



EUROPEAN COMMISSION
DIRECTORATE-GENERAL HOME AFFAIRS

Directorate C
Unit C/4: Financial support - Migration and Borders

SOLID/2011/31/Rev

Committee
General programme
Solidarity and Management of Migration Flows

Subject: Guidelines for determining financial corrections to be made to expenditure co-financed by the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', European Refugee Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', External Borders Fund for the period 2007 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows' and the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows' (The Four Funds) for non-compliance with the rules on public procurement

This document sets out guidelines for the financial corrections to be applied for irregularities in the application of the Union regulations on public procurement to contracts co-financed by the four Funds of the General Programme "Solidarity and Management of Migration Flows" during the programming period 2007-2013.

Action:

The guidelines presented in this document are applicable immediately to all programmes co-financed by the four Funds of the General Programme "Solidarity and Management of Migration Flows" during the programming period 2007-2013.

When the Commission services detect during audits irregularities in the application of the Union regulations on public procurement to contracts co-financed by the Four Funds, they must determine the amount of the financial correction applicable. If, when the Commission proposes a correction, the Member State does not agree to make the correction itself in accordance with Article 42(1) and (2) of Council Decision 2007/435/EC (EIF), Article 46(1) and (2) of Decision 574/2007/EC of the European Parliament and the Council (EBF), Article 44(1) and (2) of Decision 575/2007/EC of the European Parliament and the Council (RF) or Article 44(1) and (2) of Decision 573/2007/EC (ERF III) of the European Parliament and the Council, the correction is made in accordance with Article 44 of EIF, Article 48 of EBF, Article 46 of RF or Article 46 of ERF III. These guidelines are intended to help the Commission services to maintain a common approach in dealing with these cases of irregularities.

The audit authorities of the Member States may also detect irregularities of the same type during their controls. In this case, they are required to make the necessary corrections in accordance with Article 42(1) and (2) of EIF, Article 46(1) and (2) of EBF, Article 44(1) and (2) of RF or Article 44(1) and (2) of ERF III.

The competent authorities in the Member States are recommended to apply the same criteria and rates when correcting irregularities detected by their own services during the checks and audits under Articles 15 and 17 of Commission Decision's 2008/457/EC, 2008/456/EC, 2008/458/EC and 2008/22/EC (the Implementing Rules), Article 28(1)(a) and (b) of EIF, Article 32(1)(a) and (b) of EBF, Article 30(1)(a) and (b) of RF and Article 30(1)(a) and (b) of ERF III and other checks, unless they apply yet stricter standards.

The cases described in the table in the Annex are the types of situations found most frequently. Other cases not shown in the table should be dealt with in accordance with the same principles. The amounts and rates take account of the relevant Union regulations and the guidance documents on financial corrections, in particular:

Union Directives relating to the coordination of procedures for the award of public contracts:

92/50/EEC – Public service contracts,

93/36/EEC – Public supply contracts,

93/37/EEC – Public works contracts,

93/38/EEC – Public contracts in the water, energy, transport and communications sectors, 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,

97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC,

92/13/EEC – remedies relating to the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,

89/665/EEC – review procedures to the award of public supply and public works contracts,

2004/17/EEC – Public contracts in the water, energy, transport and postal services sectors,

2004/18/EEC – Public works contracts, public supply contracts and public service contracts,

2005/51/EC – amending Annex XX of Directive 2004/17/EC and Annex VIII of Directive 2004/18/EC,

Commission Directive 2001/78/CE of 13 September 2001 on the use of standard forms in the publication of public contract notices,

and

Regulation (EC) No 1564/2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC,

Decision 2005/15/EC on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (7.1.2005), the rules and the principles of the Treaty, concerning mainly the free movement of goods (Article 28 of the Treaty of the functioning of the European Union), the right of establishment (Article 49), the free provision of services (Article 56), the non-discrimination and the equality of treatment, the transparency, the proportionality and the mutual recognition.

