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## **Guidelines on Financial Corrections in the Cross-Border Cooperation Programme Poland - Russia 2014-2020**

### **1. Introduction**

In the case of irregularities related to non-compliance with public procurement rules by the Russian beneficiaries, it is necessary to define an appropriate amount of the financial correction in accordance with the Guidelines on Financial Corrections in the Poland-Russia Cross-Border Cooperation Programme 2014-2020, hereinafter referred to as Guidelines.

The types of irregularities described in this document are the most frequently found types of irregularities related to public procurements. Other irregularities not indicated in that section should be dealt with in accordance with the principle of proportionality and, where possible, by analogy to the types of irregularities identified in these Guidelines.

The amount of the financial correction is calculated in view of the expenditure amount declared or approved in the project progress report and related to the contract/procurement procedure (or part of it) affected by the irregularity. The adequate rate of the correction applies to the amount of the expenditure declared or approved in connection with the contract/procurement procedure affected by the irregularity. The same correction rate should be applied also to any future expenditure related to the same affected contract/procurement procedure.

Practical example: the amount of expenditure declared to the verification of auditors in connection with public procurement for construction works, for which the contract was concluded after the application of illegal criteria is 10 000 000 EUR. If the applicable rate of the correction is 25%, the amount to be deducted from the amount of eligible expenditure is 2 500 000 EUR. Accordingly, based on adequate funding rate the amount of eligible expenditures subjected to the approval of the auditor is reduced. If afterwards the beneficiary intends to declare further expenditure concerning the same contract and affected by the same irregularity, that expenditure should be subject to the same correction rate.

The appropriate institutions authorized to controls on correcting irregularities are recommended to apply the same criteria and rates when correcting irregularities detected by their own services, unless they apply stricter standards.

### **2. Criteria to consider when deciding which rate of correction to apply**

These Guidelines set out a range of corrections of 5%, 10%, 25% and 100% that are applied to the expenditure of a contract/procurement procedure. They take into account the importance 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/procurement procedure in



question. The seriousness of an irregularity related to non-compliance with the rules on public procurement and the related financial impact to the European Union budget is assessed taking into account the following factors: level of competition, transparency and equal treatment.

The value of the financial correction may be reduced if the cancellation of eligible expenditure incurred under the contract/procurement procedure is disproportionate to the nature and importance of the particular irregularity. The nature and the gravity of the particular irregularities is evaluated separately for each contract/procurement procedure, taking into account the degree of violation of the principles of fair competition, equal treatment of contractors, transparency and non-discrimination.

The use of reduced correction rates for the irregularity is not possible in relation to the contracting institutions, which, despite receiving the result of verification or control of the implemented project stating irregularities, re-commit the same irregularity in the procurement procedures initiated after receiving the result of the control or audit.

It is not possible to reduce the financial correction in the case of irregularities which relate to cases of fraud or deliberate preference of one of the contractors identified in finally ended legal proceedings or other final decision ending an administrative procedure applicable to national legislation.

When the non-compliance with public procurement rules has a deterrent effect to potential tenderers or when the non-compliance leads to award an offer other than the one that should have been awarded, this is a strong indication that the irregularity is serious. When the irregularity is only of a formal nature without any actual or potential financial impact, no correction will be made.

Where a number of irregularities are detected in the same tender procedure, the rates of correction are not cumulated, the most serious irregularity being taken as an indication to decide the rate of correction (5%, 10%, 25% or 100%), which means that the highest possible rate is applied.

A financial correction of 100% may be applied in the most serious cases when the irregularity favors certain tenderer(s)/ candidate(s) or where the irregularity relates to fraud.

While applying corrections, the cross-border character of the tender procedure shall also be taken into consideration. The cross-border character have procurements, which are (also potentially) in the interest of entities registered in one of the two countries participating in the Programme. This concept implies that for contracts which are not (or not fully) subject to the public procurement national law - also the need to determine the existence of a certain cross-border interest exists.

Contracting entities should be made aware that it is in their responsibility to decide whether an intended contract award might potentially be of interest to economic operators located in other countries participating in the Programme and to choose the appropriate means of publication. This

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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 and the specifics of the sector concerned (size and structure of the market, commercial practices etc.) and the geographical location of the place of performance. In case when providers from other countries may be interested in a procurement, sufficient degree of advertising is required, at least in terms of publication of a tender notice.

### Examples

1. For a project event taking place in a city in the geographical centre of Poland, the beneficiary (a public institution) intends to contract a caterer for lunch and coffee breaks for an estimated value of 10 000 EUR. The beneficiary has to observe the applicable national rules on publication. Due to the geographical location of the event, the interest of providers located in other countries in this catering contract is likely to be limited. Accordingly, the use of additional publication channels enlarging the degree of visibility of the tender notice, especially to foreign potential providers, is not necessary.<sup>1</sup>
2. A project partner (public institution) intends to contract a study covering the territory of two states participating in the Programme, for an estimated value of 65 000 EUR. The procurement law of the state where the awarding institution is located requires a national wide publication of the tender notice. Due to the potential cross-border interest of the contract, the use of wider (than national) publication channels might be advisable - if accessible for the awarding institution - in order to ensure a sufficient degree of advertising. The beneficiary might also use the opportunity offered by the Programme to publish it also on the Programme website.<sup>2</sup>
3. The same contract as in example 2) is to be tendered by a beneficiary located in a state where, for the estimated amount of the contract, there is no obligation to publish the tender notice. Again, due to the potential cross-border interest of the contract, at least the publication on the Programme website is advised.

