



An Analysis of Types of Errors in Public Procurement within the Structural Funds Programmes

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List of Abbreviations

AA	Audit Authority
CA	Certifying Authority
CDRT	Centre for Development, Research and Training
CF	Cohesion Fund
COCOF	Committee of the Coordination of Funds
DoC	Department of Contracts
EC	European Commission
ECA	European Court of Auditors
ERDF	European Regional Development Fund
ESF	European Social Fund
EU	European Union
IAID	Internal Audit and Investigations Department
MA	Managing Authority
NAO	National Audit Office
NSRF	National Strategic Reference Framework
OJ	Official Journal of the European Union
OP	Operational Programme
OPI	Operational Programme I
OPII	Operational Programme II
SAI	Supreme Audit Institution
SFD	Structural Funds Database
TEN-T	Trans-European Network for Transport

Executive Summary

Executive Summary

1. Funds acquired from the European Union are organised in terms of Operational Programmes (OPs), which in turn are governed by cohesion policies. The policy relevant to this audit is the 2007-2013 Cohesion Policy. The two OPs adopted by Malta are Operational Programme I (OPI) – *Investing in Competitiveness for a Better Quality of Life* and Operational Programme II (OPII) – *Empowering People for more Jobs and a Better Quality of Life*. OPI is co-financed by the European Regional Development Fund and the Cohesion Fund, whereas OPII is co-financed by European Social Fund. The budgetary allocation under OPI and OPII for the Programming Period 2007-2013 totalled €856,615,355 and €131,764,707, respectively.
2. In 2013, the Contact Committee of the Supreme Audit Institutions (SAIs) mandated the Working Group on Structural Funds to carry out an analysis of the types of errors in EU and national public procurement within the Structural Funds Programmes. The types of errors reviewed in this audit correspond to those categorised by the Committee of the Coordination of Funds (COCOF) Note 07/0037/03, which provides guidelines and parameters for determining financial corrections in cases of non-compliance with the rules on public procurement. The guidelines enable the adoption of a common approach in dealing with cases of irregularities across Member States.
3. This parallel audit was carried out in conjunction with the SAIs of eight Member States, while five other SAIs and the European Court of Auditors acted as observers. This audit focused on errors that were already detected and categorised by the Authorities. The key stakeholders in this regard were the Planning and Priorities Coordination Division, in its role as the Managing Authority (MA); the European Union Paying Authority within the Ministry of Finance, in its role as the Certifying Authority (CA); the Internal Audit and Investigations Department, in its role as the Audit Authority (AA); as well as the European Commission (EC). For the purpose of this audit, NAO reviewed and analysed the population of errors detected during the period 2010-2013.
4. The errors reviewed as part of this audit addressed the various aspects of public procurement, including instances of breach of the principle of equal treatment, the failure to state selection and award criteria, as well as cases where incorrect methods of procurement were resorted to. Other irregularities centred on non-compliance with advertising procedures, unapproved changes in contract scope and the unjustified resort to direct contracts, among others.