Under Article 6(2) and (3) of EIF, Article 8(2) and (3) of EBF, Article 8(2) and (3) of RF and Article 7(2) and (3) of ERF III, operations financed by the Funds must be in conformity with the provisions of the Treaty, with instruments adopted under it and with Union policies, including on the award of public contracts. Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests states: *“Irregularity”¹ shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.*”

Articles 42(2) of EIF, 46(2) of EBF, 44(2) of RF and 44(2) of ERF III provide that *“The Member State shall make the financial corrections required in connection with the individual or systemic irregularity. Corrections made by Member States shall consist in cancelling and if applicable, recovering all or part of the Community contribution.”* Pursuant to Article 44 of EIF, Article 48 of EBF, Article 46 of RF or Article 46 of ERF III if the Member State does not make the necessary financial corrections, the Commission may itself decide to make the financial corrections required by cancelling all or part of the contribution of the Funds to the assistance concerned.

Under Articles 44(2) and (3) of EIF, 48(2) and (3) of EBF, 46(2) and (3) of RF and 46(2) and (3) of ERF III,

“2. The Commission shall base its financial corrections on individual cases of irregularity identified, taking account of the systemic nature of the irregularity to determine whether a flat-rate or extrapolated correction should be applied. Where the irregularity relates to a declaration of expenditure for which a reasonable assurance had previously been given by the audit authority

¹ The same definition for "irregularity" is introduced in Article 2 of the Implementing Rules for the Four Funds.

in accordance with Article 28(3)(b)²/32(3)(b)³/30(3)(b)⁴, there will be a presumption of a systemic problem giving rise to the application of a flat-rate or extrapolated correction, unless the Member State can provide proof within three months to rebut this presumption.

3. The Commission shall, when deciding the amount of a correction, take account of the importance of the irregularity and the extent and financial implications of the deficiencies found in the annual programme concerned.”

The amounts and rates of financial corrections set out in the table in the Annex are applied to individual cases of irregularities due to non-compliance with the rules on public procurement. Where systemic or repeated irregularities are detected in the application of the rules on public procurement, financial corrections at flat rates or by extrapolation (within the meaning of Articles 44(2) and (3) of EIF, 48(2) and (3) of EBF, 46(2) and (3) of RF and 46(2) and (3) of ERF III) can be made to all the operations and/or programmes affected by the irregularities.

The amounts and rates of financial corrections set out in the table in the Annex may be increased where irregular applications for payment are presented to the Commission after the date on which the latter has explicitly informed the Member State, by reasoned opinion based on Article 258 of the Treaty, of an infringement of the public procurement regulations.

² Applicable for the European Fund for the Integration of third-country nationals.

³ Applicable for the External Borders Fund.

⁴ Applicable for the European Return Fund and the European Refugee Fund.

1. CONTRACTS SUBJECT TO THE EC PUBLIC PROCUREMENT DIRECTIVES

No	Irregularity		Recommended correction (Note n° 1)
1	Non-compliance with the advertising procedures	The contract was awarded without complying with the advertising requirements laid down in the EU Public Procurement Directives, except in the cases referred to in point 2 below. This is a flagrant disregard of one of the conditions for Union co-financing.	100% of the value of the contract involved
2	Non-compliance with the advertising procedures	The contract was awarded without complying with the advertising requirements laid down in the EU Public Procurement Directives, but was advertised to some extent allowing economic operators located in another Member State access to the contract.	25% of the value of the contract involved
3	Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or the absence of an unforeseen circumstance for complementary works and services or for	The main contract was awarded in accordance with the EU Public Procurement Directives, but was followed by one or more supplementary contracts (whether or not formalised in writing) awarded without complying with the provisions of the Public Procurement Directives namely the ones related to the negotiated procedures without publication for reasons of extreme urgency brought about by unforeseeable events or for attribution of complementary supplies, works and services.	100% of the value of the contract involved In the cases where the total of supplementary contracts (whether or not formalised in writing) awarded without complying with the provisions of the Public Procurement Directives do not exceed the

