





# Evaluation and contracting – auditor's perspective



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- Who can come?
  - Audit Authority
  - European Commission
  - European Court of Auditors
  
- What to expect?
  - Practical examples of common mistakes (non-compliance vs. irregularity)

# Who can come?

What	Flow		Who
Approval of the funds	↓		Council and the European Parliament - Annual approval of the EU's general budget
Absorption / N+3 rule Automatic de-commitment	↓		European Commission („Geographical“ Unit)
	↓		Member State / Beneficiary country („Management and Control Systems Bodies“)
Control / Audit of functioning of the management and control systems and on legality and regularity of expenditure		↓	Member State / Beneficiary country („Management and Control Systems Bodies“)
		↓	Member State / <b>Beneficiary Country (Audit Authority)</b>
		↓	<b>European Commission („Audit“ Unit / Outsourcing)</b>
Consolidated accounts of the EU (Consolidated financial statements and the Budgetary implementation reports)		↓	European Commission - Ultimate responsibility for the legality and regularity of the transactions underlying the EU's accounts - Obligation to present to the Court of Auditor's for audit the consolidated accounts of the EU which should give a true and fair view of the financial position
Audit (financial, compliance, performance)		↓	<b>(European) Court of Auditors</b> - External auditor of the EU's finances and the independent guardian of the financial interests of all EU citizens, notably by helping to improve the EU's financial management - Annual report on the implementation of the EU budget / Statement of Assurance provided to the European Parliament and the Council (on the reliability of the consolidated accounts of the EU and the legality and regularity of transactions)
Discharge to the European Commission		✓	European Parliament - Court of Auditor's Annual report (together with its special reports), provides a basis for the discharge procedure in which the Parliament, acting on a recommendation from the Council, decides whether the European Commission has satisfactorily met its budgetary responsibilities



# Who can come – Audit Authority (AA)

Framework Agreement between the Republic of Serbia and the European Commission ...  
(Article 10(3) and Annex A, Clause 5)

- AA - Independent from NIPAC, NAO, management and operating structure(s)
- AA functions - submit to the Commission and the Government of the Republic of Serbia
  - Annual Audit Opinion / Annual Audit Activity Report / Opinion of any Final Statement of Expenditure
- Annual Audit Opinion
  - efficient and effective functioning of the management, control and supervision systems (proper functioning of the system) – systems audits
  - legality and regularity of the underlying transactions (expenditure declared to the Commission) – audits of samples of transactions
- Annual Audit Activity Report
  - shall set out, inter alia, any deficiencies found in the management, control and supervision systems and any corrective measures taken or planned by the NAO, National Fund and/or the operating structures concerned

# Who can come – European Commission (EC) and European Court of Auditors (ECA)

Framework Agreement between the Republic of Serbia and the European Commission ... (Article 50)

- (1) All Financing Agreements as well as all resulting programmes, actions and subsequent contracts shall be subject to supervision, control and **audit by the Commission**, including the European Anti-Fraud Office (OLAF), and **audits by the European Court of Auditors**
- (4) The IPA II beneficiary shall maintain records and accounts adequate to identify the **services, supplies, works** and grants financed under the related Financing Agreement. The **IPA II beneficiary** shall also ensure that the agents or representatives of the **Commission**, including OLAF, have the **right to inspect all relevant documentation** and accounts pertaining to items financed under the related Financing Agreement and **assist the European Court of Auditors to carry out audits** relating to the use of IPA II assistance
- (6) The controls and audits described above are applicable to all recipients and subcontractors who have received IPA II assistance
- (7) ... accounts and operations of the National Fund and, where applicable, operating structures may be checked by the **Commission itself** or by an **external auditor** assigned by the Commission

# What to expect?

It depends on responsibilities of bodies (AA, EC, ECA)

## ➤ Audit Authority (AA)

### a) Verification of the proper functioning of the system (systems audits)

- The objective is to identify potential deficiencies in the functioning of the system, to detect the cause of problems, to assess the (financial) impact of identified deficiencies and to give recommendations to improve the system. For example:
  - Review of the procurement plan – (non)adequate estimation of contract value, if any; is the time frame (deadlines) respected? If no, what are the reasons for delays? E.g. non-realistic / "too ambitious" planning; potential problems, in a particular body (such as non adequate administrative capacity, delays in drafting/correcting various procurement documents); inadequate coordination between different actors ...
  - Review the „quality” of documents in the procurement process. How auditors can reach conclusions about the „quality”? E.g. reviewing Questions and Answers; analysing the feedback from the ex-ante/ex-post control of the European Union Delegation; analysing the feedback from the results of any other control/audit; engagement of independent external experts ...
  - Review the fulfilment of the responsibility of each actor in the system
  - Review the risks of automatic de-commitment (N+3 rule) and risks related to that

