

Dovolují si tímto Ministerstvo financí České republiky jako povinný subjekt dle zákona o svobodném přístupu k informacím požádat o poskytnutí informace - jaký byl obsah dopisu Ministerstva financí České republiky č. j. MF-98364/2013/52 ze dne 23.9.2013. a to ideálně v podobě zaslání jeho kopie. Dopis byl adresován Evropské komisi a týkal se finančních korekcí poskytnutých dotací při vzniku pochybností o transparentnosti losování v rámci zadávacího řízení dle zákona č. 137/2006 Sb., o veřejných zakázkách, v platném znění.

Na tento dopis bylo Evropskou komisí odpovězeno dopisem č.j. ARES(2013)3366900 ze dne 29.10.2013.

MINISTERSTVO FINANCÍ

Letenská 15, poštovní přihrádka 77

118 10 Praha 1

Telefon: 257043399 Fax: 257049272

V Praze dne 9.6.2014

Č. j.: MF-45308/2014/21/708IK

Věc: Odpověď na žádost o poskytnutí informace podle zákona č. 106/1999 Sb., o svobodném přístupu k informacím, ve znění pozdějších předpisů

Na Ministerstvo financí bylo dne 2. června 2014 doručeno Vaše podání se žádostí o poskytnutí informací podle zákona č. 106/1999 Sb., o svobodném přístupu k informacím, ve znění pozdějších předpisů. Požádal jste o zaslání kopie dopisu, který se týkal finančních korekcí poskytnutých dotací při vzniku pochybností o transparentnosti losování v rámci zadávacího řízení dle zákona č. 137/2006 Sb., o veřejných zakázkách, v platném znění, č.j.: MF- 98364/2013/52 ze dne 23. 9. 2013.

Kopii výše uvedeného dopisu Vám zasílám v příloze.

Miroslav MATEJ
Deputy Minister of Finance

Prague, 23 September 2013
PID: MF CR3XLELS
Ref. No.: MF-98 364/2013/52
Annexes: 1 (Court judgement 62 Af
61/2012 – 108)

Dear Mr. Deffaa,

I am writing to you in respect of audits of the Czech Ministry of Finance Audit Authority, particularly regarding the use of the new judgment concerning tender procedure, where the number of bidders was limited by a draw using an electronic drawing (lottery) device.

In this context I would like to point out that in the past the Ministry of Finance evaluated this procedure as a risk. Therefore in December 2011 the Paying and Certifying Authority adopted a systemic measure and informed all managing authorities that it would not certify any expenditure regarding tender procedures initiated after 1 January 2012 where the number of bidders was limited by a draw. Consequently, the Ministry for Regional Development initiated an amendment to the Act No. 137/2006 Coll., on Public Procurement. From 1 April 2012 the amended Act banned the possibility to limit the number of bidders by a draw.

The Regional Court in Brno dealt with the issue of limiting the number of bidders in a restricted procedure by using an electronic drawing device for the first time in its judgement of 6 June 2013 (ref. No. 62 Af 61/2012 – 108).¹ First of all the Court in its judgement stated that in relation to the existing law it cannot be a priori concluded that any draw was not transparent and therefore in breach of the rules on public procurement. In the past the Act on Public Procurement explicitly allowed limiting the number of bidders by an electronic draw. The contracting authority was obliged in relation to the act of drawing lots to ensure the notary supervision, not to prevent the participation of bidders, and to permit the check of a drawing device prior to drawing lots. At the same time, the contracting authority had to comply with the basic principles of the procurement procedure, i.e. the principles of transparency, equal treatment, and non-discrimination. The Regional Court

¹ *Currently that judgement is being assessed by the Supreme Administrative Court.*

concluded that with regard to the specific circumstances of the present matter the contracting authority committed a breach of the principle of transparency.

The Audit Authority assumes that the contracting authority is and always was obliged to act during the procurement process in accordance with the principle of transparency and the corresponding legal interpretation existed also before the above-mentioned judgement. The Court in the specific case only explained in more detail the requirements arising from the principle of transparency when reducing the number of candidates under the restricted procedure by the electronic draw.

In the future, during the audits of operations, the Audit Authority will verify the transparency of electronic draw on case-by-case basis. The Audit Authority will assure itself that in a particular case existing supporting documents concerning the public contract do not contain evidence that would question the principle of transparency by using the electronic drawing device. Particularly, the Audit Authority will verify whether the notarial record comprehensively describes the drawing procedure, whether any bidder expressed interest in checking the device and whether he (she) was allowed to do so, or in case a bidder requested the change of numbers, whether the contracting authority complied with the request. The Audit Authority will also always examine whether no other doubts about the principle of transparency occurred.

In case the Audit Authority finds out that an electronic drawing procedure was not transparent and thus there was a violation of the principles set out in Article 2 of the European Parliament and Council Directive No. 2004/18/EC, Article 10 of the European Parliament and Council Directive No. 2004/17/EC and a violation of Article 6 of the Act No. 137/2006 Coll., on Public Procurement, as amended, the Audit Authority, when determining financial corrections, will proceed according to the rules defined in the COCOF 07/0037/03 document. The Audit Authority proposes for public contracts covered by the Community Directives on public procurement to apply 25% correction and for public contracts, which are fully or partially not covered by the Community Directives on public procurement 10 % correction of the contract value. In the case of a proven fraud a rate of 100 % of the contract value would be applied.

Although the Audit Authority considers the possibility of applying the above mentioned judicial interpretation of the principle of transparency also for public contracts awarded before the judgement as obvious, beneficiaries and managing authorities expressed objections regarding the alleged retroactivity of this approach. In order to displace any doubts of third parties I would like to ask you to confirm the correctness of this approach.

Dear Mr Deffaa, with regard to this issue allow me to ask you for the confirmation of the Audit Authority approach outlined above. With regard to the objection of retroactivity I would also like to ask you for an opinion whether any financial correction can be proposed

for the projects for which the tender was held prior to the above-mentioned Court judgement. The purpose and aim of these procedures is to achieve maximum correct conclusions of the Audit Authority audit reports as well as finding a consistent approach to this issue by the Audit Authority and European Commission auditors and a correct calculation of the error rate for the operational programme in the annual control reports.

Yours faithfully,

*Mr. Walter Deffaa
Director General
European Commission
Directorate General for Regional and Urban Policy
Av. de Beaulieu 29
B-1160 Brussels
Belgium*

*Copy:
Mrs. Veronika Ondráčková
Director
Paying and Certifying Authority
Ministry of Finance
Czech Republic*