	<p>supplies.</p> <p>(Note No 2)</p>		<p>thresholds of the Directives and the 50% of the value of the original contract the correction may be reduced to 25%.</p>
4	<p>Additional works or services exceeding the limit laid down by the Directives provided in unforeseen circumstances</p> <p>(Note No 2)</p>	<p>The main contract was awarded in accordance with the provisions of the EU Directives, but was followed by one or more supplementary contracts exceeding the value of the original contract by more than 50%.</p> <p>The additional works themselves do not constitute a separate work within the meaning of Article 1(c) of Directive 93/37 or Article 1(2) (a) and 2(b) of Directive 2004/18 or a separate service within the meaning of Article 1(a) of Directive 92/50 or Article 1(2) (a) and 2(d) of Directive 2004/18.</p> <p>In cases where the additional works or services exceed the thresholds of the Directives and constitute a separate work or service, it is necessary to take account of the aggregate value of all the additional works or services for the purposes of the application of the Public Procurement Directives.</p> <p>Where the additional works or services constitute a separate work or service and exceed the thresholds laid down by the Directives, the above mentioned point 1 applies.</p> <p>Where the additional works or services constitute a separate work or service but do not exceed the thresholds laid down by the Directives, point 21 below applies.</p>	<p>100% of the amount exceeding 50% of the value of the original contract</p>

5	Failure to state all the selection and contract award criteria in the tender documents or tender notice	The contract was awarded in compliance with the advertising rules of the Public Procurement Directives, but the tender documents or tender notice failed to state all the selection and/or award criteria or to describe them sufficiently.	25% of the value of the contract. This amount may be reduced to 10% or 5% depending on seriousness.
6	Application of unlawful contract award criteria	The contract was awarded applying unlawful contract award criteria (for example, use of a selection criterion for the award of the contract, non-compliance with the criteria stated by the contracting authority in the tender notice or tender documents or incorrect and/or discriminatory application of contract award criteria).	25% of the value of the contract. This amount may be reduced to 10% or 5% depending on seriousness.
7	Unlawful selection and/or contract award criteria laid down in the tender procedure	Cases in which certain operators have been deterred from bidding on account of unlawful restrictions laid down in the tender notice or tender documents (for example, the obligation to already have an establishment or representative in the country or region, or setting technical standards that are too specific and favour a single operator or the possession of experience in the region, etc.).	25% of the value of the contract. (A financial correction of 100% of the value of the contract may be applied in the most serious cases when there is a deliberate intention to exclude certain bidders.)
8	Insufficient or discriminatory definition of the subject-matter of the contract	The description in the tender documents or tender notice is discriminatory or insufficient for bidders to determine the subject-matter of the contract or for the contracting authorities to award the contract.	25% of the value of the contract. This amount may be reduced to 10% or 5% depending on seriousness.

9	Negotiation during the award procedure	The contract was awarded by open or restricted procedure but the contracting authorities negotiated with the bidders during the award procedure, except where the discussions were solely intended to clarify or supplement the content of their bids or specify the obligations of the contracting authorities.	25% of the value of the contract. This amount may be reduced to 10% or 5% depending on seriousness.
10	Reduction in the scope of the contract (Note No 2)	The contract was awarded in compliance with the Public Procurement Directives, but was followed by a reduction in the scope of the contract without making a proportional reduction in the value of the contract. (This correction applies even in cases where the amount of the reduction is used to carry out other works).	Value of the reduction in the scope Plus 25% of the value of the final scope
11	Reduction in the scope of the contract (Note No 2)	The contract was awarded in compliance with the Public Procurement Directives, but was followed by a reduction in the scope of the contract with a proportional reduction in the value of the contract already carried out. (This correction applies even in cases where the amount of the reduction is used to carry out irregular supplementary contracts).	25% of the value of the final scope
12	Incorrect application of certain ancillary elements	The contract was awarded in compliance with the provisions of the Public Procurement Directives, but without complying with certain ancillary elements, such as publication of the notice of award of the contract. Note: If this type of irregularity is only of a formal nature without potential financial impact, no correction will be made.	2%, 5% or 10% of the value of the contract, according to the seriousness of the irregularity and whether a repeat occurrence

2. CONTRACTS NOT OR NOT FULLY SUBJECT TO THE PUBLIC PROCUREMENT DIRECTIVES (PUBLIC CONTRACTS BELOW THE THRESHOLDS FOR APPLICATION OF THE UNION DIRECTIVES AND PUBLIC CONTRACTS FOR SERVICES LISTED IN ANNEX I B TO DIRECTIVE 92/50/EEC, ANNEX XVI B TO DIRECTIVE 93/38/EEC, ANNEX II B TO DIRECTIVE 2004/18/EC AND ANNEX XVII B TO DIRECTIVE 2004/17/EC)

The European Court of Justice (ECJ) has confirmed in its case-law that the rules and the principles of the EU Treaty apply also to contracts outside the scope of the Public Procurement Directives.