5. Irregularities detected during the period 2010 to 2013 accounted for 1.64 per cent of the value of projects declared to the EC and carried out through public procurement. In terms of actual amounts, out of the €425,756,293, €6,997,691 were classified as irregular expenditure. This irregularity resulted in a financial correction of €1,291,297, equivalent to 0.3 per cent of the total value of projects carried out through public procurement, that is, €425,756,293.
6. At the level of OP, a notable disparity was recorded in terms of irregularities detected and subsequent financial correction under each Programme. While the irregularities detected in OPI amounted to €1,564,865, those in OPII amounted to €5,432,826. As a percentage of the value of projects carried out through public procurement, the irregularities detected in OPI accounted for 0.43 per cent of the total of €370,572,211. On the other hand, the irregularities corresponding to OPII accounted for 9.84 per cent of the total value of publicly procured co-financing, that is, €55,184,082. The financial corrections applied as a result of the irregularities detected were €178,429 for OPI and €1,112,868 for OPII. These financial corrections, when considered as a percentage of declared expenditure, represent 0.05 per cent in the case of OPI and 2.02 per cent in the case of OPII. It has to be clarified that while the MA reviewed all projects and therefore, the reported irregularities correspond to the population of projects carried out through public procurement, the AA and EC only reviewed a sample of projects. Therefore, the reported irregularities, financial corrections and relative percentages reflect the scope of reviews undertaken by the various Authorities and do not represent an absolute or comprehensive account of all errors.
7. Errors relating to the incorrect application of certain ancillary elements and breaches of the principle of equal treatment were the most frequently detected irregularities. The remaining irregularities were detected in uniformly low frequencies across the other error types.
8. Error 12 featured a broad array of irregularities ranging from the erroneous application of public procurement regulations resulting in the incorrect method of procurement to contract management-related shortcomings. Irregularities classified under this Error were all detected by the AA and included the cancellation of a tender later awarded by means of a direct contract, as well as an incorrectly valued bid bond. Other shortcomings were the procurement of items not specified in the tender document, the incurrence of variations without prior approval of the MA, the double-payment of certain items and poor budgetary control.
9. Error 24 was the most frequently detected irregularity, with the majority of cases identified by the MA. This error occurred at various stages of the procurement process. Irregularities relating to the commencement of the procurement process entailed the inappropriate or incorrect application of the procurement method adopted. At times, the error involved a lack of clarity with respect to the tender award criteria, which should have been clearly indicated in the tender document. Administrative shortcomings identified included the acceptance of bank guarantees not in line with requirements and the failure of a selected bidder to submit evidence of past experience. Other errors related to the failure on the part of the Contracting Authority to adhere to the eligibility criteria stipulated in the tender document and to select the cheapest offer, as well as the absence of the requisite performance guarantees.
10. Although the incidence of irregularities was most pronounced in Errors 12 and 24, the materiality of errors detected by the Authorities did not reflect this distribution. The most significant irregularity in terms of materiality is that of Error 2, that is, the 'Non-compliance with the advertising procedures (but advertised to some extent)'. Three irregularities were classified under this error type, with two detected by the

MA and one by the EC. All three errors were the result of failure on the part of the Contracting Authorities to adequately advertise the project in the Official Journal of the European Union. In the case of the EC detected error, this situation arose as a result of the misclassification of the project as 'research and development' instead of 'education and vocational education services'. This misclassification led to an erroneous procurement method, which consequently resulted in the failure by the Contracting Authority to advertise appropriately.

11. NAO noted that the MA registered the highest incidence of error detection, equivalent to 59 per cent of all irregularities. Possible explanations for this are the fact that the MA is the first line of verification, therefore increasing the probability of detection, and that its breadth of review is wider than that of the other Authorities. Although the MA registered the highest incidence of errors, the value of these irregularities accounted for 33 per cent of all the errors detected by the Authorities and Beneficiaries. On the other hand, although only one error was detected by the EC, this accounted for 54 per cent of the value of all irregularities. With regard to the corresponding financial corrections applied, those imposed by the MA and the EC made up 21 per cent and 73 per cent of the value of all corrections, respectively. The reimbursable amount with respect to the financial correction applied by the EC was significantly higher than the aggregate sum of those detected by the other Authorities.

Chapter 1

Structural Funds Management and Errors in Public Procurement

Chapter 1 – Structural Funds Management and Errors in Public Procurement

1.1. Background on European Union Funded Operational Programmes in Malta

1.1.1 Funds acquired from the European Union (EU) are organised in terms of Operational Programmes (OPs), which in turn are governed by cohesion policies. The policy relevant to this audit is the 2007-2013 Cohesion Policy. The two OPs adopted by Malta are Operational Programme I (OPI) – *Investing in Competitiveness for a Better Quality of Life* and Operational Programme II (OPII) – *Empowering People for more Jobs and a Better Quality of Life*. OPI is co-financed by the European Regional Development Fund (ERDF) and the Cohesion Fund (CF), whereas OPII is co-financed by the European Social Fund (ESF). These two programmes, OPI and OPII, are consonant with Malta's strategic priorities for the 2007-2013 Cohesion Policy, particularly as outlined in the National Strategic Reference Framework (NSRF). The focus of OPI is the enhancement of quality of life through increased competitiveness, while OPII focuses mainly on employment, education, training and social inclusion.

1.1.2 As at December 2013, a total of 123 projects were approved under OPI. Of these 123 projects, 112 were approved under ERDF, with nine of them constituting Aid Schemes¹ and Technical Assistance². The remaining 11 projects were approved under CF. With regard to ESF, as at December 2013, 83 projects had been approved, with two projects classified as an Aid Scheme and another as Technical Assistance.

