

ANNEX 1: GUIDELINES FOR DETERMINING FINANCIAL CORRECTIONS TO BE MADE TO EXPENDITURE FINANCED BY THE UNION FOR NON-COMPLIANCE WITH PROCUREMENT PRINCIPLES

1. INTRODUCTION

For the purposes of safeguarding Union funds, and without prejudice to the legal status of VOs and NGOs, the Managing Authority/Paying Agency assess procurement-related irregularities affecting EU-funded expenditure by reference to the Commission's established approach to financial corrections, as set in the [Commission Decision C\(2019\) 3452 of 14 May 2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement](#). Consequently, the types of irregularities and indicative correction rates set out in this Annex are applied by analogy, insofar as they reflect breaches of the fundamental principles of transparency, equal treatment, non-discrimination, mutual recognition, proportionality, good governance and sound financial management.

1.1. Financial Impact of Irregularities

A financial correction is warranted only where a procurement irregularity **has or could have had a financial impact on EU funds**, in particular by restricting competition, reducing transparency or distorting equal treatment. Irregularities which are purely formal in nature, and which clearly did not and could not have affected the outcome of the procurement procedure, do not automatically give rise to a financial correction. Each case is assessed on its specific circumstances, taking into account the nature, gravity and potential impact of the irregularity.

1.2. Non-cumulation of correction rates

Where more than one irregularity is identified within the same procurement procedure, financial correction rates are not cumulative. In such cases, the correction rate applied shall correspond to the most serious irregularity identified, having regard to its nature and potential financial impact.

1.3. Systemic Irregularities

While individual procurement errors may occur on an isolated basis, repeated or recurring weaknesses of a similar nature across several procurement procedures may indicate a systemic deficiency in internal controls or procedures. In such cases, corrective action may be required beyond the individual procedure concerned, and continued recurrence may increase the risk of higher-level or broader financial corrections.

1.4. Fraud

A 100% financial correction applies where breaches of procurement principles affecting the EU budget are linked to fraud or other criminal offences, as established by a competent judicial body or identified by a competent EU or national authority on the basis of evidence.

While auditors do not determine fraud, they are obliged to report any facts indicating potential criminal conduct to OLAF and the competent authorities.

2. TYPES OF IRREGULARITIES AND CORRESPONDING RATES OF FINANCIAL CORRECTIONS

2.1. Procurement Publication

Commission Decision No ¹	Type of irregularity	Description of the irregularity	Maximum Rate of correction ²
1.	Unjustified direct award	The works, supplies, or services were procured through a direct award: <ul style="list-style-type: none"> - without first undertaking a competitive procurement procedure; or - in the absence of duly substantiated justification for the use of a direct contract, in line with section 2.2.8 of this Guidance Note. 	100%
2.	Artificial splitting of works/services/supplies contracts	A works project or proposed purchase of a certain quantity of supplies and/or services is artificially subdivided into several contracts, to avoid the advertising of the procurement procedure.	100%
4.	Non-compliance with time limits for receipt of tenders	The reduction of the time limits for a call for tenders set in section 2.2.3 of this Guidance Note is more than or equal to 85% or the time limit is equal to/less than 5 days.	100%
	<i>or</i> Failure to extend time limits	The reduction of the time limits for a call for tenders set in section 2.2.3 of this Guidance Note is more than or equal to 50% (but below 85%).	25%

¹ For reporting purposes, the Irregularity Type Number corresponds to the numbering set out in Commission Decision C(2019) 3452

² Where due to the nature of the irregularity, it is not possible to quantify precisely the financial impact but the irregularity is capable, as such, to have a budgetary impact, the Managing Authority may calculate the amount of the correction to apply by taking into account three criteria (i.e. level of competition, transparency and equal treatment), namely the nature and gravity of the irregularities and the resulting financial loss to the Funds. **Where more than one irregularity is detected in the same procurement procedure, the rates of correction are not cumulated. The most serious irregularity is taken as an indication to decide the rate of correction applicable to the contract concerned.**

