

EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY

The Director-General

Brussels,
REGIO DGA2.TF/LF/lS

Subject: 2005CZ16CPE021 "Cidlina"
Preparation of closure of Cohesion Fund project – revised

Reference: Closure letter of 12 October 2012 (Ares(2012)1206547)

Please note that all correspondence should mention the registration number which you find in the top right corner.

Dear Sir

Following the revised final statement of expenditure sent by your authorities by letter of 27 February 2013 (ref. no. MF-36520/2013/55-552) and the final claim sent by your authorities by letter of 25 May 2011 (ref. no. 55/106463/2010-552) concerning the above mentioned project, please find below the elements which, as far as the Commission services are informed, should form the basis of the closure statement. I note that you have applied the agreed level of financial corrections to take account of the findings of Commission audit linked to the contractual penalties and the discrepancies of published information between the national and the international contract notices.

1. By its decision C(2005)5966 of 23 December 2005 the Commission has approved a financial assistance of EUR 11 136 018.
2. The commitments made by the CF amount to EUR 11 136 018.
3. The payments made by the CF amount to EUR 8 599 202,81.
4. The balance of the CF commitment amounts to EUR 2 536 815,19.
5. The declared eligible expenditure amounts to EUR 19 591 688,05 out of which EUR 3 938 521,62 is not considered eligible (see Annex I), leaving as eligible expenditure EUR 15 653 166,43.
6. The contribution due by the CF amounts to EUR 10 487 621,12.

Mr Jan GREGOR
Deputy Minister
National Authorising Officer
Ministry of Finance of the Czech Republic
Letenská 15
118 00 Prague 1
CZECH REPUBLIC

Conclusion:

7. Balance of the CF assistance to be decommitted: EUR 648 396,88.
8. Balance to be paid: **EUR 1 888 418,31.**

The expenditure certified submitted in the final payment request amounts to EUR 19 591 688,05. Nevertheless, the Commission services have identified within EUR 3 938 521,62 of irregular expenses. Therefore, the Commission services would propose to deduct this last amount from the certified expenditure, if the Czech authorities accept the financial correction (see the attached calculation sheet).

Please reply within two months of the date of receipt of this letter on the payment and on the decommitment proposed. The payment procedure will be suspended during that period.

Since closure may have negative implications for the final beneficiar(y/ies), I would ask you expressly to ensure that they are duly informed and given the opportunity of making known their views concerning the particulars on which this proposed closure is based. I would be grateful if you would keep me informed of this matter.

In case no reply is received within the time limit indicated above or if your authorities or the final beneficiar(y/ies) do not agree with the assessment set out above, the Commission will according to Article H of Annex II of Regulation (EC) N° 1164/94 as last amended by the 2003 Act of Accession and Article 17 to 20 of Regulation (EC) N° 1386/02, reduce assistance on the basis of the elements indicated above and initiate the procedure for the above payment.

Yours faithfully



Walter Deffaa

Contact: Lubica Farah, Telephone: +32 229 63616
Lubica.Farah@ec.europa.eu

Enclosures: Calculation sheet of the final payment
Annex I: Description of the financial correction

Copy: Mr M. Povejšil, Permanent Representation of the Czech Republic to the EU
Mr R. Mazal, Ministry for Regional Development
Ms V. Ondráčková, Ministry of Finance
Mr E. Mrázek, Audit Authority, Ministry of Finance
DG REGIO Units DGA1.A3, DGA1.B4, DGA1.C4, DGA2.TF

ANNEX I

EXPLANATIONS CONCERNING INELIGIBLE EXPENDITURE AND PROPOSED CORRECTIONS

On the basis of the information available to them, the Commission services consider that the amount of EUR 3 938 521,62 within the project "Cidlina" is not eligible for the following reasons:

FINDING

BREACH OF PUBLIC PROCUREMENT RULES OF EQUAL TREATMENT AND TRANSPARENCY SUBSTANTIAL MODIFICATION OF THE CONTRACT

The finding concerns the tendering procedure for the works contract (published on 1 August 2007 in EUOJ; signed contract value EUR 24 977 808; declared value EUR 20 094 252,46 decreased by the financial correction linked to the contractual penalties in the amount of EUR 1 085 041,50 giving the final declared value of the contract EUR 19 009 210,96).

Following award criteria were used in the tendering procedure:

Price (50%)

Completion time (35%)

Contractual penalties for delay in completion (10%)

Warranty period (5%)

The contract was awarded to the GEOSAN GROUP, the bidder who offered the shortest period for the completion of works (i.e. 70 weeks).

As the completion time was one of the most significant award criteria and as the tender submissions were unclear, before the tender evaluation the Contracting authority requested clarifications from the two bidders offering the shortest completion periods (i.e. GEOSAN GROUP = 70 weeks and MOTA-ENGIL E.C.S.A. & STREICHER = 72 weeks) regarding this element of their tenders. The Contracting authority specifically asked whether, in line with point 8.2 of Terms and Conditions, the completion time included the trial period for the waste water treatments plants and requested the tenderers to specify and/or supplement the information provided regarding the trial periods and the proposed time schedule.

The contract winner (GEOSAN GROUP), who proposed the shortest time, in its reply of 16 October 2007 confirmed that its offer of 70 weeks included a one year (52 weeks) trial period for the waste water treatment plants and a 6 months (26 weeks) trial period for the pumping stations, in accordance with the tendering documentation (par. 4, p.4.1; par. 8, p. 8.2; par 10, p. 10.1).

