



Franck

Sébert  
European Commission, DAC

Our ref. 17.12.2024 No 10-2/5674-1

Dear Mr Franck Sébert,

In 2020, Audit Authority audited project No. 2014-2020.4.01.16-0052 “University of Tartu ASTRA project PER ASPERA (IT centre investment)”. In the final report No. ERF-322/2020 Audit Authority found that the beneficiary had included a restrictive selection criterion in the contract notice for public procurement No. 190596, whose value exceeded the international threshold. The selection criteria required the bidder to include in fulfilling of the contract a person responsible for electrical work. This person was required to hold, among other qualifications, a class A certificate of competency (issued in Estonia) as an electrician (pursuant to the Electrical Safety Act and the regulation No. 60 of the Minister of Economic Affairs and Communications of Estonia, dated 12.07.2007).

First, the aforementioned regulation was no longer in effect at the time the procurement procedure commenced. Most importantly, this way the contracting authority excluded all interested parties whose person responsible for electrical work did not possess the specific class A certificate at the time of bid submission. The contract notice did not indicate that the contracting authority would accept equivalent evidence of the required professional qualification under the legal provisions of the bidder’s country of origin, which would have allowed for an assessment of the capacity of foreign bidders to fulfil the contract.

Audit Authority found that the selection criteria set by the contracting authority, requiring foreign bidders to undergo a national professional qualification recognition process in Estonia and submit a certificate of competency for the responsible person for electrical work by the bid submission deadline, unjustifiably restricted competition and created unequal treatment. It was deemed appropriate to apply a financial correction rate of 10% pursuant to clause 10 of the annex to the Commission decision of 14.5.2019 (the use of selection criteria which is discriminatory based on unjustified national, regional or local preferences). The intermediate body issued a financial correction decision in August 2021.

Our national first instance (administrative) court and second instance (circuit) court acknowledged the violation and upheld the financial correction decision. On 20.11.2024, the final instance, the Supreme Court, issued a decision overturning previous court rulings as well as the financial correction decision. The Supreme Court disagreed with the finding of a violation. It held that the class A certificate of competency was indeed a professional qualification that allowed the contracting authority to assess the bidder's technical capability. According to the Supreme Court, foreign bidders could have qualified for the procurement by undergoing a professional qualification recognition process. Additionally, bidders could have requested clarifications from the contracting authority. The Supreme Court concluded that it could not be presumed that the requirement deterred foreign companies from submitting bids

- thus, no damage was incurred to the European Union budget. Since the contracting authority did not violate the principle of equal treatment, there was no reason to apply a financial correction. Even if a violation had occurred, the 10% financial correction rate would not have been proportional. As a result, the decision of the Supreme Court contradicts our established practice.

Audit Authority considers these costs ineligible and the amount of the correction should not be declared by the Managing Authority in the payment claim to the Commission. We have considered discriminatory conditions to be a problem, regardless of the actual impact. The court decision, on the other hand, shows that if there is no direct and proved impact, the correction can essentially be decreased or even voided in entirety. In the light of Commission decision of 14.5.2019 there is no such possibility. The correction rate is applied if the exact amount of the violation cannot be calculated.

This Supreme Court decision has a wider impact and does not only deal with §41 of Estonian public procurement law. Therefore, we ask for your assessment and guidance how such contradictions should affect our approach in terms of correction rates established in Commission decision of 14.5.2019? We ask for your opinion on whether the court's proposed "opportunity to ask the contracting authority for explanations" and "lack of interest from foreign bidders" could preclude the application of clause 10 of the Commission decision of 14.5.2019.

We would also like to get your opinion on the European Court of Justice's decision (4.10.2024 Obshtina Svishtov, C-175/23), which is also referred to by our Supreme Court decision:

*It states (paragraph 33-34) that while it is open to the Commission and the Member States to rely on a scale of flat-rate correction rates, the fact remains that determining the final amount of the correction to be applied necessarily involves conducting an individualised and detailed examination, taking into account all of the characteristics of the irregularity found in relation to the elements taken into consideration for the establishment of that scale and which are liable to justify the application of an increased or, on the contrary, a reduced correction. Court of Justice concludes that as a rule, the amount of a financial correction must not be determined automatically on the sole basis of a pre-established scale of flat-rate correction rates.*

In audits we have recommended flat-rate corrections according to Commission decision of 14.5.2019. Considering European Court of Justice's decision, the EC guidelines are not binding to the Member States and the Member States shall consider the nature and gravity of the irregularities and shall apply a proportionate correction. Considering the above mentioned, there is a high possibility that the financial corrections made by Managing Authority will differ from those set out in the Commission decision of 14.5.2019. We would appreciate your guidance in this matter.

Yours sincerely,

*(signed digitally)*

Merike Saks

Secretary General

C.C.  
Ms C. de Buggenoms, DAC.5

Annexes:

1. Audit report No. ERF-322/2020
2. Judgement No 3-21-2607 of Supreme Court of Estonia

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