1.1.3 OPI is based on the priorities highlighted in the NSRF document and addresses the following seven key priority areas (also referred to as Priority Axes) agreed upon between Malta and the European Commission (EC). In essence, the Priority Axes were introduced as a means to refine the categorisation of the OPs.

a. **Enhancing Knowledge and Innovation**

This Priority Axis is designed to support Malta's efforts at becoming a more competitive and knowledge-based economy. The attraction of foreign direct investment, the support of enterprise infrastructure and the provision of

¹ Aid Schemes are implemented by Intermediary Bodies (for example an entity such as Malta Enterprise) on behalf of the MA. The Beneficiaries, which are the parties receiving aid under the relevant scheme, sign a Grant Agreement with the Intermediary Body.

² The Technical Assistance arm within the MA aims to facilitate the overall implementation of OPs in accordance with Article 46 of Council Regulation 1083/2006. Related objectives include ensuring the efficient administration and implementation of the Programme through the effective application of the relevant regulations and procedures.

the required industrial facilities are some of the measures employed in the achievement of this objective. Furthermore, this Priority Axis also serves to promote entrepreneurship by facilitating the transition of local industry towards a competitive knowledge-based economy.

b. Promoting Sustainable Tourism

This second Axis aims to promote a sustainable and competitive tourism industry, particularly through the upgrading of the local product. Such objectives are supported through the promotion of the Maltese Islands as a tourist destination, and by aiding tourism and cultural operators in enhancing their competitiveness.

c. Developing the Trans-European Network for Transport (TEN-T)

This Axis aims to optimise the domestic and international connectivity of the Maltese Islands. The proposed avenues for the fulfilment of the objectives of this Axis are the upgrading of road infrastructure, inland waterways, airports, inland ports and seaports, as well as improvements in journey-time reliability, traffic management systems and road safety. TEN-T is a European-wide network of road, rail, air and water transport, providing integrated and intermodal routes for the movement of people and freight throughout Europe.

d. Climate Change and Resource Efficiency

This Priority Axis aims to improve and strengthen Malta's mitigation and adaptation strategies in response to climate change, as well as measures intended to ensure the best and efficient use of available resources. In this context, this Priority Axis finances actions that are intended to promote the generation of energy from Renewable Energy Sources and other measures intended to limit the need for energy inputs, as well as energy efficiency projects. Moreover, this Priority Axis finances studies undertaken to further investigate issues relevant to Malta's attainment of its climate change objectives. Funding is also directed towards other actions intended to safeguard Malta's competitiveness by ensuring that current practices are more sustainable, such as through projects relating to water abstraction and the use of water resources.

e. Safeguarding the Environment and Risk Prevention

The objective of this Priority Axis is to continue upgrading the country's environmental infrastructure, with particular focus on solid and liquid waste management, as well as develop measures related to risk prevention, in particular flooding. In operational terms, this involves increasing the capacity of waste treatment facilities for energy recovery and recycling, minimising the use of waste landfills and rehabilitating others that are no longer in use. Other initiatives include investments in water networks, the increase in sewage treatment capacity in the south of Malta, and the development of infrastructure to minimise the effects of storm water and reduce the incidence of flash flooding.

f. Urban Regeneration and Improving the Quality of Life

The aim of this Priority Axis is to safeguard and value Malta's urban heritage and promote an overall improvement in quality of life. Such improvements are attained through increased accessibility, improved educational opportunities, better quality of social and health systems, as well as through an increase in the environmental monitoring capacity. In this context, operational objectives include the upgrading of the physical environment and the visual appeal of urban cores, particularly through urban regeneration and integrated local development. The improvement of internal mobility, an increase in e-services, and continued

investment in the health, social and educational sectors are additional objectives falling under this Priority Axis.

g. Technical Assistance

This Priority Axis aims to upgrade the administrative capacity of public administration organisations tasked with implementing OPI in order to facilitate the overall management of the Programme. Efficient administration and implementation of the OP are achieved through the effective application of the relevant regulations and procedures.

