 75,000 excluding VAT.

The procedure may include one or more lot, at the discretion of the tenderers.

The requirement for specific turnover exceeds more than three times the total estimated value of the contract (3.27), respectively 6 times for lot - 1 and 12 times - for lots 2 and 3. The requirement does not take into account the option for submission of tenders for one or two lots. The requirement for specific turnover exceeds more than three times the total estimated value of the contract (3.27), respectively 6 times for lot - 1 and 12 times - for lots 2 and 3. The requirement does not take into account the option for submission of tenders for one or two lots. The requirement for specific turnover is unreasonably high and does not correspond to the value and amount of the public contract, including of each lot.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. IV

To avoid the above deviations the contracting authority should:

- formulate the requirements for specific turnover, determining an activity corresponding to the scope of the public contract for a source of turnover;
- define the free financial resource as a fixed amount;
- define the turnover (general and / or specific one) as a global amount for the three-year period, rather than for each year separately;
- define the last three completed financial years as a reference period for the turnover (general and / or specific one) requirements;
- in case of lots in the scope of its contract, formulate requirements for economic and financial situation (general and / or specific turnover, free financial resource) for each separate lot, so as to make them proportionate to the estimated value of the lots.

V. DISPROPORTIONATE REQUIREMENTS FOR THE TECHNICAL CAPABILITIES OF THE TENDERERS

V.1. Requirements for the Tenderers' Experience

1. The tenderer should have completed successfully at least 10 (ten) audit engagements.

The number of engagements does not correspond to the purpose of the requirement to establish whether the economic operator has performed similar activities with the same quality in the past.

2. In case of construction contract the tenderer should have completed at least 1 construction contract which scope is similar to that of the awarded public contract and each contract indicated in the declaration shall be accompanied by a letter of recommendation for satisfactory performance, building permit, and use permit / certificate of commissioning.

The requirement for commissioning of the similar site unreasonably restricts the participation of the persons in the procedure, since the builder delivers the site to the contracting authority along with the construction papers in the issuance of Permit 15, thus completing its commitments under the construction contract. According to the applicable legislation, the builder does not participate in the commissioning and obtaining of the use permit - it is not an addressee of the issued documents and does not have them.

3. In its service contract which scope is event organisation and hiring of meeting rooms, presentation equipment and coffee breaks, the contracting authority has set to the tenderers a requirement for at least 3 completed contracts in the area of provision of services under projects funded by the EU Funds.

The source of funding does not change the nature of the activities on organisation of public events. In this regard, the requirement is not related to the scope and nature of the contract.

4. To participate in an open procedure under the PPA with subject provision of airline tickets for transportation of passengers and luggage by air in trips abroad, the tenderers should have completed at least 3 contracts which scope is similar to that of this contract in the last 3 years (2010, 2011 and 2012) within a year.

The time limit for execution of the contract does not indicate the volume of performed activities and is therefore irrelevant for assessing whether the economic operator has experience in the performance of such activities. The reference period for acquisition of experience is 3/5 years from the date of submission of the tender, rather than calendar years.

5. To be awarded a construction contract for rehabilitation of railway infrastructure, the tenderer should have completed successfully projects of the same nature / complexity as the scope of the contract, or should have constructed new railway lines over the last 5 years, as at least one of these projects should have a linear length of not less than 80 km, minimum speed of 130 km / h and a minimum value of BGN 100,000,000.

The project cost and the characteristics which should be met, unreasonably restrict the participation of the persons in the procedure, since the procedure itself does not impact on the fact whether the economic operator's experience corresponds to the contract being awarded.

6. To be awarded a contract for supply and installation of transport facility, the tenderers should have SA 8000: 2008 certificate or equivalent certificate of social responsibility.

The certificate is not required to perform the activities covered by the scope of the contract, and therefore it is not relevant to the scope and nature of the contract.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. V.1

To avoid the above deviations the contracting authority:

- should designate a maximum of 3 similar construction works / supplies or services (contracts under the cancelled award procedure);
- when determining the required documents to prove the experience, should strictly adhere to the applicable legislation and should not require documents which are not required by the Public Procurement Act;
- when determining the requirement for experience, should not bind it on the source of funding, execution of any public contract or implementation of programme (s) or project (s).