The second bidder stated that its already submitted offer comprised only the commencement of the trial periods. It therefore added additional weeks in respect of the trial periods in its reply.

The contracting authority, nonetheless, evaluated the two offers using the originally proposed completion times (i.e. 70 and 72 weeks).

Following the signature of the contract with the GEOSAN GROUP on 18 January 2008, an amendment was signed on 7 March 2008 adding a trial operation period of 54/26 weeks for

waste water treatment plants/pumping stations into the works time schedule. The completion time was thus prolonged from 70 to 124 weeks.

POSITION OF THE COMMISSION

The contract signed for the project in question falls, both *ratione temporis* and *ratione materiae*, within the scope of Directive 2004/18/EC.

The contract was awarded in breach of Article 2 and Article 53 of the Directive 2004/18/EC. According to Article 2 contracting authorities shall treat economic operators equally and non-discriminatory and shall act in a transparent way. And according to Article 53 the contract should be awarded to the most economically advantageous tender or to the tender who offered the lowest price only.

a) Negotiations after the award procedure

The Contracting authority allowed for a substantial modification of the contract by signing the first amendment which changed the time schedule of works and added 52 more weeks for the trial period.

As a general rule, the modification of an essential term of the contract is not possible after the award and, normally, entails the award of a new contract (see Case C-454/06, paragraph 34). It can only be otherwise if the Contracting authority expressly provided for that possibility, as well as for the relevant detailed rules, in the contract notice or in the tender documents so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders (see Case C-496/99, paragraph 118).

In this case, the Contracting authority before the award of the contract had confirmed that, with regard to the award criterion "completion time", the end date for works completion is considered to be the date when the commissioning certificate for the whole works comes into force. The winning bidder had also confirmed that the offer comprised the trial period.

Therefore no modification of the contract was possible. Given the fact that the completion time was one of the main criteria, which significant weight (35%) influenced the ranking of the bidders, the Commission services consider this modification as substantial and a significant breach of public procurement rules.

Therefore, the Commission services propose a financial correction of 25% amounting to EUR 3 938 521,62 (25% x EUR 20 094 252,46 minus EUR 1 085 041,50 (already applied financial correction for contractual penalties)), based on the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'¹, irregularity type no. 9.

b) Unequal treatment/Lack of transparency

According to the information available to them, the Commission services believe that the bidders did not propose comparable offers which would enable the contracting authority for an equal and non-discriminatory evaluation and award of the contract.

¹ COCOF 07/0037/02

The Contracting authority clarified the issue of "completion time" to all possibly interested economic operators already before the evaluation and awarding stage of the tendering procedure. The Contracting authority confirmed that, with regard to the award criterion "completion time", the end date for works completion is considered to be the date when the commissioning certificate for the whole works comes into force. And in line with the tender documentation and the relevant working permits, the commissioning certificates could be issued (and come into force) only after the trial operation period had been finished.

On clarification of the two shortest bids in terms of "completion time" the Contracting authority received two different replies.

The GEOSAN GROUP in their reply of 16 October 2007 confirmed that their offer (70 weeks) comprised the trial period of 12 months/6 months for waste water treatment plants/pumping stations. Further, the Contracting authority had been informed from the second bidder, who they requested information from, that his offer comprised only the commencement of the trial periods and had therefore added supplementary weeks as the trial periods in his time schedule.

However, in the award evaluation sheet, the time period mentioned 72 weeks, which in fact did not comprise the trial period.

Therefore the offers could not be compared. As a result, the Commission services propose a financial correction of 25% amounting to EUR 3 938 521,62 (25% x EUR 20 094 252,46 minus EUR 1 085 041,50 (already applied financial correction for contractual penalties)), based on the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'², irregularity type no. 6.

c) Insufficient description of the tender documents

Additionally, the Commission services believe that the tender documents did not describe the subject of the project in a clear manner. The complainant in his objection to the Contracting Authority on the selection of the most suitable bid mentioned that the duration of the trial period was set at 18 months. In its decision the Contracting authority acknowledged that the tender documentation specified a requirement for trial period of the wastewater treatment plant of 12 months and for the pumping stations of 6 months. It also acknowledged that the information indicated by the Complainant, the trial period of 18 months, was only indicated in the documentary part of the project documentation. Furthermore, the bidder offering 72 weeks of completion time which comprised only the commencement of the trial periods, stated in his clarification of the offer, that he acted in line with point 4.2 of General requirements for the construction and volume 4 of Technical conditions for delivery and bill of quantities.

Therefore the Commission services consider that the tender documents were not described in a clear manner which would lead to a financial correction of 25% amounting to EUR 3 938 521,62 (25% x EUR 20 094 252,46 minus EUR 1 085 041,50 (already applied financial correction for contractual penalties)), based on the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'³, irregularity type no. 9.

² COCOF 07/0037/02

³ COCOF 07/0037/02

However, considering that 25% is already to be applied for the breach of public procurement rules, the irregularity would not change the proposed correction.

Therefore, the Commission services propose a financial correction of 25% amounting to EUR 3 938 521,62 (25% x EUR 20 094 252,46 minus EUR 1 085 041,50 (already applied financial correction for contractual penalties)), based on the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'⁴, irregularity type no. 6 and 9.

⁴ COCOF 07/0037/02