1.1.4 OPII is also based on priorities highlighted in the NSRF document and addresses five key priority areas, namely:

a. Improving Education and Skills

This Priority Axis aims to invest in human capital by increasing the participation rates within all levels of education, and widening the knowledge and skill-set of the Maltese labour force. These objectives are to be attained through increased levels of student participation in diverse fields of study, such as science, technology and ICT, as well as by improving the quality and relevance of the educational experience.

b. Investing in the Employability and Adaptability of the Workforce

This Priority Axis aims to increase the adaptability of the working age population as well as that of enterprises in response to the changing profile of the economy, thereby resulting in sustainable high employment rates. Lifelong learning and skills improvement are two practical methods for achieving the objectives of this Axis.

c. Promoting an Equal and Inclusive Labour Market

The aim of this Priority Axis is to promote the uptake of stable and quality employment by persons who encounter some difficulty in participating in the labour market. Among others, the objectives of this Axis include measures intended at increasing the female participation rate, as well as better integration, retention and progression of disadvantaged groups in the labour market.

d. Strengthening of Institutional and Administrative Capacity

This Priority Axis aims to strengthen institutional capacity as well as the efficiency and effectiveness of public administration, local government, social partners and civil society through human resource development and investment in related mechanisms. An additional objective is the development of effective partnerships in a wide range of policy areas.

e. Technical Assistance

This Priority Axis aims to facilitate the overall implementation of OPII, optimising the quality and efficiency of the Programme, and the effectiveness with which regulations and procedures are applied. The focus areas include Programme implementation, capacity building requirements, information dissemination, publicity, as well as the application of innovative activities.

1.1.5 Table 1 and Table 2 present the budgetary allocation under OPI and OPII, which totalled €856,615,355 and €131,764,707, respectively. The division of funds across the Priority Axes for OPI and OPII are also indicated in these tables. The relative apportionment of ERDF, ESF, CF and national co-financing against each OP is presented in Table 3.

Table 1: OPI Budgetary Allocation against Priority Axis

Priority Axis	Funds
Priority Axis 1	€120,000,000
Priority Axis 2	€120,000,000
Priority Axis 3	€145,000,000
Priority Axis 4	€105,000,000
Priority Axis 5	€189,288,259
Priority Axis 6	€165,000,000
Priority Axis 7	€12,327,096
Total	€856,615,355

Table 2: OPII Budgetary Allocation against Priority Axis

Priority Axis	Funds
Priority Axis 1	€41,400,000
Priority Axis 2	€30,995,000
Priority Axis 3	€36,900,000
Priority Axis 4	€17,199,118
Priority Axis 5	€5,270,589
Total	€131,764,707

Table 3: Allocation of Funds as per OP

OP	Budget of the OPs (2007-2013)					Percentage in total
	ERDF	ESF	CF	National co-financing	Total	
OPI	€443,978,031	n/a	€284,145,020	€128,492,304	€856,615,355	86.67%
OPII	n/a	€112,000,001	n/a	€19,764,706	€131,764,707	13.33%
Total	€443,978,031	€112,000,001	€284,145,020	€148,257,009	€988,380,062	100%

1.2 Cohesion Policy and Errors in Public Procurement within the Structural Funds Programmes

1.2.1 The Cohesion Policy is based on a shared management system between the EC and Member States, with the principal aim of ensuring that the principles of regularity, legality and sound financial management are complied with. On one hand, Member State authorities are entrusted with lead responsibility for all aspects of programme design and delivery, while on the other hand, the EC provides the regulatory parameters, particularly through EU legislation, against which such disbursement of funds must comply.

1.2.2 It is in this understanding that EU legislation provides regulations applicable to public procurement and sets a legislative framework that establishes common rules and procedures for contracts with a value that does not exceed certain thresholds. Instrumental to the effectiveness of the shared management system is the transposition of the applicable legal provisions relating to the regulation of public procurement by Member States into their corresponding national regulations. Reference to the importance of these regulations was made in the European Court of Auditors (ECA)

Annual Report of 2012 (Section 5.30), which stated that, “Public procurement rules are a key instrument for spending public money economically and effectively and for establishing an internal market within the EU.”

1.2.3 In the same report, the ECA found that across the EU, out of 180 audited public procurement transactions, 24 were in breach of public procurement regulations. Serious breaches of these regulations, which led to quantifiable errors, were identified in nine cases. These accounted for 29 per cent of all quantifiable errors. Against this background, and in order to understand why the application of the public procurement legislation may lead to irregularities, the Working Group on Structural Funds called for an analysis of these types of errors.

