



Valga Vallavalitsus
valga@valga.ee
Puiestee tn 8
Valga linn
68203, Valga maakond

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FINANCIAL CORRECTION DECISION No 17-1

Tallinn

Project Est-Lat 181 “Renewing and developing Valga-Valka twin town common recreational area“ (Valga-Valka Recreational Area)

Lead Partner: Valga Municipality Government

Beneficiary: Valga Municipality Government

Based on the compromise agreement concluded on 14 December 2023 between Valga Municipality Government and the Managing Authority and the Tallinn Administrative Court decision 3-23-1707 of 18 December 2023, the Managing Authority repeals 25% of the costs of the contract “Valga Veskijärve tänavavalgustuse ehitus ja rekonstrueerimine“ of the project partner Valga Municipality Government.

Therefore, and according to the Interreg V-A Estonia-Latvia programme 2014-2020 Programme Manual and based on the 2014-2020 Structural Assistance Act, adopted by the Parliament of the Republic of Estonia on 13 June 2018, subsection 6 of the paragraph 54, the Managing Authority decides:

1. Repeal the decision of the State Shared Service Centre from 3 May 2023 on the Financial Correction Decision No 17 in so far as the correction of 25% that was made to the costs related to the public procurement "Construction and reconstruction of the street lighting of Valga Veskijärve" submitted by AS Valga Vesi in the project Est-Lat181 "Renewing and developing Valga-Valka twin town common recreational area" in connection with the failure to provide a performance guarantee and the duration of the manufacturer's guarantee. For the rest, the financial correction decision No 17 on 3 May 2023 remains valid.
2. Adopt a new decision declaring 5% of the costs of the contract "Construction and reconstruction of the street lighting of Valga Veskijärve" ineligible.

Circumstances

Pursuant to point 10.1.1 of the public procurement contract, the Contractor undertakes to deliver to the Contracting Authority, a bank guarantee as a guarantee for the construction period within 14 days from the date of the conclusion of the contract, and which shall be valid until the completion of the works and acceptance by the Contracting Authority.

According to the public procurement contract, the performance guarantee letter had to be submitted no later than 14 days after the conclusion of the contract (21.01.2022), which means no later than 04.02.2022. The verification of the procurement revealed that there was no guarantee for the construction period, and the corresponding guarantee letter had not been submitted.

Pursuant to point 10.1.2 of the public procurement contract the Contractor undertakes to hand over a bank guarantee to the Contracting Authority as a guarantee (from a bank previously accepted by the Contracting Authority) for the guarantee period, at the latest by the date of signing the act of acceptance of the work.

The letter of guarantee for the guarantee period has been issued late, as the acceptance of the works has been signed on 16.05.2022 and the letter of guarantee has been issued only on 04.10.2022. The Contractor submitted a bank guarantee valid from 04.10.2022 to 16.05.2025 as guarantee for the guarantee period.

Based on point 7.10 of the public procurement contract, the last payment shall be made by the Contracting Authority after the final acceptance of the works and the signing of the duly executed building inspection report, the Contractor being entitled to invoice after the handing-over-acceptance of the work and the acceptance of the guarantee bond by the Contracting Authority.

As the letter of guarantee was issued on 04.10.2022, therefore the requirement to issue the last invoice has not been respected, as the last invoice was issued on 16.05.2022 and paid on 26.07.2022.

Point 10.2 of the public procurement contract states that the equipment installed during the works shall be subject to a valid. period of guarantee laid down by the manufacturer, which, in accordance with the conditions of the contract, must be at least 60 months. This guarantee period shall start from the date of acceptance of the works by the contracting entity.

As the installed equipment is covered by a manufacturer's guarantee letter valid 5 years from 04.10.2021, the requirement of the **Procurement Contract is not fulfilled**, as the guarantee letter was supposed to be valid from May 2022 to May 2027.

The Managing Authority identified that the parties have not mutually agreed to change the terms of the contract, but the alternative performance of the contract was a consequence of the Contracting Authority's negligence and inattention.

The Tallinn Circuit Court, in its judgment on 4 May 2023, in case 3-21-1711, found that amending a procurement contract requires the expressed consent of both parties (regardless of its form). The court stated that the contractor's breach of the contract (failure to provide guarantees in a timely manner) and the breach of obligations arising from the Public Procurement Act by the Contracting Authority (failure to verify the timely submission of guarantees) do not imply an agreement between the parties to amend the procurement contract. The court emphasized that the silence or inaction of the parties must be a consciously made choice, not an error resulting from insufficient diligence. According to the Tallinn Circuit Court, the failure to demand guarantees for the performance period and warranty period from the contractor in a timely manner could constitute a violation of the contracting authority's obligations under the Public Procurement Act. However, it did not result in an amendment of the procurement contract.

Therefore, the Managing Authority is of the opinion that the alternative performance of the procurement contract constitutes a violation of Public Procurement Act § 3.

