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**Public Procurement Management – Solutions  
to Minimize the Risk of Irregularities**

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**Abstract:** The implementation of projects funded by structural funds must be carried out in compliance with the legal provisions in the field of public procurement or specific procedures, depending on the nature of the beneficiary and the quality of the contracting authority. The good progress of the public procurement process also depends on the coherence with which it is approached by the grant beneficiary. In order to verify the correctness of compliance with the procurement procedures carried out by the control bodies in the projects, there may be situations when some deficiencies are identified, according to E.G.O. no. 66/2011, which are considered deviations / irregularities from compliance with procurement rules, and percentage reductions / financial corrections can be applied. The paper aims at analyzing some situations identified in the practice of some beneficiaries.

**Keywords:** implementation of projects; structural funds; public procurement; contracting authority

## **1. Introduction**

Financing contracts establish the managerial framework for organizing implementation, as well as the actual implementation of those assumed in the application for funding submitted in advance for analysis, evaluation and approval.

In case where the financing beneficiaries are contracting authorities as defined by the legislation in the field of public procurement (Law no 98/2016), they are obliged during the implementation of the object of the financing contract to comply with the rules laid down for attributing public procurement contracts. The same implementation regime also applies to the private beneficiaries of the funding, in the case where the procurement in the financing contract exceeds a minimum threshold set by the law. For purchases below the minimum threshold, private beneficiaries are encouraged to comply with the procedural rules established by the funding authority, which may be a management authority or an intermediary body.

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## **2. Ways to carry out the Prevention Activity**

The prevention of irregularities is carried out at institutional level by the development and implementation of management and control procedures ensuring the correct use of these funds as well as in compliance with the principles of good financial management as defined in the EU legislation.

The prevention rules and selection and approval procedures of financial support requests must ensure the compliance with the following principles:

- a) good financial management based on the principles of economy, efficiency and effectiveness;
- b) respecting the principles of free competition and equal and non-discriminatory treatment;
- c) transparency - making available to all interested parties the information on the application of the procedure for granting European funds;
- d) preventing conflicts of interest occurring during the entire selection process of the projects to be funded;
- k) exclusion of accumulation - the activity that is the subject of the application for financing from European funds can not benefit from financial support from other sources of non-reimbursable financing, except for the amounts that constitute state aid granted under the law.

The obligation to comply with the above principles also rests with the beneficiary of the funding, whether is public or private. As an exception, the ultimate exclusion principle should only be respected by the financing authority of the grant agreement, since the means of prevention in this respect lies only at its level.

Also for preventive purposes, the public entities having the capacity to manage European funds or beneficiaries of programs fully or partly funded by European funds and / or national public funds must also fulfill the following obligations:

- a) organizing and exercising the internal control, preventive control and risk identification and management functions;
- b) to perform the internal audit activity in accordance with the provisions of the national and European Union legislation in force, as well as with the International Auditing Standards.

Prevention is also provided by authorities with competence in managing European funds and by:

- a) the continuous professional training and evaluation of the personnel;
- b) take all necessary measures to prevent irregularities and fraud, including through activities which involve the right and timely information of beneficiaries on the risk of irregularities and fraud, in particular as regards the evidence of fraud;
- c) adequate and timely implementation of the recommendations made by the internal and external, national and European control and audit bodies;
- d) to take the necessary measures to ensure the reasonableness of the values contained in the indicative budgets of the financing contracts / agreements / orders / decisions, the reality and regularity of the offers submitted in the procurement procedures used and the reasonableness of the prices included in the contracts procurement of works, supplies and services. An analysis of the reasonableness of the values contained in the indicative budgets underlying the contracts / financing agreements / orders / decisions applies only if the project has not been explicitly approved by the European Commission.

In order to prevent irregularities, authorities responsible for managing European funds have the obligation to exclude all or part of those expenses from the verification of payment requests that do not comply with the conditions of legality, regularity or compliance established by national and Community legislation in force.