1.2.4 The types of errors reviewed in this audit correspond to those categorised by the Committee of the Coordination of Funds (COCOF) Note 07/0037/03, which provides guidelines for determining financial corrections in cases of non-compliance with public procurement regulations. This Note presents parameters for the application of financial corrections following the detection of irregularities in the programming periods 2000-2006 and 2007-2013. The guidelines enable the adoption of a common approach in dealing with cases of irregularities across Member States. The categories of errors, as established by COCOF Note 07/0037/03, are delineated hereunder.

a. **Error 1: Non-compliance with the advertising procedures**

This error occurs when a contract is awarded without complying with the advertising requirements stipulated in the EC Public Procurement Directives, except in cases referred to in the next point. This shortcoming is considered as a flagrant disregard of one of the essential conditions of Community co-financing.

b. **Error 2: Non-compliance with the advertising procedures (but advertised to some extent)**

In this case, although the contract would have been awarded without complying with the advertising requirements of the EC Public Procurement Directives, it would have been advertised to some extent, allowing economic operators located in another Member State access to the contract.

c. **Error 3: Granting of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or in the absence of an unforeseen circumstance for complementary works and services or for supplies**

This error is recorded in instances when the main contract is awarded in accordance with the EC Public Procurement Directives, but is then followed by one or more supplementary contracts awarded without complying with the provisions of these Directives.

d. **Error 4: Additional works or services exceeding the limit laid down by the Directives provided in unforeseen circumstances**

Somewhat related to the preceding error, in this case, the main contract is awarded in accordance with the provisions of the EC Directives, but is then followed by one or more supplementary contracts exceeding the value of the original contract by more than 50 per cent.

e. **Error 5: Failure to state all the selection and contract award criteria in the tender documents or tender notice**

In this case, the tender documents or tender notice fail to state all the selection and/or award criteria, or to describe them in sufficient detail.

- f. **Error 6: Application of unlawful contract award criteria**
This error is registered when a contract is awarded following the application of unlawful contract award criteria.
- g. **Error 7: Unlawful selection and/or contract award criteria laid down in the tender procedure**
This applies to cases in which certain operators have been deterred from bidding on account of unlawful restrictions laid down in the tender documents or tender notice.
- h. **Error 8: Insufficient or discriminatory definition of the subject matter of the contract**
Such an error is recorded when the description in the tender documents or tender notice is discriminatory or insufficient for bidders to determine the subject matter of the contract or for the contracting authorities to award the contract.
- i. **Error 9: Negotiation during the award procedure**
This error is deemed as such when a contract is awarded by open or restricted procedure yet it emerges that the contracting authority negotiated with the bidders during the award procedure. It must be noted that this error excludes instances where the discussions held were solely intended to clarify or supplement the content of bids submitted or to specify the obligations of the contracting authority.
- j. **Error 10: Reduction in the scope of the contract without proportional reduction in the value of the contract**
Here, the contract is awarded in compliance with the Public Procurement Directives, but is then followed by a reduction in its scope without a proportional reduction in its value.
- k. **Error 11: Reduction in the scope of the contract, but also proportional reduction in the value of the contract already carried out**
Differing slightly when compared to the previous error, in this case, the contract is awarded in compliance with the Public Procurement Directives, but is then followed by a reduction in its scope and a proportional reduction in the value of the contract already carried out.
- l. **Error 12: Incorrect application of certain ancillary elements**
The conditions necessary for the identification of this error entail the contract being awarded in compliance with the provisions of the Public Procurement Directives, yet not in compliance with certain ancillary elements, such as the publication of the notice of award of the contract.
- m. **Error 21: Non-compliance with the requirement of an adequate degree of advertising and transparency³**
Under such circumstances, a contract is awarded without adequate competitive tendering, thereby deemed non-compliant on grounds of breach of the principle of transparency.

³ The numbering of errors as indicated in paragraph 1.2.4 reflects that cited in COCOF Note 07/0037/03.

- n. **Error 22: Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or for complementary works and services brought about by unforeseen circumstances**

This type of error arises when the main contract is awarded after adequate competitive tendering, but is then followed by one or more supplementary contracts awarded without adequate competition. Central to this classification is the absence of reasons of extreme urgency brought about by unforeseeable events or, in the case of contracts of works and services, the absence of unforeseen circumstances justifying such supplementary contracts.

- o. **Error 23: Application of unlawful selection and/or contract award criteria**

This error features the application of unlawful criteria that deter certain bidders on account of unlawful restrictions laid down in the tender procedure.