Based on Article 3 of the Estonian Public Procurement act, when carrying out public procurement, the Contracting Authority must adhere to the following principles:

- when carrying out public procurement, the Contracting Authority must act transparently, verifiably and proportionately;
- the Contracting Authority must treat all persons whose place of residence or seat is in Estonia, in another Member State of the European Union, in another contracting state of the European Economic Area or in a country that has joined the Government Procurement Agreement of the World Trade Organization equally and make certain that all restrictions and criteria imposed on the persons are proportional, relevant and reasoned in relation to the purpose of the public procurement;
- the Contracting Authority must ensure effective use of competition in public procurement, ensuring that the participation of a public legal person or a private legal person using public funds in public procurement does not distort competition due to its use of public funds;
- the Contracting Authority must avoid a competition-distorting conflict of interest;
- the Contracting Authority must use funds economically and expediently, award the public contract based on the best price-quality ratio, and carry out the public procurement within a reasonable time.

In certain cases, the lack of a guarantee period guarantee issued by a bank or other financial institution or its submission, which does not meet the conditions of the public procurement, is insignificant and does not lead to the financial correction. This is the case if all the following conditions are met:

- 1) despite the guarantee requirement, the contractor has a contractual obligation to liquidate the defects that appeared during the guarantee period, i.e. the contractor has a contractual debt guarantee;
- 2) the existence of an additional guarantee is not important due to the specifics of the procurement object or from the aspect of fulfilling the guarantee obligations due to risk considerations;
- 3) the additional guarantee is not large in terms of percentage or money.

Taking into account clauses 10.2 and 10.3 of the procurement contract, the guarantee period guarantee is an additional guarantee to the contractor's own guarantee, i.e. the contractor has a contractual debt guarantee. The object of the procurement is standard construction work, which cannot be considered riskier than usual, in which case a higher probability of realization of the guarantee period guarantee and, consequently, a greater need for it could be assumed. According to clause 10.1.2 of the contract, the guarantee for the guarantee period is set at 2% of the contract price, i.e., €1026.90 (€804 of the actual cost of the contract), which is not large in terms of percentage or monetary value.

Based on the abovementioned, the Managing Authority considers the deviation from the contract regarding the provision of the guarantee period as an insignificant change. In so far as the submission of a guarantee period guarantee that does not meet the requirements must be considered an insignificant change, the earlier making of the last payment in this case must be considered irrelevant, as this condition was inherently tied to the submission of the guarantee period guarantee.

Regarding the non-presentation of the guarantee of the performance time and the guarantee period of the equipment manufacturer, the Managing Authority is of the opinion that the Contracting Authority has made the terms of the procurement contract more favourable to the Contractor compared to what was stipulated in the procurement documents, and that these changes would have broadened the pool of potential participants in the procurement procedure, because:

- if the requirement to provide a guarantee letter during the construction period had not been mandatory, the tender could have been open to tenderers who did not have the possibility to provide a letter of guarantee. The Contractor was given an advantage of not having to bear the cost of the guarantee, which was assumed to be included in the cost of the tender, and it must therefore be assumed that the Contractor was also partially remunerated in the event of default obligations;
- the Contractor got an advantage because it did not have to renew or extend the manufacturer's guarantee, and since the guarantee extension or renewal was assumed to be burdensome for the bidders or associated with additional costs, this condition could discourage interested parties from participating in the tender. Thus, there was an impact on the circle of bidders.

Due to the nature of the irregularity, it is not possible to precisely quantify the financial impact when considering application of the correct rate of this financial correction.

The project partner violated the general principles of Article 3 of the Estonian Public Procurement Act. The violation is related to fundamental principles, such as transparency, equal treatment, non-discrimination, and competition, which are crucial for maintaining fairness in public procurement processes.

Considering that the Managing Authority is not aware whether, due to the infringement, the outcome of the procurement would have been significantly different, and since the condition covered by the infringement is not a condition regulating the main obligation of the contract and it is not affecting the performance of the contract throughout, the Managing Authority is of the opinion that the financial impact resulting from the infringement can not be substantial, so the 5% correction is applied as a result of the finding of non-compliance. This correction is likely to address the departure from the established principles and mitigate the impact of the non-compliance, as regards the fairness and competitiveness of the procurement process.

Considering that the Managing Authority is not aware that the outcome of the procurement would have been significantly different due to the infringement, and since the condition covered by the infringement does not regulate the main obligation of the contract or affect its performance throughout, the Managing Authority is of the opinion that the financial impact resulting from the infringement cannot be substantial. Therefore, a 5% correction has been applied due to the finding of non-compliance. This correction aims to address departing from established principles and mitigate the impact of non-compliance, as regards the fairness and competitiveness of the procurement process.

Additionally, the correction may serve as a deterrent, encouraging project partners to exercise greater diligence in adhering to the principles of the Public Procurement Act to avoid similar penalties in the future. Regular communication and clarification of expectations between procuring entities and project partners can contribute to minimizing such errors and ensuring a smoother procurement process.

The total ineligible costs (EUR):

Expenditure budget line	Total cost of the contract including VAT (EUR)	Total declared costs (EUR)	ERDF support (EUR)	Self-financing (EUR)	Total ineligible (EUR)	Ineligible ERDF support (EUR)	Ineligible self-financing (EUR)
Infrastructure and works	51 346.68	40 200.00	34 170.00	6030.00	2010.00	1708.50	301.50

The ERDF support has already been deducted by the Certifying Authority. This correction does not lead to any further reduction in the costs of the partner.