# What to expect?

## b) Verification of expenditure's legality and regularity (audits of samples of transactions)

- The objective is to verify compliance with the applicable rules and procedures (e.g. PRAG) and contractual provisions. For that purpose, detailed checklists are prepared. For example, auditors PRAG checklist follows the public procurement phases according to the applicable requirements and contains:
  - i. Selection of the correct type of procurement procedure
  - ii. Publications of documents (prior information notice, contract notice, contract award notice...)
  - iii. Shortlisting (service contracts)
  - iv. Completeness and quality of tender documents (e.g. Declaration of Objectivity and Confidentiality)
  - v. Submission and opening of tenders
  - vi. Evaluation Committee - composition and fulfilment of the applicable requirements (e.g. adequate experience, Declaration of Impartiality and Confidentiality)
  - vii. Evaluation process – selection of tenderers and evaluation of offers (administrative and technical compliance, financial evaluation, clarifications)
  - viii. Award / notification / conclusion of contract
  - ix. Modification (amendment) of contracts (contract implementation)

➤ Frequency of AA audits – at least once a year (but much more often several times per year)



# What to expect?

## ➤ European Commission (EC)

- a) Scope of the audit – similar to the Audit Authority's (AA) scope
- b) Frequency of audits – in general, less frequent than AA

## ➤ (European) Court of Auditors (ECA)

- a) Scope of the audit – depends on the objective of the audit
  - Statement of assurance audits
    - i. Compliance audit – transactions/expenditure comply with the relevant legal and regulatory requirements?
    - ii. Financial audit - are the financial statements complete and accurate (reliable)? Do they present fairly the financial position, results and cash flow for the year, in accordance with the applicable financial reporting rules?

### ➤ Performance audits

Do the EU funds provide value for money? Have the funds used been kept to a minimum (economy)? Have the results been achieved with the fewest possible resources (efficiency)? Have spending or policy objectives been met (effectiveness)?

## b) Frequency of audits

- Generally, in a pre-accession country „not so frequent” / More frequently Statement of assurance audits

# What to expect?

- What is in common to all audits (AA, EC, ECA)? Special attention is always put on the general principles which apply to procurements (section 2.5.1. of the PRAG)
  - 1) Transparency
  - 2) Equal treatment
  - 3) Non-discrimination
  - 4) Competition
  - 5) Proportionality
  - 6) Sound financial management (Article 2(59) and 33(1) of Financial Regulation 2018/1046)
    - means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness
      - i. Economy - resources used shall be made available in due time, in appropriate quantity and quality, and at the best price
      - ii. Efficiency - best relationship between the resources employed, the activities undertaken and the achievement of objectives
      - iii. Effectiveness - extent to which the objectives are achieved

# Practical examples of common mistakes (non-compliance vs. irregularity)

Framework Agreement between the Republic of Serbia and the European Commission ...  
(Article 51 - Protection of the financial interests of the Union)

## ➤ Error

- *non-deliberate clerical and technical errors committed by the IPA II beneficiary or a recipient of IPA II assistance*

## ➤ Irregularity

- *any infringement of a provision of applicable rules and contracts resulting from an act or an omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the Union by charging an unjustified item of expenditure to the general budget*



# Practical examples of common mistakes (non-compliance vs. irregularity)

## ➤ Error

- Non-compliance, less serious, and often formal errors
- Without financial impact
- Error (non-compliance) which did not have a detrimental impact (deterrent effect) on the level of competition (for example, publishing the contract award notice later than required)

## ➤ Irregularity

- ... infringement **rules** („legality”) and **contracts** („regularity”) ...
- ... which **has**, or **would have**, the effect to the general budget of the Union ...

➤ Therefore, taking into account the definition of the irregularity, in the area of public procurement special attention has to be put on the **potential** effect to the EU budget

# Practical examples of common mistakes (non-compliance vs. irregularity)

➤ For better understanding of this **potential** effect (financial impact) – Case C-406/14

- *... an infringement must be considered to be an irregularity in so far as it is capable, as such, to have a budgetary impact. By contrast, there is no requirement that the existence of a specific financial impact be shown ... (paragraph 44)*
- *Consequently, it should be considered that a failure to comply with the public procurement rules constitutes an irregularity ... in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the Funds. (paragraph 45)*

➤ So, if the auditors (AA, EC, ECA) found the irregularity, who bears the financial consequences (costs)?

# Practical examples of common mistakes

## General „findings”

- Procedures, from the preparation and the approval of tender documentation to the conclusion of the contract, last notably longer than initially planned
- European Union Delegation (EUD) has a significant role in tendering and contracting procedures in each phase of a single procurement procedure, with its comments, requests for information/clarification/improvement, rejections/return for corrections, suspensions and approvals of relevant documents. For example:
  - For one work contract, 20 months elapsed as of the moment when the Tender Documents (TD) and the Contract Notice were delivered to the EUD for ex-ante approval. The EUD returned the TD for correction several times (ex-ante approved after the third submission)
  - During the evaluation phase, certain documentation was also returned for correction several times (Evaluation Report ex-ante approved after the third submission). In accordance with the comments, evaluations is corrected to a large extent, which had a decisive impact on the selection of tender
  - Delay in the procedures was caused, inter alia, by insufficiently comprehensive and detailed technical documentation and inadequate administrative capacity for the preparation and control of the documentation of the relevant actors (end recipient / implementing body / line ministry)