- p. **Error 24: Breach of the principle of equal treatment**

Here, the contract is awarded in accordance with the rules on advertising but the contract award procedure breaches the principle of equal treatment of operators.

1.2.5 The detection of an error institutes financial corrections in the corresponding project, which corrections may vary between 2 and 100 per cent of the value of the contract. A financial correction is calculated as a percentage of the amount declared to the Commission.

1.2.6 The Commission's identification of an irregularity during an audit leads to the recommendation for correction to the Member State. If the Member State does not execute the correction in accordance with Article 98 of Regulation (EC) 1083/2006, the correction is effected by virtue of a Commission decision as provided for by Article 99 of Regulation (EC) 1083/2006.

1.2.7 Member State Authorities may also detect irregularities during internal controls. In such cases, Member States are required to make the necessary corrections in accordance with Article 98 of Regulation (EC) 1083/2006.

1.2.8 Appendix A presents the applicable financial corrections of each listed error in percentage terms.

1.3 Objectives and Scope of Audit

1.3.1 In 2013, the Contact Committee of the Supreme Audit Institutions (SAI) mandated the Working Group on Structural Funds to carry out an analysis of the types of errors in EU and national public procurement within the Structural Funds Programmes. In this regard, the National Audit Office (NAO) agreed to carry out an audit that evaluated errors in public procurement detected within OPI and OPII during the period 2010 to 2013.

1.3.2 More specifically, the errors reported upon narrowly focus on public procurement-related irregularities. Other errors, although falling within the ambit of public procurement, could not be classified as public procurement-related. These errors included cases where the irregularities detected related to breaches of recruitment procedures, as well as other issues related to the project's management and control systems. Therefore, such errors were not considered as forming part of the scope of this audit.

1.3.3 This parallel audit was carried out in conjunction with the SAIs of eight Member States, namely, the Czech Republic, Germany, Italy, Latvia, the Netherlands, Poland, Portugal and Slovakia. The SAIs of Bulgaria, Estonia, Finland, Hungary and Sweden, as well as the ECA, acted as observers.

1.3.4 The parallel audit focused on errors that were already detected and categorised by the participating Member States. The principal objectives of this audit were to:

- a. Evaluate the types of errors in EU and national public procurement detected within Structural Funds Programmes; and
- b. Analyse these errors and establish their causes.

1.4 Methodology

1.4.1 A range of information sources was referred to in order to analyse errors in public procurement within Structural Funds Programmes during the period 2010 to 2013. Research undertaken with respect to this topic consisted of a review of EU-wide literature and the analysis of relevant legal frameworks. In the case of EU-wide literature, NAO mainly referred to reports drawn up by the EC and the ECA on the topic under review. Of particular relevance to this audit was the COCOF Note 07/0037/03, which essentially presented guidelines with respect to detected errors.

1.4.2 NAO also paid particular attention to the legal clauses pertinent to this audit, specifically, Council Regulation (EC) 1083/2006 and Commission Regulation (EC) 1828/2006. EU public procurement legislation, which establishes common rules and procedures for contracts that exceed or are equal to established thresholds, was also referred to. The main EU Directives that relate to public procurement financed through Structural Funds are listed hereunder:

- a. Directive 2004/17/EC - Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors; and
- b. Directive 2004/18/EC - Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts:

1.4.3 With regard to the national legal framework corresponding to the above-mentioned Directives, NAO referred to the following two Legal Notices:

- a. L.N. 178 of 2005 – Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations; and
- b. L.N. 296 of 2010 – Public Procurement Regulations.⁴

1.4.4 For the purposes of this audit, NAO reviewed and analysed the population of projects where errors were detected by the Managing Authority (MA), the Certifying Authority (CA), the Audit Authority (AA), as well as the beneficiaries, with respect to the period 2010-2013. During the course of this audit, the NAO met all of the aforementioned Authorities, namely, the Planning and Priorities Co-ordination Division (in its capacity as MA), the EU Paying Authority Directorate (in its role as CA), and the Internal Audit and Investigations Department (IAID) (tasked with fulfilling the function of AA). Fieldwork was carried out between July 2014 and October 2014.

⁴ Legal Notice 296 of 2010 came into effect on 1 June 2010, therefore, prior to this date, Legal Notice 177 of 2005 applied.