- when determining the requirement for experience, should not individualise the similar activities with important, significant features of the scope of the contract, with the exception of the value. For example, the proper wording may be:
 - ✓ in case of contract for organisation of trainings - number of organised trainings per person;
 - ✓ in case of construction contracts - length and other characteristics of the road / water supply and sewerage system, population equivalent for WWTPs, including other important elements of the WWTP, etc.; length of the rail network, including other important features thereof;
 - ✓ in the case of construction supervision contracts - the site subject to construction supervision.

V.2. Requirements for the Tenderer's Technical Equipment

1. In case of engineering contract the tenderer shall prove that it has the minimal required equipment, such as 450-650 kg vibration plate or vibration roller with pike-like band tyre weighing 1.2-1.4 tons - 2 pieces; submersible pump $Q = 6-12 \text{ l/s}$ and $H = 8-15 \text{ m}$ - 1 piece, etc. The set of construction equipment, transport vehicles and mechanical equipment is specified in detail (e.g. submersible pump $Q = 6-12 \text{ l/s}$ and $H = 8-15 \text{ m}$).

At conceptual design stage, during which the engineering contract is specified, it is not typical to indicate in detail the type and number of construction equipment. The construction equipment is detailed at the next stage of the design - in the development of detailed design - and in particular in the development of part Organisation and Performance of Construction Works. Therefore, given the scope and nature of the contract (engineering contract), the requirement is excessive and inadequate.

2. The tenderer should have / should have ensured the use of repair shop authorised by the manufacturer in the city of Sofia with the required capacity and staff for comprehensive warranty and post-warranty maintenance of the buses covered by the scope of the contract, including for repair of their main aggregates and systems, when submitting the tender.

The requirement for provision of repair shop authorised by the manufacturer in the city of Sofia on the date of submission of tenders, rather than for execution of the contract, is discriminatory, since it places the tenderers who have already had access to the required facilities in the relevant place in a more favourable position than the other tenderers.

3. The tenderer should have at least one office for sale of airline tickets on the territory of the city of Sofia, Republic of Bulgaria, and should specify its address, telephone number and mobile phone for connection. The tickets are scheduled to be delivered electronically.

The requirement for provision of office for sale of airline tickets in the city of Sofia is discriminatory, since it does not conform to the scope and nature of the contract - the location of the office is irrelevant to the delivery of the goods, since they are delivered electronically.

4. The tenderer should have at least 1 separate office on the territory of the respective region.

5. The tenderer should have at least one office for sale of airline tickets on the territory of the city of Sofia, Republic of Bulgaria and should specify its address, telephone number and mobile phone for connection.

6. The tenderer should have / should have ensured the use of repair shop authorised by the manufacturer in the city of Sofia for comprehensive warranty and post-warranty maintenance. The evidence thereof is described and enclosed to the tenderer's technical proposal. It may include authorisation letters, contracts, extracts from contracts and other similar documents certifying that the repair shop is authorised by the manufacturer and that the tenderer has provided such a repair shop.

7. Service facilities on the territory of the Republic of Bulgaria shall be available for all apparatus and systems. They shall be duly authorised by the manufacturer or its authorised representative and shall be certified according to ISO 9001: 2008 or equivalent standard.

In the examples listed in items 4-7, the contracting authority has determined territorial location of the technical equipment at the time of submission of the tender, rather than a requirement for execution of the contract.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. V.2

To avoid the above deviations the contracting authority should:

- assess whether it has to require evidence of the availability of technical equipment in the submission of tenders or to direct its requirements in this regard only to the tenderer selected for contractor;
- require the provision of equipment needed to execute the contract;
- in case of construction contracts, the requirements for the equipment should not be aimed at its technical characteristics but should concern its performance;
- the requirement for location of the equipment should only be formulated if this is needed to execute the contract and should apply only to the tenderer selected for contractor.

VI. DISPROPORTIONATE REQUIREMENTS CONCERNING THE TENDERERS' PROFESSIONAL QUALIFICATION

VI.1. Requirements for the Type of Professional Qualification of the Experts

1. In case of construction contract, the technical manager shall be a construction engineer and shall have a Master's degree.

According to Art.163a, para.4 of the Spatial Planning Act, the technical manager of the sites falling within all categories may be a construction engineer or a construction technician, i. e. the legislator has not introduced an explicit requirement for completed higher education with a specifically acquired Bachelor's or Master's degree to the position of technical manager.