# Practical examples of common mistakes

## I. Contract notice and tender specifications

### ➤ „General”

- procedures for supervision of work contracts and technical assistance under the infrastructure projects were held at the same time; as a consequence many tenders for technical assistance and none/one/very few for supervision

### ➤ Special attention to the following

- Do not use the criteria for exclusion, selection, award that are **discriminatory** on the basis of unjustified national, regional or local preferences (e.g. at the time of submission the tender to require an establishment or representative in the country/region; tenderer's possession of experience/qualification in the country/region)
- Avoid **restrictive** selection criteria - criteria which could restrict access for economic operators (e.g. minimum capacity levels of ability for a specific contract are related but not proportionate to the subject matter of contract)
- Adequate communication/publication of clarifications/additional information should be ensured

### ➤ For future consideration

- FIDIC (always use the following wording: e.g. „or any other similar national rules”; „or any similar national or international conditions of contract”) – works vs. supervision contracts
- Professional experience as selection criteria – general vs. specific professional experience? („general” - it is not sufficiently specified and it could be hard to establish a clear link to the subject matter of the contract); ask „reasonable” years of experience (e.g. try to avoid 15 years or ensure appropriate justification)
- Subcontracting – Case C-406/14

# Practical examples of common mistakes

## II. Selection of tenderers and evaluation of tenders

### ➤ Nomination of the Evaluation Committee (Works contracts)

- For the construction of water supply and sewerage system, composition of the Evaluation Committee was formally ex ante approved by the EUD after the Tender opening

### ➤ Tender Opening Report (Services; Works Supervision Contract)

- During the Tender Opening Session, one Tender does not contain the Tender submission form. However, this Tender was included in the evaluation process as the EUD did not prefer the elimination of the tenders on the administrative basis. Even though there is a reasonable explanation for including this Tender in the evaluation process, the explanation was not included in the Tender Opening Report. Further, this Tender was excluded because of the technical non-compliant

### ➤ Preparatory meeting (Works contracts)

- Preparatory meeting was held after the Tender opening session and just before the first evaluation session. The checklist fulfilled by the IB was not completed with the completely accurate data because it is stated that the Preparatory meeting was held before the tender opening session. The tender dossiers had not been distributed in advance to the members of the Evaluation Committees

# Practical examples of common mistakes

## ➤ Declaration of Impartiality and Confidentiality (Works contract)

- According to PRAG, „*All members of the Evaluation Committee and any observers must sign a Declaration of Impartiality and Confidentiality.*” Members of the Evaluation Committee signed the Declaration of Objectivity and Confidentiality which is intended for persons involved in the preparation of Tender documentation

## ➤ Tender documents (Services; Works Supervision Contract)

- According to PRAG, „*The envelopes containing the financial offers of rejected tenderers following the technical evaluation must remain unopened and retained.*” One envelope containing the financial offer of the tenderer which had not met technical conditions of the tender was slightly damaged

## ➤ Request for clarification

- During the evaluation process clarification is not requested from all tenderers – infringement of the principle of equal treatment (EUD considers this as an irregularity)



# Practical examples of common mistakes

## ➤ Evaluation grids (Services; Works Supervision Contract)

- Scoring method - the fulfilment of the minimum technical requirements of the tender did not ensure meeting the required threshold
- Significant share of potential points in the overall number of evaluation points for key experts relate to advantages
- Scoring - e.g. experience of a team leader in supervision of works in one project of 30 mil. EUR in last five years is score with 1 point, two and three projects is score with 2 points and four and more projects is score with 3 points. The question is, how many experts could have experience as a team leader in last five years on the several projects of significant value? In practice, all experts were scored with 1 point

## ➤ Submission of Letters to unsuccessful tenders (Services; Works Supervision Contract)

- According to PRAG, *“regardless of the type of procedure, the Contracting Authority must send to the unsuccessful tenderers a standard letter informing their tenders have been unsuccessful within not more than 15 days from receipt of the countersigned contract.”* Contracting Authority sent the letters to unsuccessful tenderers with delay of 25 days compared to the prescribed period

# Practical examples of common mistakes

## III. Contract implementation / modifications of the contract elements set out in the contract notice or tender specifications

- Replacement of key expert (Contract modification) (Service; Works Supervision Contract)
  - New expert had a lower qualification and experience and the fees for new expert are renegotiated (Article 17 of General Conditions for Service Contracts)
  - However, qualification and experience of new expert were not in accordance with the criteria for professional experience as required in the Terms of Reference (experience in at least one successfully completed specific infrastructure project)
  - PRAG, 2.11.1. „... *No changes to the contract may alter the award conditions prevailing at the time the contract was awarded. Following this logic, major changes, such as fundamental change to the terms of reference cannot be made ...*”
  - If new expert was the part of the initial assessment, then the contract should be awarded to the other tenderer (contractor)
- Materials on site (Works Contract) (Contract implementation)
  - FIDIC (Red Book) conditions of contract

# EU PROJECT PREPARATION FACILITY PROJECT

All documents, information, materials and pictures from this EU PPF training are available for download in the download section of our site [www.ppf.rs](http://www.ppf.rs)



# Questions and assistance

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**Thank you for your attention!**