If it finds **deviations from the application of the procurement provisions**, either in relation to the national regulations in force in the field of public procurement or the specific procurement procedures applicable to the private beneficiaries, the exclusion of the expenditure concerned is effected by applying percentage reductions - of the amounts requested for payment by the beneficiaries. It is also a precautionary measure, as the exclusion from payment of the amounts affected by the deviations will not result in the obligation of the party at fault to pay any financial burden of ancillary nature. Acts issued by the authorities with competence in the management of European funds to exclude ineligible expenditure from financing are not expressly defined by the legislator. In such a context, a reference to the contractual provisions found in the present case would be sufficient to justify the decision to exclude payment costs. The failure to state a legal basis on the basis of which the decision to reduce the percentage of claimed expenditure is repaid is the basis for an administrative litigation seeking recognition of the alleged right. The recognition of the alleged right is exercised only after a prior conciliation procedure, where the parties have proved their full availability for amicable settlement of the dispute arising from the binding relationships conducted in the financing contract.

The application of percentage reductions is excluded when the penalties provided for in national public procurement law require for the corrections to be higher than those provided for in G.E.O. no. 66/2011 regarding the prevention, detection and sanctioning of irregularities in obtaining and using the European funds and / or the national public funds related thereto.

**Percentage reductions** of the amounts submitted for payment or reimbursement also apply in case of non-fulfillment or partial fulfillment of the result indicators or of the objectives of the projects funded by European funds for which the beneficiaries have committed their achievement through contracts / agreements / decisions / non-repayable financing order or other types of multi-annual contracts, except the cases where the rules laid down by the international public donor provide otherwise.

**The administrative and on-site checks** by the contract manager within the authority responsible for the management of European funds are also a preventive element. These may be followed by further investigations carried out this time by the control structure set up within the European funds management authority. Primary on-the-spot checks are intended to determine the eligibility of expenditure claimed by a beneficiary before reimbursement or payment thereof. The organization and conduct of primary preventive checks is governed by its own procedures and is a distinct activity of referral control which is expressly regulated in G.E.O. no. 66/2011 regarding the prevention, detection and sanctioning of irregularities in obtaining and using the European funds and / or the national public funds related thereto. In this respect, the act attesting the outcome of the additional investigation is recorded in a control note, which is a separate act from those established by the legislator as effective control acts of a legal nature of an administrative act.

In the case where the authorities with competence in the management of European funds find in the prevention activity indications of fraud or attempted fraud, they are obliged to immediately notify the Anti-Fraud Department. Referral to the Anti-Fraud Department will entail the suspension of the application of the contract / decision / order / grant agreement and, subsequently, the payment / reimbursement of the amounts claimed by the beneficiary suspected of being at fault will be suspended. Suspension shall take effect from the transmission of the referral to the competent

authorities and / or where the case is brought before the courts and ends in obtaining the final and irrevocable sentence of the court as to whether or not the offense is incriminated.

A prevention measure also applies to expenditure included in applications / payment requests of beneficiaries who do not comply with the conditions of legality, regularity or compliance established by national and Community legislation identified by authorities responsible for managing European funds prior to payment. This eliminates the obligation to resort to:

- a) the ordinary procedure for finding the irregularity;
- b) the procedure for reporting irregularities to the Anti-Fraud Office or any other entity provided for in the international agreements, except for cases where the Anti-Fraud Department reports to the European Fund Management Authority that has notified the Prosecutor's Office to carry out the criminal investigation as a result of a notification of fraud or attempted fraud before requesting a refund / payment.

In the case where there are irregularities in the application by the beneficiaries of the provisions on procurement procedures, either in relation to the national regulations in force in the field of public procurement or in relation to the specific procurement procedures applicable to private beneficiaries, there are issued control documents whose purpose is to apply a financial correction.

### ***Financial Corrections***

*Financial corrections* are those administrative measures taken by competent authorities in accordance with G.E.O. no. 66/2011, which consists of excluding from the financing of European funds and / or national public funds related to them of the expenditures for which an irregularity has been found;

Financial corrections result in a budgetary claim, the value of which is calculated according to a set of express indicators set by the legislation in force, except the cases when:

- a) the penalties provided for in the national law in the field of public procurement require for the corrections to be higher than those provided for under the legislation specific to legal liability;
- b) the authorities with competence in the management of the European funds financing the projects shall apply the measures included in the regulations of this program.

Applying financial corrections is an activity of a special nature specifically defined in the legislation. The activity in question consists of those administrative measures taken by the competent authorities in accordance with the legal provisions relating to the specific legal liability in the use of European funds, which consist of excluding from the European funds and / or national public funds related to them, of the expenditure for which an irregularity was found.