Contracting entities from Member States have to comply with the rules and principles of the EU Treaty whenever they conclude public contracts falling into the scope of that Treaty. These principles include the free movement of goods (Article 28 of the Treaty of the functioning of the European Union), the right of establishment (Article 49), the freedom to provide services (Article 56), non-discrimination and equal treatment, transparency, proportionality and mutual recognition (*Commission interpretative communication n° 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*).

The principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the ECJ case-law, "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed" (*Commission interpretative communication n° 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*).

The lack of conformity with these rules and principles represents risks for the Union funds. Consequently, financial corrections should be applied to the irregularities detected in the contracts that do not conform or conform partially to the Union Directives. The rates to be applied depending on the type of irregularity are the following:

No	Irregularity ⁵		Recommended correction
21	Non-compliance with the requirement of an adequate degree of advertising and transparency (Note No 3)	Contract awarded without adequate competitive tendering, involving non-compliance with the principle of transparency	25% of the value of the contract
22	Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or for complementary works and services brought about unforeseen circumstance. (Note No 2)	The main contract was awarded after adequate competitive tendering, but was followed by one or more supplementary contracts (whether or not formalised in writing) awarded without adequate competition in the absence of reasons of extreme urgency brought about by unforeseeable events or (for contracts of works and services) in the absence of unforeseen circumstances justifying them.	25% of the value of the contract(s) attributed without adequate competition.
23	Application of unlawful selection	Application of unlawful criteria which deter certain bidders on account of unlawful restrictions laid down in the tender procedure (for example, the	10% of the value of the contract. This amount

⁵ Without prejudice to Article 11 of the Implementing Rules, in particular for small value contracts.

	and/or contract award criteria	obligation to have an establishment or representative in the country or region or the setting of technical standards that are too specific and favour a single operator).	may be reduced to 5% depending on seriousness.
24	Breach of the principle of equal treatment	Contracts awarded in accordance with the rules on advertising but where the contract award procedure breaches the principle of equal treatment of operators (for example, when the contracting authorities have made an arbitrary choice of candidates with whom they negotiate or if they give preferential treatment to one of the candidates invited to negotiate).	10% of the value of the contract. This amount may be reduced to 5% depending on seriousness.

Note n° 1. The amount of the financial correction is calculated according to the amount declared to the Commission related to the contract affected by the irregularity. The percentage of the suitable scale applies to the amount of the expenditure declared to the Commission for the contract in question. Practical example: The amount of the expenditure declared to the Commission for a work contract concluded after the application of illegal criteria is 10,000,000€. The applicable correction rate is 25% in agreement with the scale n° 6. The amount to be deducted from the expenditure statement to the Commission is 2,500,000€. Accordingly the Union co-financing is reduced according to the cofinancing rate of the measure under which the contract in question was financed.

Note n° 2) In the application of these guidelines for the financial correction for non conformity with the rules relating to the public procurement, one limited degree of flexibility can be applied to the modifications of a contract after its attribution provided that (1) the contracting authority does not alter the general economy of the invitation to tender or the terms of reference by modifying an essential element of the attributed contract, (2) modifications, if they had been included in the invitation to tender or in the terms of reference, would not have had any substantial impact on the received offers. The essential elements of the attribution of the contract concern mainly the value of the contract, the nature of the works, the completion period, the terms of payment, and the materials used. It is always necessary to make an analysis on a case by case basis.

Note n° 3. The concept of “sufficient degree of advertising” must be interpreted in the light of Commission interpretative communication No 2006/C 179/02 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, and in particular:

- a) The principles of equal treatment and non-discrimination imply an **obligation of transparency** which consists in ensuring, for the benefit of any potential bidder, **a degree of advertising sufficient to enable the contract to be subject to competition**. The obligation of transparency requires that an **undertaking located in another Member State can have access to appropriate information regarding the contract before it is awarded**, so that, if it so wishes, it would be **in a position to express its interest** in obtaining the contract.
- b) For individual cases where, because of particular circumstances such as a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case the effects on the fundamental freedoms are to be regarded as too uncertain and indirect to warrant the application of standards derived from primary Union law and consequently there is no ground for application of financial corrections.

It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance.