

Information Note No. 7



To: All successful Ireland-Wales beneficiaries

From: Finance Unit, Ireland-Wales Programme

Date: 12th June 2009

Re: Penalties for non-compliance with rules on Public Procurement (applies to both Irish and Welsh beneficiaries)

We have been informed by the Commission that we must apply the provisions of COCOF paper 07/0037/03-EN¹, which sets out guidelines for financial corrections to be applied for irregularities in relation to public procurement of contracts co-financed by Structural Funds or the Cohesion Fund. What follows is a brief description of the contents of that paper.

When the Commission detect procurement-related irregularities during audits, they will apply a financial correction. The control authorities of the Member States, in this case the First Level Controllers of the Ireland-Wales Programme, may also detect similar irregularities during their control work, and if so, they are also required to make corrections. The Commission recommends we apply the same criteria and rates they will use, unless ours are even stricter.

The cases described in the tables are the situations found most frequently. Other cases, not shown, will be dealt with similarly. The amounts and rates take account of Community regulations and the guidance documents on financial corrections.

Under Article 12 of Regulation 1260/1999, operations financed by the Funds must be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies, including on the award of public contracts. The same obligations have been provided for the programming period 2007-2013 under Article 9, paragraphs 2 and 5 of Regulation 1083/2006.

Article 39(1) of Regulation 1260/99 provides that "*The Member State shall make the financial corrections required in connection with the individual or systemic irregularity. The corrections made shall consist in cancelling all or part of the Community contribution.*" The same obligations have been provided for the programming period 2007-2013.

Under Article 4 of Regulation (EC) No 448/2001,

1. The amount of the correction made will be assessed on individual files and be equal to the amount of expenditure wrongly charged to the Funds, having regard to proportionality.
2. When we can't quantify the amount of irregular expenditure precisely, or when it would be disproportionate to cancel the expenditure entirely, we are instructed to base our correction on extrapolation or a flat rate as follows:
 - "(a) in the case of extrapolation, using a representative sample of transactions with like characteristics;
 - (b) in the case of a flat rate, (by assessing) the importance of the infringement of rules and the extent and financial implications of the irregularity established."

In accordance with Commission principles, "The purpose of financial corrections is to restore a situation where 100% of the expenditure declared for cofinancing from the Structural Funds is in line with the applicable national and EU rules and regulations."

¹ "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

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Table 1

No	Irregularity	Detailed Example	Recommended Correction (Note 1)
1	Non-compliance with Advertising procedures	Contract was awarded without complying with the advertising requirements laid down in the Public Procurement Directives (except in the cases referred to in No. 2 below). This is considered a flagrant disregard of one of the conditions for Community co-financing.	100% of the contract value.
2	Non-compliance with Advertising procedures	Contract was awarded without complying with the advertising requirements laid down in the Public Procurement Directives, but was advertised to an extent	25%
3	Attribution of contracts without competition (in the absence of extreme urgency brought about by unforeseeable events, or absence of unforeseen circumstances for complementary works and services or for supplies (Note 2))	Main contract was awarded in accordance with the EC 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	100% Where the total of supplementary contracts awarded without complying with Directives does not exceed the thresholds of the Directives and 50% of the value of the original contract, the correction may be reduced to 25%.
4	Additional works or services exceeding limits laid down by Directives for unforeseen circumstances	Main contract was awarded in accordance with Directives, but was followed by supplementary contracts exceeding the value of the original contract by more than 50% and the additional works themselves do not constitute a separate work or service.	100% of the amount exceeding 50% of the original contract value.
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 Directives, but the tender documents or tender notice failed to state all the selection/ award criteria or to describe them sufficiently.	25%. 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 (example: non-compliance with the criteria stated by the contracting authority)	25%. May be reduced to 10% or 5% depending on seriousness.
7	Unlawful selection and/or contract award criteria laid down in the tender procedure	Some operators may have been deterred from bidding on account of unlawful restrictions laid down in the tender notice or documents (for example, an obligation to already have an establishment or representative in the country/region, or setting technical standards that are too specific and favour a single operator, etc.)	25% (100% 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	The description in the tender documents or 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%. 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%. May be reduced to 10% or 5% depending on seriousness.
10	Reduction in the scope of the contract (Note 2)	The contract was awarded in compliance with Directives, but was followed by a reduction in the scope of the contract without making a proportional reduction in the value of the contract.	Value of the reduction in scope, PLUS 25% of the original value
11	Reduction in the scope of the contract (Note 2)	The contract was awarded in compliance with 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	25% of the value of the final scope
12	Incorrect application of certain ancillary elements	Contract was awarded in compliance with Directives, but without complying with certain ancillary elements, such as publication of the notice of award of the contract	2%, 5%, or 10%, according to the seriousness of the irregularity and whether it is a repeat occurrence.

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Contracts not subject to, or not fully subject to, Public Procurement Directives (e.g., public contracts below the thresholds for application of the Community Directives)

The European Court of Justice (ECJ) has confirmed in its case-law that the rules and principles of the EC 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 EC Treaty whenever they conclude public contracts falling into the scope of that Treaty.

The principles of equal treatment and non-discrimination 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".

Lack of conformity with these rules and principles represents risks for the Community funds, and we have been instructed to apply corrections where contracts do not conform, or conform only partially to the Directives. The rates to be applied are as follows:

No	Irregularity	Detailed example	Recommended correction
21	Non-compliance with the requirements for adequate advertising and transparency (Note 3)	Contract awarded without adequate competitive tendering, involving non-compliance with the principle of transparency	25% of the contract value
22	Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events etc. (Note 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 etc.	25% of the value of the contract(s) attributed without adequate competition
23	Application of unlawful selection/award criteria	Application of unlawful criteria which deter certain bidders on account of unlawful restrictions laid down in the tender procedure (for example, the 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).	10%. 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%. May be reduced to 5% depending on seriousness.

Notes

1. The correction is calculated by reference to the amount declared to the Commission on the contract affected.
2. Some flexibility can be applied to 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.
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.

SUMMARY - Non-compliance with the rules of Public Procurement is considered a flagrant breach of co-financing terms. If we detect it during our Control work, we are obliged to impose a correction, and will do so in line with the tables above.

For full details of the COCOF paper, please see:

http://www.espon.eu/mmp/online/website/content/programme/1455/1496/1928/2032/file_4879/guidelines_on_financial_corrections.pdf