Therefore, in order to apply a financial correction, it is necessary to find an irregularity justifying the ineligible nature of the funding, irrespective of its origin. The correction implies a reduction in an obligation to pay a sum of money that an entity with competences in managing European funds owes to a beneficiary.

The corrections are differentiated according to the value of the contract, i.e. if it is equal to or higher than the limit/threshold set in the national public procurement legislation for which publication is mandatory in the OJEU.

**The financial corrections or reductions** applicable to the expenditure on projects funded by European funds and / or national public funds for non-compliance with procurement regulations are as follows:

a1) for contracts the value of which is equal to or greater than the limit/threshold laid down in national public procurement legislation for which publication is required in the OJEU.

a2) 100% of the value of the contract in question for non-compliance of the advertising procedures. Failure to comply with the advertising procedures means that the contract was awarded without complying with advertising requirements governed by national and Community public procurement legislation except in the cases referred to in point a.2. This deviation is a flagrant violation of one of the conditions for funding from European funds. Appraisal of adherence to advertising rules will only need to be reported to the relevant legal provisions. In the case of negotiations without prior publication of a contract notice this correction is inapplicable.

b) 25% of the value of the contract in question for failure to comply with advertising procedures, if there was a certain degree of publicity.

The contract was awarded without complying with the advertising requirements governed by the national and Community public procurement legislation, but there was an advertisement that allowed economic operators in the territory of another State to have access to the procurement procedure in question. In the case of this correction, the demonstration of the cross-border nature of the public procurement by the evaluation body is essential from a probationary point of view.

c) 100% of the total amount of additional contracts (additional acts) in question, if the total value of additional contracts (additional acts) exceeds the percentage of the initial contract amount set as a limit by national and Community public procurement legislation. The correction / reduction rate may be reduced - in accordance with the proportionality principle - to 25% of the cumulative value of additional contracts (additional acts) if the total value of additional contracts (additional acts) awarded without respecting the national procurement legislation exceeds the percentage of the value of the initial contract, set as a limit by the national and Community public procurement legislation.

In this case of the correction, the initial contract was awarded in compliance with the national and Community legislation on public procurement, but was followed by one or more additional contracts (acts) awarded without complying with national and Community legislation on (including the condition of extreme urgency caused by unforeseeable events or the condition of unforeseen circumstances requiring additional works, services or supplies) allowing the use of the negotiated procedure without publication of a contract notice.

d) 100% of the cumulative amount exceeding the percentage of the initial contract amount set as a limit by the national and Community public procurement legislation or 100% of the cumulative value of the additional contracts (additional acts) concerned or 25% of the cumulative value of the additional contracts (s) concerned for the acquisition of additional / supplementary works or services which, due to unforeseen circumstances, have become necessary by exceeding the percentage of the initial contract amount set as a limit by the national and Community public procurement legislation.

In this case of the correction, the initial contract was awarded in compliance with the national and Community legislation on public procurement, but was followed by one or more additional contracts (additional acts). The cumulative value of additional acts exceeds the percentage of the initial contract amount set as a limit by the national and Community public procurement legislation and the additional / supplementary works or services do not constitute distinct activities within the meaning of European regulations (directives). The original contract was awarded in compliance with public procurement legislation, but was followed by one or more additional contracts (additional acts), and additional / supplementary works or services are distinct activities within the meaning of European regulations (directives). In the case where the cumulative value of additional contracts (additional acts) exceeds

the percentage of the value of the initial contract set as a limit by public procurement legislation, a 100% correction of the additional value applies if the cumulative value of the additional contracts (additional acts) does not exceed the percentage of the value of the initial contract, set as a limit by the public procurement legislation, a 25% correction is applied to the additional amount.

e) 25% of the value of the contract in question, which may be reduced to 10% or 5% depending on the severity of the failure to declare all the qualification and selection criteria and the assessment factors in the granting documentation or the participation notice.

In the case of the correction, the contract was awarded in compliance with the advertising requirements governed by the national and Community public procurement legislation, the award documentation or the participation notice did not show all the qualification and selection criteria and / or assessment factors or were not sufficiently detailed.