2. In case of contract for hotel accommodation and logistics the expert in logistics and IT expert shall have higher education in a certain area and educational and qualification degree Master or equivalent one acquired abroad.

The requirement set to the two experts for educational and qualification degree Master is not proportionate to the duties assigned to these experts in the terms of reference and is excessive to them. The activities planned to be performed under the public contract can be performed with high quality also by persons who have completed higher education with lower educational and qualification degree.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. VI.1

To avoid the above deviations the contracting authority should:

- take into account the applicable legislation and / or customary practice in the relevant area;
- bring the requirement for professional qualification and / or legal capacity in line with the tasks / functions that the expert is expected to perform in the execution of the public contract.

VI.2. Requirements for the Type of Experience of the Experts

1. In case of contract for construction supervision of water supply and sewerage network and WWTP the team leader, chief engineer and deputy chief engineer shall have a total experience of not less than 8 years in the area of environmental protection in the water sector.

The requirement for experience in the area of environmental protection in the water sector is not related to the scope of the contract and is therefore of a restrictive nature.

2. In case of contract for co-ordination of project in the water supply and sewerage sector the key expert is required to have specific professional experience in the scope of the contract of not less than 4 years; in this case, the scope of the contract should be understood as provision of consultancy and coordination services for international projects.

The requirement for specific experience in the provision of consultancy and coordination services for international projects is inconsistent with the scope, volume and complexity of the contract, since the contract scope is co-ordination of a project co-financed under Operational Programme Environment. The execution of the contract is not international in nature, since the contracting authority is a resident. In addition, the grant agreement in respect of which the contract is awarded is not an international one, since the parties to it are also residents. The description of the contract scope also lacks an international element of any of the activities.

3. In case of project audit contract the expert should be certified public accountant (CPA) with experience in the public sector audit and shall have at least 5 (five) years of professional experience in the area of the public sector audit.

The scope of the public contract does not include conduct of independent financial audit within the meaning of the Independent Financial Audit Act and Accounting Act. Therefore, the requirement that the key experts should be certified public accountants is inadequate and does not correspond to the scope and complexity of the public contract.

The audit involves verifications which include activities on collection and analysis of financial and non-financial information to evaluate the management of funds and activities and accountability of the audited entity in order to improve them. The nature of the audit procedures, regardless of whether they are conducted in the private or public sector, is the same. In this respect, the restriction that the experience should be gained from audit activity performed in the public sector is unjustified.

4. The legal expert should have at least 3 years of experience in the audit and / or management and / or legal advice on programmes co-financed with EU funds, and experience in implementation of the Public Procurement Act, in particular in execution of public contracts co-financed with EU and Structural and Cohesion Fund funds.

This requirement is restrictive in terms of the experts providing audit, management or legal services under contract for provision of services which are not funded with EU funds and in terms of experts with experience in implementation of the Public Procurement Act in particular in execution of public contracts which are not co-financed with funds of the EU SCF / by European Structural and Investment Funds / by other specific source. The source of funding of the audited processes and / or statements does not affect the quality and adequacy of the audit procedures and conclusions and the legal services. The rules for awarding public contracts under the PPA are the same regardless of the source of funding.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. VI.2

To avoid the above deviations the contracting authority should:

- take into account that the type of experience should correspond to the duties / responsibilities / activities that the expert will perform in the execution of the public contract. For example:
 - ✓ in case of project audit contracts - the expert should have conducted audits;
 - ✓ in case of contracts for construction of WWTP - the expert should have experience as a site manager depending on the task to be performed;
- not bind the experts' experience on the source of funding, execution of any public contract or implementation of programme (s) or project (s).

VI.3. Requirements for the Length of Experience of the Experts

1. The team leader should have:

- total professional experience of at least 10 years;
- specific professional experience - at least 7 years of management experience gained in the public, private or non-governmental sector;
- at least 5 years of experience in the management and / or implementation of projects / contracts funded by programmes co-financed by the European Union Funds and / or other national and / or foreign funding in the area of human resources.

The requirements for the total and specific professional experience of the team leader - 10 years of total professional experience, 7 years of management experience and 5 years of experience in the management or implementation of projects / contracts in the area of human resources are cumulatively excessive and restrictive.

2. Each of the proposed experts shall have at least two years of experience in the past three years as an airline ticket sales agent.