Commission Decision No ¹	Type of irregularity	Description of the irregularity	Maximum Rate of correction ²
	for receipt of tenders where significant changes are made to the procurement documents	The reduction of the time limits for a call for tenders set in section 2.2.3 of this Guidance Note is more than or equal to 30% (but below 50%). <i>or</i> The time limits were not extended where significant changes are made to the procurement documents.	10%
		The reduction of the time limits for a call for tenders set in section 2.2.3 of this Guidance Note is less than 30%.	5%
5.	Insufficient time for potential tenderers to obtain tender documentation <i>or</i> Restrictions to obtain tender documentation	Time for economic operators (i.e. potential tenderers) to obtain tender documentation for a call for tenders is too short (i.e. less than or equal to 50% of the time limits for receipt of tenders set in the tender document (of a call for tenders), in line with section 2.2.3 of this Guidance Note), thus creating unjustified obstacles to the opening up of the procurement procedure to competition.	10%
		Time for economic operators (i.e. potential tenderers) to obtain tender documentation for a call for tenders is reduced but the reduction is less than 80% of the time limits for receipt of a call for tenders, set in the tender document, in line with section 2.2.3 of this Guidance Note.	5%
		Time for economic operators (i.e. potential tenderers) to obtain tender documentation for a call for tenders is equal to or less than 5 days. <i>or</i> Where the Beneficiary has not offered at all ³ , by electronic means, unrestricted and full direct access free of charge to the tender document, this is a serious irregularity.	25%
6.	Lack of publication/communication of extended time limits for receipt of tenders	The initial time limits for receipt of tenders (for a call for tenders) were correct according to section 2.2.3 of this Guidance Note but were extended without appropriate publication/communication.	5%
9.	Failure to publish and describe in sufficient detail the selection and/or award	a) Failure to publish in the tender document the selection and/or award criteria (and their weighting).	25%

³ Where the electronic access was offered but the period of access has been shortened, then the above rates of 25%, 10% or 5% apply accordingly.

Commission Decision No ¹	Type of irregularity	Description of the irregularity	Maximum Rate of correction ²
	<p>criteria (and their weighting), or conditions for performance of contracts or technical specifications.</p> <p><i>or</i></p> <p>Failure to communicate/publish clarifications/additional information.</p>	<p>b) Failure to publish in the tender document the conditions for performance of the contract or technical specifications</p> <p>c) The technical specifications of the tender document do not describe in sufficient detail the award criteria and their weighting, with the effect of unduly restricting the competition (i.e. the lack of sufficient detail could have had a deterrent effect to potential tenderers)⁴.</p> <p>d) The clarifications or additional information (in relation to selection/award criteria) provided by the Beneficiary were not communicated to all tenderers or published.</p>	10%
10.	<p>Use of</p> <ul style="list-style-type: none"> - criteria for exclusion, selection, award <i>or</i> - conditions for performance of contracts <i>or</i> - technical specifications, <p>that are <u>discriminatory</u> on the basis of unjustified national, regional or local preferences</p>	<p>Cases in which economic operators could have been deterred from tendering because of exclusion, selection and/or award criteria or conditions for performance of contracts that include unjustified national, regional or local preferences. This is for example the case when there is a requirement to have, at the time of submission of the tender:</p> <ul style="list-style-type: none"> - an establishment or representative in the country or region; or - tenderers' possession of experience and/or qualification in the country or region⁵. - tenderers' possession of equipment in the country or region 	25%
		<p>Same as above except for the fact that a minimum level of competition was still ensured, i.e. a number of economic operators submitted tenders that were accepted and fulfilled the selection criteria.</p>	10%

⁴ Except if the award criteria and their weighting were clarified by the Beneficiary in sufficient detail, upon request of tenderers, before the deadline for submission of tenders.

⁵ The definition of the selection criteria must not be discriminatory or restrictive and be linked to the subject-matter of the contract and proportionate. In any case, where a sufficiently precise description of the specific selection criterion required is not possible, the reference used in the selection criteria needs to be accompanied by the words "or equivalent", in order to ensure the opening up of competition. When these conditions are in place, no financial correction is warranted.