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<sup>1</sup> For the entities located in Russia subject for the national public procurement law it is not obligatory to publish the tender notice and documentation on other web site than <http://zakupki.gov.ru>

<sup>2</sup> As above.

### 3. TYPES OF IRREGULARITIES AND CORRESPONDING RATES OF FINANCIAL CORRECTIONS

#### 3.1. Contract notice and tender specifications

No	Type of irregularity	Description of irregularity	Rate of correction
1.	Lack of publication of contract notice.	The contract notice was not published in accordance with the relevant national legislation.	100%  25% if publication of a contract notice(s) is required by the national legislation and the contract notice(s) was not published in the respective official publication, but it was published in a way that ensures that undertakings located in the country involved in the Programme had access to the appropriate information regarding the public procurement before it was awarded, so that it would be in a position to submit a tender or express its interest to participate in obtaining that contract. In practice, this means that either the contract notice was published at a national level (following the national legislation or rules in that regard) or the basic standards for the publication of the contract notice was respected.
2.	Artificial splitting of works/services/supplies contracts.	A works project or proposed purchase of a certain quantity of supplies or services is subdivided resulting in its coming outside the scope of national law, i.e. preventing its publication in accordance with the national legislation for the whole set of works,	100%  25% if publication of a contract notice(s) is required by the national legislation and the contract notice(s) was not published in the respective official publication, but it was



		services or supplies.	published in a way that ensures that undertakings located in the country involved in the Programme had access to the appropriate information regarding the public procurement before it was awarded, so that it would be in a position to submit a tender or express its interest to participate in obtaining that contract. In practice, this means that either the contract notice was published at a national level (following the national legislation or rules in that regard) or the basic standards for the publication of the contract notice was respected.
3.	Non-compliance with - time limits for receipt of tenders; or - time limits for receipt of requests to participate.	The time limits for receipt of tenders (or receipt of requests to participate) were lower than the time limits required by the national legislation.	25% if reduction in time limits $\geq$ 50% 10% if reduction in time limits $\geq$ 30% 5% if any other reduction in time limits (this correction rate may be reduced to between 2% and 5%, where the nature and gravity of the deficiency is not considered to justify a 5% correction rate).
4.	Insufficient time for potential tenderers/candidates to obtain tender documentation.	Time for potential tenderers/candidates to obtain tender documentation is too short, thus creating an unjustified obstacle to the opening up of public procurement to competition. Corrections are applied on a case by case basis. In determining the level of the correction, account will be taken of possible mitigating factors related to the specificity and complexity of the contract, in particular possible administrative burden or difficulties in providing the tender documentation.	25% if the time that potential tenderers/candidates had to obtain tender documentation is less than 50% of time limit for receipt of tenders (in line with relevant provisions). 10% if the time that potential tenderers/candidates had to obtain tender documentation is less than 60% of time limit for receipt of tenders (in line with relevant provisions). 5% if the time that potential tenderers/candidates had to obtain tender documentation is less than 80% of time limits for request of tenders (in line with relevant

			provisions).
5.	Lack of publication of - extended time limits for receipt of tenders; or - extended time limits for receipt of requests to participate.	The time limits for receipt of tenders (or receipt of request to participate) were extended without publication in accordance with the relevant rules (i.e., publication in the respective official publication).	10% The correction can be decreased to 5% depending on the relevance of irregularities.
6.	Cases not justifying the use of the negotiated procedure with prior publication of a contract notice.	Contracting authority awards a public contract by negotiated procedure, after publication of a contract notice, but such procedure is not justified by the relevant provisions.	25% The correction can be reduced to 10% or 5% depending on the relevance of irregularities.
7.	Failure to state: - the selection criteria in the contract notice; and/or - the award criteria (and their weighting) in the contract notice or in the tender specifications.	The contract notice does not set out the selection criteria  and/or  when neither the contract notice nor the tender specifications describe in sufficient detail the award criteria as well as their weighting.	25% The correction can be decreased to 10% or 5% if the selection/award criteria were stated in the contract notice (or in the tender specifications, as regards award criteria) but with insufficient detail.
8.	Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents.	Cases in which entities have been deterred from bidding because of unlawful or discriminatory selection and/or award criteria laid down in the contract notice or tender documents. For example: - obligation to already have an establishment or	25% The correction can be decreased to 10% or 5% depending on the relevance of irregularities.

		representative in the country or region; - tenderers' possession of experience in the country or region.	
9.	Selection criteria not related and proportionate to the subject-matter of the contract.	When it can be demonstrated that the minimum capacity levels of ability for a specific contract are not related or proportionate to the subject-matter of the contract, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of public procurement to competition.	25% The correction can be decreased to 10% or 5% depending on the relevance of irregularities.
10.	Discriminatory technical specifications	Setting technical standards that are too specific, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of public procurement to competition.	25% The correction can be decreased to 10% or 5% depending on the relevance of irregularities.
11.	Insufficient definition of the subject-matter of the contract	The description in the contract notice or the tender specifications is insufficient for potential tenderers/candidates to determine the subject-matter of the contract.	10% The correction can be decreased to 5% depending on the relevance of irregularities. In case the implemented works were not published, the corresponding amount is subject to a correction of 100%.