This requirement unjustifiably restricts the participation of experts / tenderers who have the required 2-year professional experience but the experience has not been gained within the specified period of the past three years.

The scope of the contract does not imply a dynamic change in the requirements for performance of the air ticket sales activity, and the requirement under Art.51, para. 1, cl. 1 of the PPA itself for deliveries or executed services over the last three years refers to the tenderer's experience but is not applicable to the professional experience of the experts offered by the tenderer.

3. In case of design contracts, the chief designer and designer should have at least 10 years of professional experience in the preparation of investment projects in the area of construction and / or reconstruction of WWTP.

The above length of the required experience does not comply with the statutory requirements for performance of the relevant activity, or with the customary practice in the relevant area. The activities that will be performed by this expert can be performed by persons having less experience, without affecting the quality of performance.

In addition, the requirement for the number of years of experience, as defined by the contracting authority, cannot be demonstrated, since there are no documents which prove such facts - 10 years of experience in the development of investment projects in the area of construction and / or reconstruction of WWTP. The requirement is unclear for the potential tenderers since they are not aware of what evidence they need to present to prove that the requirement imposed by the contracting authority has been met.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. VI.3

To avoid the above deviations the contracting authority should:

- take into account the type and nature of the activities planned to be performed and the legal requirements and / or customary practices in the relevant area;
- take into account, when determining the length of experience, whether this length is demonstrable and feasible, i.e. the position which the persons should occupy to perform such activities. In case that the experience is not normally associated with particular job, the contracting authority should measure the experience, taking into account the minimum number of projects, services and activities, rather than the years of performance. For example:
 - ✓ "10 years of experience in design of WWTP" is not correct; the correct wording could be: "participation in 3 WWTP design projects";
 - ✓ "5 years of experience in development of training programmes" is not correct; the correct wording could be: "development of 3 training programmes";

- ✓ "7 years of experience in the analysis of particular topic" is not correct; the correct wording could be: "3 analyses on a particular topic".

VI.4. Requirement to the Experts for Compliance with National Regulatory Regimes in the Submission of the Tender

1. The contracting authority has set a requirement that all engineering and technical staff should ensure the technical management during the construction works in order to meet the requirements of Art.163a of the Spatial Planning Act. According to the above standard, the builder shall enter into employment contracts with persons who have the required technical skills and shall engage them with the technical management of the construction works.

As is apparent from the foregoing, the contracting authority requires that, when submitting the tender, the experts proposed to participate in the management team responsible for the execution of the public contract be hired on an employment contract, without any advantages for them, since it is not sure that the tenderers will be selected for contractors.

2. According to item III.2.3 / 6 of the contract notice "all proposed experts (key and non-key ones) must be included in the certified list enclosed to the consultant's construction supervision licence".

The tenderer should therefore prove its suitability only through the experts who have used in the issuance of the licence which enables it to perform the construction supervision activity. The requirement is restrictive, since the licence may have been obtained by the economic operator long before the contract notice was announced.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. VI.4

To avoid the above-mentioned deviations, the contracting authority should explicitly allow the experts pursuing their profession outside the Republic of Bulgaria to prove their legal capacity, submitting equivalent documents issued in the state in which they are established.

VII. UNJUSTIFIED RESTRICTIONS FOR USING THE RESOURCES OF OTHER NATURAL AND / OR LEGAL PERSONS

VII.1. Restriction for the Availability of Free Financial Resources

1. The tenderer shall submit bank statement for access to a credit line or other acceptable form of available funds in an amount of not less than 30% of the estimated value for each lot in which it participates.

The requirement is evidenced by bank certificate for access to a guaranteed irrevocable credit line of the tenderer issued not earlier than 1 (one) month before the deadline for submission of tenders in this procedure. The contracting authority has specified that it will accept any other document issued by a bank which proves unambiguously that the tenderer will dispose of these funds during the execution of this public contract.

2. The contracting authority has required from the tenderers to have their own financial resources, or to have access to credit lines amounting to 40% of the announced estimated value of each

separate lot. The requirement is evidenced by certificate for available own funds or access to credit lines issued by bank institution.

3. The contracting authority has required from the tenderers to have financial resources for execution of the contract amounting to at least BGN 400,000.00 in one of the following forms - own funds or access to credit line (s).