Commission Decision No ¹	Type of irregularity	Description of the irregularity	Maximum Rate of correction ²
11.	Use of - criteria for exclusion, selection, award <i>or</i> - conditions for performance of contracts <i>or</i> - technical specifications, that are not discriminatory in the sense of the previous type of irregularity but still <u>restrict access</u> for economic operators	This refers to criteria or conditions that, despite not being discriminatory on the basis of national/regional/local preferences, still lead to restricting access for economic operators to the specific procurement procedure, as exemplified in the following cases. - cases in which the minimum capacity levels of ability for a specific contract are related but not proportionate to the subject matter of the contract; - cases where specific trademarks/brands/standards are required ⁶ , except where such requirements relate to an ancillary part of the contract and the potential impact on the EU budget is only formal.	10%
		Cases in which restrictive criteria/conditions/specifications were applied but still a minimum level of competition was ensured, i.e. a number of economic operators submitted tenders that were accepted and fulfilled the selection criteria.	5%
		Cases in which the minimum capacity levels of ability for a specific contract are manifestly not related to the subject matter of the contract. <i>or</i> Cases where the exclusion, selection and/or award criteria or conditions for performance of contracts led to a situation where only one economic operator could submit a tender and this outcome cannot be justified by the technical specificity of the contract in question.	25%
12.	Insufficient or imprecise definition of the subject-matter of the contract	The description in the tender document and/or the tender specifications is insufficient or imprecise in a way that may not allow potential tenderers to fully determine the subject matter of the contract, causing deterrent effect potentially restricting the competition ⁷ .	10%
13.	Unjustified limitation of sub-contracting	The tender documentation (e.g. technical specifications) imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks that would be concerned.	5%

⁶ Without allowing for an equivalent trademark/brand by not using the compulsory quote "or equivalent".

⁷ E.g. it has been established though the complaints or notifications during the tendering that the tender specifications are insufficient for the possible bidders to determine the subject matter of the contract. However, the number of questions made by potential tenderers is not an indicator that an irregularity exists, provided the questions are adequately answered by the Beneficiary to all potential tenderers during the publication period.

2.2. Selection of tenderers and evaluation of tenders

Commission Decision No ⁸	Type of irregularity	Description of irregularity	Maximum Rate of correction ⁹
14.	Selection criteria (or technical specifications) were modified after opening of tenders or were incorrectly applied.	The selection criteria (or technical specifications) were modified during the selection phase or were incorrectly applied during the selection phase, resulting in acceptance of winning tenders that should not have been accepted (or rejection of tenders that should have been accepted ¹⁰) if the published selection criteria had been followed.	25%
15.	Evaluation of tenders using award criteria that are different from the ones stated in the tender specifications <i>or</i> Evaluation using additional award criteria that were not published	The award criteria (or respective sub-criteria or weightings) stated in the tender specifications were not followed during the evaluation of tenders, or additional award criteria not published were used in that evaluation.	10%
		Where the two cases above-mentioned had a discriminatory effect (on the basis of unjustified national/regional/local preferences), this is a serious irregularity.	25%
16.	Insufficient audit trail for the award of the contract	The relevant documentation is insufficient to justify the award of the contract, resulting in a lack of transparency.	25%
		Refusing access to the relevant documentation is a critical irregularity, since the Beneficiary does not provide evidence that the procurement procedure complied with the applicable rules.	100%
17.	Negotiation during award procedure, including modification of the winning tender during evaluation	The Beneficiary allowed a tenderer to modify its tender during evaluation of offers, where the modification leads to the award of the contract to that tenderer. <i>or</i>	25%

⁸ For reporting purposes, the Irregularity Type Number corresponds to the numbering set out in Commission Decision C(2019) 3452

⁹ Where due to the nature of the irregularity, it is not possible to quantify precisely the financial impact but the irregularity is capable, as such, to have a budgetary impact, the Managing Authority may calculate the amount of the correction to apply by taking into account three criteria (i.e. level of competition, transparency and equal treatment), namely the nature and gravity of the irregularities and the resulting financial loss to the Funds. **Where more than one irregularity is detected in the same procurement procedure, the rates of correction are not cumulated. The most serious irregularity is taken as an indication to decide the rate of correction applicable to the contract concerned.**

¹⁰ Unless the Beneficiary can clearly demonstrate that the rejected tender would in any case have not won and that therefore the irregularity did not have any financial impact.