### 3.2. Evaluation of tenders

12.	Modification of selection criteria after opening of tenders, resulting in incorrect acceptance of	The selection criteria were modified during the selection phase, resulting in acceptance of tenderers that should not have been accepted if the published selection criteria had been followed.	25% The correction can be decreased to 10% or 5% depending on the relevance of irregularities.
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	tenderers.		
13.	Modification of selection criteria after opening of tenders, resulting in incorrect rejection of tenderers	The selection criteria were modified during the selection phase, resulting in rejection of tenderers that should have been accepted if the published selection criteria had been followed.	25% The correction can be decreased to 10% or 5% depending on the importance of the irregularity.
14.	Evaluation of tenderers/candidates using unlawful selection or award criteria	During the evaluation of tenderers/candidates, the selection criteria were used as award criteria, or the award criteria (or respective sub-criteria or weightings) stated in the contract notice or tender specifications were not followed, resulting in the application of unlawful selection or award criteria. Example: Sub-criteria used for the award of the contract are not related to the award criteria in the contract notice / tender specifications.	25% The correction can be decreased to 10% or 5% depending on the relevance of irregularities.
15.	Lack of transparency or equal treatment during evaluation	The audit trail concerning in particular the scoring given to each bid is unclear/unjustified/ lacks transparency or is non-existent. And/or The evaluation report does not exist or does not contain all the elements required by the relevant provisions.	25% The correction can be reduced to 10% or 5% depending on the relevance of irregularities.
16.	Modification of a tender during evaluation	The contracting authority allows a tenderer/candidate to modify its tender during evaluation of offers.	25% The correction can be reduced to 10% or 5% depending on the relevance of irregularities.
17.	Negotiation during the award procedure	In the context of an open or restricted procedure, the contracting authority negotiates with the bidders	25% The correction can be reduced to 10% or 5% depending



		during the evaluation stage, leading to a substantial modification of the initial conditions set out in the contract notice or tender specifications.	on the relevance of irregularities.
18.	Negotiated procedure with prior publication of a contract notice with substantial modification of the conditions set out in the contract notice or tender specifications	In the context of a negotiation procedure with prior publication of a contract notice, the initial conditions of the contract were substantially altered, thus justifying the publication of a new tender.	25% The correction can be reduced to 10% or 5% depending on the relevance of irregularities.
19.	Rejection of abnormally low tenders	Tenders appear to be abnormally low in relation to the goods, works or services but the contracting authority, before rejecting those tenders, does not request in writing details of the constituent elements of the tender which it considers relevant.	25%
20.	Conflict of interest	When a conflict of interest has been established by a competent judicial or administrative body, either from the part of the beneficiary of the contribution paid by the Union or the contracting authority.	100%

### 3.3. Contract implementation

21.	Substantial modification of the contract elements set out in the contract notice or tender specifications	The essential elements of the award of the contract include but are not limited to price, 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 of what is	25% of the amount of the contract plus the value of the additional amount of the contract
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		an essential element.	resulting from the substantial modification of the contract elements.
22.	Reduction in the scope of the contract	The contract was awarded in compliance with the national legislation, but was followed by a reduction in the scope of the contract.	Value of the reduction in the scope  Plus  25% of the value of the final scope (only when the reduction in the scope of the contract is substantial).
23.	Award of additional works/services/supplies contracts (if such award constitutes a substantial modification of the original terms of the contract) without competition in the absence of one of the following conditions: - extreme urgency brought about by unforeseeable events; - an unforeseen circumstance for additional works, services, supplies <sup>3</sup>	The main contract was awarded in accordance with the relevant provisions, but was followed by one or more additional works/services/supplies contracts (whether or not formalized in writing) awarded without complying with the provisions of the national legislation, i.e., the provisions related to the negotiated procedures without publication for reasons of extreme urgency brought about by unforeseeable events or for award of complementary supplies, works and services.	100% of the value of the supplementary contracts. Where the total of additional works/services/supplies contracts (whether or not formalized in writing) awarded without complying with the provisions of the national legislation does not exceed the thresholds of the national legislation and 50% of the value of the original contract, the correction may be reduced to 25%.

24.	Additional works or services exceeding the limit laid down in the relevant provisions	The main contract was awarded in accordance with the provisions of the national legislation, but was followed by one or more supplementary contracts exceeding the value of the original contract by more than 50%	100% of the amount exceeding 50% of the value of the original contract
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requirements resulting from the adoption of new EU or national legislation or technical conditions, which could not have been foreseen despite technical investigations underlying the design, and carried out according to the state of the art). Additional works/services/supplies caused by insufficient preparation of the tender/project cannot be considered "unforeseen circumstances".