To prove the fulfilment of this requirement, the contracting authority has required the submission of appropriate accounting documents prepared according to the applicable legislation, showing the availability of own funds or a letter of guarantee issued by local and / or foreign bank stating that the bank will provide a loan in the required amount to the tenderer in this public procurement procedure.

VII.2. Requirement for the Technical Equipment

1. Each machine and / or equipment specified in the list - declaration of the technical equipments of the tenderer shall be accompanied by a document of title / and / or purchase invoices, and valid rental agreement. In case that part of the equipment is rented, the rental agreement shall have term which is not shorter than the time limit for implementation proposed in the tender, shall clearly distinguish the rented machine / equipment and shall not contain any clauses on provision of the equipment.

2. In case that part of the equipment is rented, the agreement shall have term which ends no earlier than two years after the deadline for submission of tenders, shall clearly distinguish the rented machine / equipment and shall not contain any clauses on provision of the equipment, declarations, etc.

3. The tenderer shall have available (own or rented) construction equipment, as specified in the technical specifications. This is evidenced by a list - declaration of the technical equipment accompanied by documents of title / valid finance lease contract or valid rental agreement for each machine / equipment included in the list. In case that part of the equipment is rented, the agreement shall have term which ends no earlier than 31 March 2015, shall clearly distinguish the rented machine / equipment and shall not contain any clauses on provision of the equipment.

4. The tenderers shall submit a declaration of their own or rented mechanical equipment and declaration of their own or rented equipment. This is evidenced by photographs, invoices, accounting documents, and contracts.

5. The tenderers shall submit declaration of the technical equipment at their disposal which shall be accompanied by documents demonstrating the ownership of the equipment and machinery or lease agreements, rental agreements, etc.

VII.3. Requirement for the Team involved in the Execution of the Contract

1. The team involved in the performance of the contract activities shall include experts who have entered into a labor or civil contract with the relevant tenderer.

2. All proposed experts (key and non-key ones) shall be included in the certified list enclosed to the consultant's construction supervision licence".

3. The experts of the tenderer's team shall be included in the main or expanded list as per the Ordinance on the conditions and procedure for issuance of licences to consultants to assess the conformity of investment projects and / or the exercise construction supervision.

4. All engineering and technical staff is required to ensure the technical management during the construction works in order to meet the requirements of Art.163a of the SPA. According to the

above standard, the builder shall enter into employment contracts with persons who have the required technical skills and shall engage them with the technical management of the construction works.

5. The tenderer shall present evidence that the team leader has been hired by it on a permanent contract during the last one year by the date of submission of the tender.

6. The tenderer shall submit a list of the engineering and technical staff which will be involved in the performance of construction works and the key experts hired on employment or civil contract.

In all above listed examples the contracting authority has defined the type of relationships between the tenderer and the person providing the resource:

- loan - in the case of free financial resources;
- document of title, rental or lease agreements - in the case of technical equipment;
- labor or civil contracts - for the team involved in the execution of the contract.

The contracting authority has restricted the right of the tenderers to prove their suitability relying on the resources / capacity of other natural or legal persons that they will use in the execution of the contract.

GUIDELINES FOR AVOIDING THE INFRINGEMENTS REFERRED TO IN PARA. VII

To avoid the above deviations the contracting authority should not set requirements for the type of relationships between the applicant / tenderer and the persons providing their capacity.

VIII. FINANCIAL IMPACT

According to cl. 9 and cl.10 of the Guidelines for determining Financial Corrections to be made by the Commission to Expenditure financed by the Union under Shared Management for Non-compliance with the Rules on Public Procurement (adopted by Decision of the EC of 19 December 2013) the financial impact of the infringements of the restrictive requirements is 25%, 10% or 5% of the expenditure incurred in the execution of the contract concerned, and the specific financial correction normally depends on the following circumstances:

- whether the estimated value of the contract falls below / above the thresholds of the European Public Procurement Directives - in terms of contracts below the thresholds of the Directive, the highest rate of financial correction is 10%;
- the number of received tenders - the presence of competition in the award of the public contract is a reason to reduce the financial correction;
- whether the restriction concerns the applicants / tenderers or the experts of the team involved in the execution of the contract - if the unjustified restriction concerns the experts of the team involved in the execution of the contract, the infringement has a limited impact on the competition, i.e. lower financial correction may be set.