This case of correction is impossible in practice since the National Authority for Regulating and Monitoring Public Procurement checks all the awarding procedures published in the electronic procurement system, except for negotiation procedures without the publication of a participation notice.

f) 25% of the value of the contract in question, which may be reduced to 10% or 5%, in this case of the appliance of correction, the contract was awarded by applying the unlawful awarding criteria (assessment factors) (e.g. using a qualification and selection criterion as an evaluation factor of offers, use of a evaluation factor inconsistent with the assessment factors established by the contracting authority in the awarding documentation and the notice of participation, the incorrect and / or discriminatory application of the assessment factors, the non-compliance with the award criterion set out by the contracting authority in the participation notice and the awarding documentation).

g) 25% of the value of the contract in question (a reduction / financial correction of 100% of the value of the contract may be applied in the most serious cases, where there is an intention to deliberately exclude certain bidders) in the case of the establishment in the awarding documentation or in the participation notification of some selection criteria or of some illegal assessment factors. Cases where certain potential bidders have been prevented from participating in an awarding procedure due to restrictive criteria set out in the participation notice or in the awarding documentation (e.g. the obligation to have a representative office in the country or region or the establishment of some overly specific technical standards favoring a single operator or experience requirements in the region).

Applying the correction in question can be justified only if the following conditions are met cumulatively:

- there have been reactions of economic operators to substantiate such a hypothesis;
- the reactions did not result in the settlement (amicable or judicial) of the issues favoring a single economic operator.

h) 25% of the value of the contract in question, which may be reduced to 10% or 5%, depending on the seriousness of the insufficient or discriminatory definition of the subject-matter of the contract.

In this respect, the description of the contract object in the awarding documentation or in the contract notice must not be discriminatory or insufficient to enable offerors to identify the subject of the contract or the contracting authorities to award the contract.

In order to obtain sufficient evidence justifying the correction, it is necessary to meet the conditions for a reaction on the part of the economic operators to base such a hypothesis, and for the reactions to

not have as a result the settlement (amicably or in court) of the issues favoring a single economic operator. At the same time, in substantiating the application of the correction percentage it must be demonstrated the actual materialized damage resulting from insufficient or discriminatory definition of the subject-matter of the contract.

### 3. Case Study

#### ***Appeal against a financial correction note applied under Government Emergency Ordinance no. 66/2011***

Through the appeal filed on 16.04.2015 to the National Council for Solving Complaints (CNSC), the administrative-territorial unit Commune N. criticizes, citing art. 255, par. (1), art. 256<sup>1</sup>, par. (2) and (5) of the Ordinance, the note of non-compliance issued by the Public Procurement and Conflict of Interests Service no. [...] / 30.03.2015, through which it established a financial correction of 100% of the value of the financing contract, note issued after the direct purchase verification procedure for the works contract no. [...] / 17.04.2014 regarding the project “Rehabilitation, modernization and extension of school in Commune N., district D.”, taking into consideration address no. 27203 / 31.03.2015 for the refund of payment application no. 1, and requests “the annulment of this administrative act and, as a consequence, the issuance of an administrative act for the recognition of the alleged right of the administrative-judicial way”.

Notice of non-compliance no. [...] / 30.03.2015 was issued based on the provisions of art. 6 and 9 of Government Emergency Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities in obtaining and using the European funds and / or the national public funds related to them, as a result of the reverification of the public procurement procedure, on the basis of which the administrative-territorial unit of Commune N. concluded the contract no. [, ..] / 17.04.2014 for the implementation of the project “Rehabilitation, modernization and extension of school in Commune N., District D.”, applying to the beneficiary the 100% correction of the value of the contract, being repaid the request for payment no. 1, related to the financing contract.

Against the note of nonconformity, the contestant could only address the Ministry of Regional Development and Public Administration, with an appeal filed under Government Emergency Ordinance no. 66/2011, which in the procedure provided by this normative act shall be settled through a decision for resolution of the appeal, which may be appealed to the competent court on the basis of Law on administrative contentious no. 554/2004, in which case the law does not foresee a special administrative jurisdiction.

Therefore, the CNSC has correctly found that to the Non-Compliance Note no. [...] / 30.03.2015 is not applicable the administrative-judicial procedure provided by the Government Emergency Ordinance no. 34/2006, so that, in relation to the provisions of art. 1,255 par. (1) and (2), art. 266 par. (1) and art. 297 of that ordinance, dismissed the appeal as being inadmissible.

