

8 December 2015

Council conclusions on Special Report No 10/2015
by the European Court of Auditors:
"Efforts to address problems with public procurement in EU cohesion
expenditure should be intensified"

Second Draft

THE COUNCIL OF THE EUROPEAN UNION:

- (1) WELCOMES the special report from the European Court of Auditors (hereinafter referred to as "the Court") and TAKES NOTE of its observations;
- (2) ACKNOWLEDGES that EU public procurement policy is a key instrument in establishing the Single Market, contributing to the efficiency of public spending and achieving value for money;
- (3) HIGHLIGHTS that public procurement rules have a significant impact on the delivery of cohesion policy, especially with regard to infrastructure and equipment investments;
- (4) NOTES that the audit focused on the period from 2009 to 2013 and took account of actions taken to address the problem of non-compliance with public procurement rules by the Commission and Member States until 2014, whereas the new EU legal frameworks for European Structural and Investment Funds (ESIF) and Public Procurement should considerably improve the situation for the programming period 2014-2020;

- (5) NOTES furthermore that the audit results are based notably on a survey of 115 national audit authorities in 27 Member States (not including Croatia) responsible for structural and cohesion funds' operational programmes, 69 of which replied, visits to four Member States (the Czech Republic, Spain, Italy and the United Kingdom), a visit to Cyprus focusing on the use of e-procurement, and a short survey sent to the 28 Supreme Audit Authorities, 18 of which replied;

Court's findings

- (6) TAKES NOTE of the finding that errors relating to public procurement were detected in around 40% of the projects audited by the Court in the area of cohesion policy and that serious errors accounted for an average of 29% of total errors, and CONSIDERS that the high volume of legislation and guidelines and lack of administrative capacity notably undermines the correct implementation of public procurement rules;
- (7) NOTES the finding that about 38% of the irregularities reported by Member States to OLAF relate to public procurement, whilst some Member States do not report to OLAF any public procurement irregularities potentially linked to fraud; and HIGHLIGHTS that only a marginal share of errors affecting public procurement rules were reported to be linked to fraud, which should be taken into consideration by the competent audit authorities,
- (8) CONCURS that the share of serious errors is particularly high in the case of:
- a. the European Regional Development Fund (ERDF), where the nature of projects frequently requires public procurement, and where 70% of errors were serious,
 - b. the pre-tendering phase, where 82% of errors were serious;
- (9) QUESTIONS the terminology used by the Court for assessing the level of seriousness of public procurement errors found in its Statement of Assurance (DAS) audits 2009-2013;

- (10) NOTES the finding that most errors in the pre-tendering phase concerned incorrect direct award procedures or the artificial split of contracts into smaller tenders to avoid exceeding thresholds, whilst most errors in the tendering phase concerned the specification and application of selection and award criteria, and in the contract management phase modifications or extensions of scope of contracts without using public procurement;
- (11) REGRETS the finding that the lack of sufficiently detailed, robust and coherent data on the nature and extent of public procurement errors has precluded a comprehensive analysis by Member States' authorities, as well as the Court, of the underlying causes for these public procurement errors;
- (12) WELCOMES the finding that Member States have started to address the problem through a variety of measures and that some Member States have in particular started to collect data in a more systematic way, but ACKNOWLEDGES that there is still further room for improvement at all levels of governance and control;
- (13) HIGHLIGHTS the finding that most preventive actions by audited Member States started to be implemented towards the end of the 2007-2013 programming period and could therefore not fully be taken into account in the Court's observations;
- (14) AGREES with the finding that the level of complexity of EU public procurement rules, high volume of legislation and/or guidelines and differences in their interpretation can account for a large part of the errors observed by the Court;

- (15) NOTES the finding that only 40% of the audit authorities surveyed express the view that the new public procurement directives could help to reduce the errors;
- (16) NOTES also the finding that the extent to which EU public procurement rules are used differs significantly across Member States, with an average total value of tenders falling within the scope of EU directives found at 3.1% of the EU's GDP in 2012;
- (17) NOTES furthermore the finding that about 38% of the irregularities reported by Member States to OLAF relate to public procurement, whilst some Member States do not report to OLAF any public procurement irregularities potentially linked to fraud;

Court's recommendations

- (18) TAKES NOTE of the Court's recommendations that the Commission should:
- a. develop a database on irregularities capable of providing data for a meaningful analysis of public procurement errors and analyse in a comprehensive way the frequency, seriousness and causes of public procurement errors in the area of cohesion policy;
 - b. use its powers to suspend payments to Member States concerned by public-procurement-related ex-ante conditionalities unfulfilled by the end of 2016, until they have rectified the shortcomings;
 - c. update and publish its internal action plan on public procurement;
 - d. improve coordination across its departments dealing with related public procurement issues;
 - e. set up an internal group at political level to provide leadership in tackling the problem of public procurement errors;
 - f. impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective and, where necessary, pursue infringement procedures;

- g. exploit further the opportunities provided by e-procurement and data mining tools and good practices;
- (19) REITERATES that preventive measures (capacity building, early warning mechanism, sharing of interpretations and repetitive errors, etc.) are a very important part of simplification and EMPHASIZES that the Commission, as well as auditors at European and national level, including the European Court of Auditors and OLAF, are well positioned to contribute to the simplification effort and better implementation of cohesion policy by detecting redundant processes and procedures, whether or not resulting from the regulation, and suggesting more effective solutions based on good practices;
- (20) CALLS on the relevant authorities in Member States to:
- a. analyse their own irregularities in the area of cohesion policy in order to identify where and how public procurement errors are occurring;
 - b. consider how to exploit further the opportunities provided by e-procurement and data-mining tools in order to reduce the number of these errors;

Policy actions

- (21) SUPPORTS the Court's call for further simplification of public procurement rules and strengthening of the administrative capacity of both the contracting and control authorities, and NOTES that the Commission's "Better Regulation" initiative inter alia covers public procurement related issues;
- (22) ASKS the Commission to ensure that the design of reporting and information systems enable an effective use of the data already submitted by the Member States through other channels and provide for a homogeneous and reliable representation of the situation across Member States;

- (23) CONSIDERS that where public procurement errors occur repetitively as well as in most Member States, an in-depth analysis of the corresponding EU legal rules should be carried out by the Commission;
- (24) RECALLS that the transposition into national legislation of the revised EU public procurement directives must be fulfilled by Member States by 18 April 2016;
- (25) SHARES the Court's assessment that the new EU public procurement rules will provide more legal certainty, make public procurement more accessible for practitioners and provide for a better monitoring of irregularities, but that some new provisions such as the possibility of using social and environmental aspects as award criteria or the introduction of a new regime for certain services such as health, education and social services may on the other hand bring new elements of complexity;
- (26) RECALLS at the same time that the new 2014-2020 ESIF legal framework introduces ex ante conditionalities of direct relevance for limiting the amount of public procurement errors, REITERATES its commitment towards the strict implementation of ex ante conditionalities, and therefore INVITES the Court to update its assessment towards the end of the new programming period in the light of these changes;
- (27) CALLS at the same time on the Commission to be actively involved and support the Member States in the process of fulfilling their ex ante conditionalities' obligations before the end of 2016;

- (28) RECALLS the Council Conclusions on Simplification: Priorities and expectations of Member States with respect to European Structural and Investment Funds¹;
- (29) ASKS with this regard that the Commission's High Level Group of Independent Experts on 'Monitoring Simplification for Beneficiaries of the European Structural and Investment Funds' provides leadership in tackling the public procurement errors that result from overly complex legislation and/or guidelines.
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¹ Doc. 14266/15, 18.11.2015.