1.4.5 Semi-structured interviews were held with the MA, CA and AA, which interviews were based on a three-part questionnaire drawn up in agreement with the Working Group on Structural Funds. Aside from the questionnaires submitted to this Office by Authorities, the NAO also made various requests for supporting documentation and clarifications when required. This Office sought to verify the irregularities by selecting the five largest financial corrections and subsequently reviewing the corresponding files. The verification of one of these five errors was deemed unfeasible by this Office and therefore, the subsequent highest error was selected as a replacement.

Chapter 2

Errors in Public Procurement within the Operational Programmes

Chapter 2 - Errors in Public Procurement within the Operational Programmes

2.1 The Detection of Errors by the Managing Authority

2.1.1 In its review of expenditure falling under projects co-financed by the EU, the MA considered compliance with the national Public Procurement Regulations (L.N. 296 of 2010) and adherence to national Eligibility Rules, among other criteria. These Rules establish expenditure deemed eligible under the OPs. The MA factored a number of criteria into account when checks for errors were carried out with respect to the period under review, that is, 2010 to 2013. Details of the criteria adopted are highlighted in the ensuing paragraphs.

The Scope of Checks Carried Out

2.1.2 Administrative verifications were carried out by the MA in accordance with Article 60(b) of the Council Regulation (EC) 1083/2006 and Article 13 of the Commission Regulation (EC) 1828/2006. The main purpose of checks carried out was that of ensuring that all expenses applied for were in accordance with the parameters established by EC and national public procurement regulations. Furthermore, the MA ascertained that the principles of equal treatment, non-discrimination, transparency, free movement and competition were respected throughout the procurement process.

2.1.3 Apart from administrative verifications, the MA conducted on-the-spot verifications with scrutiny primarily directed towards the respective projects' physical deliverables. Such verifications ensured that the deliverables complied with tender specifications and the relevant contracts were in accordance with the provisions established in agreements entered into by the MA and the Beneficiary.

Checklists used in the Detection of Errors

2.1.4 The MA had two categories of checklists that were used by the Authority to ensure compliance with the relevant regulations of the procurement process. One of the checklists used scrutinised the award procedure, while the other served to ascertain whether modifications to the contract were effected, and/or whether sufficient justifications existed for the award of additional services, supplies or works. Details relating to these checklists are provided hereunder.

- a. The checklists used in the scrutiny of the award procedure listed details of all bidders, including their financial offer and the level of compliance thereof. These checklists provided details relating to the necessary documentation and stipulated requirements within the EU and national legal frameworks, apart from other administrative procedures considered as good practice.
- b. The other category of checklists served to verify whether invoices forwarded to the MA were in line with EU requirements for the reimbursement of funds. They essentially consisted of detailed checks concerning each invoice received, and focused on target-oriented verifications as well as the project's financial considerations.

The Nature and Frequency of Detected Errors

2.1.5 The nature of public procurement errors that were detected by the MA were notably varied. Table 4 presents the instances of errors, categorised according to OP and type of error.

Table 4: Type and Frequency of Errors Detected by the MA

Type of Error	OPI	OPII
Non-compliance with the advertising procedures (but advertised to some extent)	2	-
Failure to state all the selection and contract award criteria in the tender documents or tender notice	1	2
Unlawful selection and/or contract award criteria laid down in the tender procedure	-	1
Reduction in the scope of the contract without proportional reduction in the value of the contract	-	1
Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or for complementary works and services brought about by unforeseen circumstances	2	-
Application of unlawful selection and/or contract award criteria	-	1
Breach of the principle of equal treatment	3	6
Total	8	11

2.1.6 Most errors were detected prior to the certification of expenses. In the case of OPI, all public procurement irregularities were detected prior to certification, while 7 out of 11 cases were detected prior to certification with respect to OPII.

2.2 The Detection of Errors by the Certifying Authority

2.2.1 The CA applied the national Public Procurement Regulations (L.N. 296 of 2010) drawn up in accordance with EC Directives 17 and 18 of 2004. Furthermore, the CA referred to the Eligibility Rules established by Malta for the two OPs. The CA factored in a number of criteria while checking for errors in procurement with respect to the period under review, which criteria are highlighted in the ensuing paragraphs.