The fact that the irregularities concerned the legality of the procedure for the awarding contract no. [...] / 17.04.2014, in the procedure of implementing the financing contract no. [...] / 29.10.2014, and that the petitioner was charged by the Ministry of Regional Development and Public Administration with violations of art. 19 and 26 of Government Emergency Ordinance no. 34/2006, that is to say, it was charged with the fact that it purchased works over the amount of EUR 100,000, excluding VAT, did not attract the competence of the CNSC, since those irregularities were found under the

Government Emergency Ordinance no. 66/2011, which provides for a special verification procedure, at which point all the phases of the awarding procedure are exhausted.

The petitioner was considered injured by an act issued under Government Emergency Ordinance no. 66/2011, and the procedural route to follow was the one stipulated by this normative act, and not the one stipulated by the Government Emergency Ordinance no. 34/2006. Therefore, by finding that the CNSC lawfully and thoroughly rejected the appeal as inadmissible, the Court of Appeal in the town A. dismisses the appeal as being unfounded.

The control of the legality of the non-conformity note cannot be achieved through the procedural path chosen by the petitioner (Government Emergency Ordinance No. 34/2006), the Court cannot rule on the applications for annulment of the note, the suspension of the execution of the decision 18.05.2015 issued by the Ministry of Regional Development and Public Administration - the Managing Authority for the Regional Operational Program, respectively the annulment of that decision, these acts being contestable on the way stipulated by the Government Emergency Ordinance no. 66/2011.

#### **4. Conclusions**

The management of public procurement is the stage without which a contractual relationship with a public entity cannot exist. The specific stage, even if it is separate and self-regulated, prepares the conclusion of the bilateral legal act called the public procurement contract.

G.E.O. no. 66/2011 regulates the activities of prevention, detection of irregularities, establishment and recovery of budgetary receivables resulting from irregularities in the obtaining and use of European funds and / or national public funds related to them, as well as reporting irregularities to the European Commission or to other international donors. It is therefore necessary to take into account the fact that there are administrative measures that may affect the budget of the contracting authority by applying financial corrections to the financing entity in the event of deviations from the legal framework in force in public procurement.

The legislator incorporated in the body of the same normative act both norms of a sanctioning nature and procedural norms which are in turn detailed by other lower-level legal norms regarding the organization of the execution. Procedural rules establish the prevention and detection mechanism for obtaining and using European funds and / or national public funds related to them.

Procurement management needs to be managed with great care since public procurement can also help address two of the main challenges facing the European economy today: the need to maximize the efficiency of public spending in the context of budget constraints and the need to find new sources of economic growth.

#### **5. Bibliography**

Cârlan, Mircea Valentin (2013). *Procedura achizițiilor publice cu referire specială la cele finanțate din fonduri europene/ Procurement procedure with special reference to those funded by European funds*. Ed. Wolters Kluwer.

Șerban, Dumitru-Daniel (2012). *Achizițiile publice: teoria și practica jurisdicției administrative/Public procurement: the theory and practice of administrative jurisdiction*. Bucharest: Hamangiu.

Lăzăroiu, Petre; Cochintu, Ioniță; Popescu, Mihaela Agata; Cârlan, Mircea Valentin (2018). *Curs de achiziții publice: aspecte teoretice și aplicații practice/ Public procurement: theoretical aspects and practical applications*. Bucharest: Hamangiu.



Șerban, Dumitru-Daniel (2014). *Jurisprudență comentată în materia achizițiilor publice/ Commented case-law on public procurement, Vol. 4*. Bucharest: Hamangiu.

Șerban, Dumitru-Daniel (2017). *Jurisprudență comentată în materia achizițiilor publice/ Commented case-law on public procurement, Vol. 6*. Bucharest: Hamangiu.

G.E.O. no. 66/2011 on the prevention, detection and sanctioning of irregularities in obtaining and using the European funds and / or national public funds related to them, as subsequently amended and supplemented.

Government Decision no. 519/2014 regarding the setting of the rates related to the percentage reductions / financial corrections applicable for the deviations provided in the annex to the Government Emergency Ordinance no. 66/2011 on the prevention, detection and sanctioning of irregularities in the obtaining and use of European funds and / or national public funds related thereto, with subsequent amendments and amendments.

Law no. 98/2016 on public procurement (OJ No. 390 of 26 May 2016);

Civil decision no. 3169 of 2 June 2015.

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