Legal basis of the financial correction

1. Structural Assistance Act 2014-2020

According to the Article 54 subsection 6 of the Structural Assistance Act 2014-2020 a financial correction decision shall be based on the procedure for making a financial correction decision established in the ETC programme or in the procedure for making a financial correction decision, established on the basis of subsection 7 of the same section, while pursuant to the ETC programme the making of the financial correction decision is based on the procedure established nationally in the states participating in the programme.

2. The Guidelines to Financial Corrections

The Guidelines to Financial Corrections for the Estonia - Latvia Programme 2014-2020 establishes a range of corrections of up to 5%, 10%, 25% and 100% that are applied to the expenditure of a contract. They take into account the seriousness of the irregularity and the principle of proportionality. These rates of corrections are applied when it is not possible to quantify precisely the financial implications for the contract in question.

3. The Public Procurement Act of Estonia

The Public Procurement Act's paragraph 3 subsection 1-3 and 5 state that the contracting authority or the contracting entity ensures effective use of competition in public procurement, whereby the participation of a public legal person or a private legal person using public funds in public procurement must not distort competition due to its use of public funds and act transparently, verifiably and proportionately.

4. The Common Provisions Regulation

According to the Article 143(2) of the Regulation No 1303/2013 of the European Parliament and of the Council of 17 December 2013, the Member States shall in the first instance be responsible for investigating irregularities and for making the financial corrections required and pursuing recoveries. In the case of a systemic irregularity, the Member State shall extend its investigation to cover all operations potentially affected.

5. Protection of the European Communities financial interests

Article 4(1) of the European Union Council 18 December 1995 Regulation (EC, Euratom) No 2988/95 stipulates that any irregularity shall involve withdrawal of the wrongly obtained advantage. Point d) of the Article 5(1) of the same regulation stipulates that intentional irregularities or those caused by negligence may lead to the following administrative penalties: total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage.

According to the Article 160(1) of the Regulation (EU) No 2018/1046 all contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination and according to the point 2 of the Article 160 all contracts shall be put out to competition on the broadest possible basis.

6. Programme Manual for the Estonia - Latvia Programme 2014-2020

According to the Estonia - Latvia programme 2014-2020 manual point 5.3.4 each partner organisation is responsible for ensuring that EU and national public procurement rules are respected and that all contracts comply with the basic principles of transparency, non-discrimination and equal treatment as defined in the EC Treaty and the Commission Interpretative Communication on the Community law applicable to contract awards below the EU thresholds.

7. Programme Manual Annex 6. Guidelines to Financial Corrections

According to the Programme Manual Annex 6. Guidelines to Financial Corrections Chapter 2.3.3 Financial correction in case of irregularity related to non-compliance with the general rules on procurement when the Estonian partner is a contracting authority for the purposes of the procurement, when Estonian beneficiary or partner is a contracting authority for the purposes of the public procurement, and the estimated value of a service, goods or building works is equal to or in excess of simple procurement threshold has violated the obligation to comply with the general principles of procurement, the financial correction rate of 5, 10, 25 or 100 percent may be applied depending on the severity of the violation by using the financial correction principles according to the EC Guidelines.

8. Subsidy Contract

Article 1 of the Subsidy Contract stipulates that the partners should also follow the EU and national principles on protection of environment, sustainable development, equal opportunities, non-discrimination.

Point 2 of the Article 3 of the Subsidy Contract regulates that the Lead Partner and Project Partner shall implement the project with the requisite care, efficiency, transparency and diligence, in line with best practice in the field concerned and in compliance with this Contract. For this purpose, the Lead Partner and Project Partner shall mobilise all the financial, human and material resources required for full implementation of the project as specified in the approved application.

9. Hearing of opinions and objections of participants in proceedings

According to § 40 (1) of the Administrative Procedure Act, before issuing an administrative act, the party to the proceedings must be given the opportunity to express their opinion and objections regarding the matter in written, oral, or any other suitable form. There were no comments from the leading partner.

DECISION

1. Based on the 2014-2020 Structural Assistance Act, adopted by the Parliament of the Republic of Estonia on 13 June 2018, and Guidelines to Financial Corrections for the Estonia - Latvia Programme 2014-2020, the Managing Authority decides to apply:

- 5% of the costs of the contract “Valga Veski järve tänavavalgustuse ehitus ja rekonstrueerimine“ of the project partner Valga Municipality Government are ineligible.

2. Ineligible costs of the project partner Valga Municipality Government are already deducted, no further deduction of this matter is therefore made.

Appeal of the decision

The present Financial Correction Decision No 17-1 may be appealed in accordance with the Annex 4 to the Programme Manual, which is available on the web-site <https://old.estlat.eu/>.

Ege Ello
Head of the Managing Authority
Cooperation Programme
Interreg V-A Estonia-Latvia
Grants Development Department

Küllli Kaare
kylli.kaare@rtk.ee