Commission Decision No ⁸	Type of irregularity	Description of irregularity	Maximum Rate of correction ⁹
		In the context of an open procedure, the Beneficiary negotiates with any tenderer(s) during the evaluation stage, leading to a substantially modified contract in relation to the initial conditions set out in the tender document.	
18.	Irregular prior involvement of tenderers towards the Beneficiary	Where the prior advice of a tenderer to the Beneficiary leads to a distortion of the competition or results in a violation of the principles of non-discrimination, equal treatment and transparency. ¹¹	25%
20.	Unjustified rejection of abnormally low tenders	Tenders that appeared to be abnormally low in relation to the works/supplies/services were rejected but the Beneficiary, before rejecting those tenders, did not question in writing the respective tenderers (e.g. requesting details of the constituent elements of the tender, which it considers relevant), or where such questioning exists but the Beneficiary is not able to evidence that it has assessed the replies provided by the tenderers at stake.	25%
21.	Conflict of interest with impact on the outcome of the procurement procedure	Whenever an undisclosed or inadequately mitigated conflict of interest has been identified, according to Article 61 of the Financial Regulations, and the tenderer concerned was successful in securing the contract(s) in question ¹² .	100%
22.	Bid-rigging ¹³ (established by a competition / anti-cartel office, a court or other competent body)	Case 1a: The bid-rigging tenderers operated without either the assistance of a person within the management and control system or the Beneficiary and a bid-rigging company was successful in securing the contract(s) in question.	10%
		Case 1b: If only colluding companies participated in the procurement procedure, competition is seriously impeded.	25%
		Case 2: A person within the management and control system or the Beneficiary participated in the bid-rigging by assisting the bid-rigging tenderers and a bid-rigging company was successful in securing the contract(s) in question. In this case, there is a conduct of fraud / conflict of interest on the part of the person within the management and control system assisting the bid-rigging companies or the Beneficiary.	100%

¹¹ Such advice is irregular no matter whether it occurs at the moment of the drafting of the tender documentation or during the preceding project application procedure.

¹² The conflict of interest may already occur at the stage of the project preparation, as far as the project preparation had an influence on the tender documentation/tender procedure.

¹³ Bid rigging happens when groups of firms conspire to raise prices or lower the quality of goods, works or services offered in tenders. No correction is warranted where the bid-rigging tenderers operated without assistance from a person within the management and control system or the Beneficiary, and none of the bid-rigging companies were successful in securing the contract(s) in question.

2.3. Contract implementation

Commission Decision No ¹⁴	Type of irregularity	Description of irregularity	Maximum Rate of correction ¹⁵
23.	Substantial modification of the contract elements set out in the tender document	<p>The modifications to contract elements will not be considered as an irregularity subject to a financial correction where the modification does not alter the overall nature of the contract.¹⁶</p> <p>There is a <u>substantial modification</u> of the contract elements (such as the price, nature of the works, the completion period, the terms of payment, the materials used) if the modification renders the implemented contract materially different in character from the one initially concluded.</p> <p>A modification will be considered substantial where:</p> <ul style="list-style-type: none"> a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the acceptance of a tender other than that originally accepted or would have attracted additional tenderers in the procurement procedure; b) the modification changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial contract; c) the modification extends the scope of the contract considerably. 	25% of the initial contract and the new works/ supplies/ services (if any) resulting from the modifications
		Any increase in price exceeding 50% of the value of the original contract.	25% of the initial contract and 100% of related contract modifications (price increase)

¹⁴ For reporting purposes, the Irregularity Type Number corresponds to the numbering set out in Commission Decision C(2019) 3452.

¹⁵ Where due to the nature of the irregularity, it is not possible to quantify precisely the financial impact but the irregularity is capable, as such, to have a budgetary impact, the Managing Authority may calculate the amount of the correction to apply by taking into account three criteria (i.e. level of competition, transparency and equal treatment), namely the nature and gravity of the irregularities and the resulting financial loss to the Funds. **Where more than one irregularity is detected in the same procurement procedure, the rates of correction are not cumulated. The most serious irregularity is taken as an indication to decide the rate of correction applicable to the contract concerned.**

¹⁶ Modification is permitted where it is expressly provided for in review clauses set out in the initial procurement documents. Review clauses can provide a certain degree of flexibility in the terms of the contract. Modifications to the contract cannot be permitted simply because they were mentioned in the procurement documents in advance. Review clauses in procurement documents must be clear, precise and unequivocal. Review clauses must not be drafted in broad terms with a view to covering all possible changes. A review clause that is too general is likely to breach the principle of transparency and entails the risk of unequal treatment. (...) Review clauses must specify the scope and nature of possible modifications or options as well as the conditions under which they may be used. (...) Review clauses must not alter the overall nature of the contract. (...) For example, a new contract is likely to be drawn up if the nature of the contract is modified in such a way that the delivery of different products or the provision of services of a different kind is required in comparison to those set out in the original contract. In these circumstances, a modification will not be permitted, even if the scope, nature and conditions for different products or new services have been established in advance in a clear, precise and unequivocal manner."