The Scope of Checks Carried Out

2.2.2 Through its checks, the CA ensured that the MA performed its role as stipulated by Article 60 of EC 1083/2006 and in accordance with the requirements of EC 1828/2006. Most of the information was gathered through the CA's review of the management

verification reports drawn up by the MA, with special attention directed at the findings and follow-up thereof. The CA also indicated its awareness of other audit reports on the subject matter, particularly, those drawn up or commissioned by the AA, the EC and the ECA. The CA also stated that it evaluated errors in order to establish whether they constituted a one-off oversight or systematic risk. Following such reviews, the CA ascertained that the stakeholders involved implemented the necessary corrective action as indicated in the reports.

- 2.2.3 The CA noted that checks for errors were performed at the previous levels of control points in the system, albeit to differing degrees. The Authority also noted that Beneficiaries were responsible for monitoring their respective projects on a daily basis and checking every aspect of the project, including procurement, the delivery of goods and services, and the eligibility and certification of works carried out.

Checklists used in the Detection of Errors

- 2.2.4 The CA reported that it made use of various checklists in its verification of invoices and highlighted the importance of the use of checklists in expenditure testing, which when structured in a particular manner allow for the consideration of different scenarios that may present themselves during a testing exercise. The CA stated that since most of its checks on procurement issues were carried out through its review of management verification and audit reports, the duplication of checks was to a certain extent avoided. The checklists used for management verification reports incorporated a number of criteria, including documentation, deliverables, financial implementation, public procurement, as well as publicity and information. The CA noted that it normally utilised the Structural Funds Database 2007-2013 (SFD) to perform its checks. This Database is essentially a shared electronic system used by the Authorities and beneficiaries involved in the recording and reviewing of data relating to co-financed projects.

The Nature and Frequency of Detected Errors

- 2.2.5 The CA did not detect any public procurement irregularities in the period under review; however, the Authority noted that it would have been unlikely for procurement irregularities to have made it through the previous filters given the rigorous scrutiny undertaken by the Beneficiary and the MA. Moreover, the CA stated that it identified issues when reviewing on-the-spot reports prepared by the MA, as well as when conducting expenditure testing. Under such circumstances, the CA requested clarifications and/or submitted recommendations to the MA for corrective action to be taken. Finally, the CA stated that it sought to avoid the duplication of work when carrying out the certification of payments.

2.3 The Detection of Errors by the Audit Authority

- 2.3.1 The AA stated that when checking for errors within projects subject to public procurement regulations, it takes into consideration EU and national public procurement legal frameworks. On a national level, the Authority made reference to the Public Procurement Regulations (L.N. 196 of 2010), while with respect to EU regulations, the AA referred to Commission Regulation (EC) 1177/2009. Similar to the MA, the AA factored in a number of criteria when checks for errors were carried out, which criteria are presented hereunder.

The Scope of Checks Carried Out

- 2.3.2 Checks carried out by the AA were based on a sample of projects that fall under OPI and OPII. As a matter of procedure, this sample is extracted during the first month of each year from a population of projects that would have had expenditure declared to the Commission in the preceding year. The AA indicated to NAO that in order to achieve a sufficiently large population, both OPs are grouped and the Beneficiaries' periodic Statements of Expenditure are deemed as components of the sample selection exercise, thereby increasing the number of items in the population.
- 2.3.3 The AA informed the NAO that in determining the sample size, the Authority took into consideration the reliability of the system, which would have been confirmed through the results of the systems audits that would have been carried out up to that date. The AA also took into consideration the fact that the management and control system for the programming periods 2004-2006 and 2007-2013 were essentially the same. The Authority stated that the system was found to be adequately functional through the system audits and sample checks it carried out and those undertaken by the EC's Directorate General for Regional Policy and the Directorate General for Employment, Social Affairs and Equal Opportunities.
- 2.3.4 By way of example, the sample selected in January 2014 was selected after applying a confidence level of 70 per cent, an expected error rate of 10 per cent, and a two per cent materiality level. The AA used a specialised programme to select the sample, which listed the Statements of Expenditure according to the percentages inputted. For the audit period 2013, the AA selected the first 51 Statements, based on a risk-rating system, which represented 1.6 per cent of a population of 3,221 Statements. The resultant cumulative value of the sample represented 34 per cent (€66,514,989) of the total value of the population (€196,879,135). On a finer level of analysis, the claims selected represented:
- a. 43 OPI Statements from a total of 558; and
 - b. 8 OPII Statements from a total of 2,663.
- 2.3.5 The divergence in the number of claims selected for the two OPs, especially given that Statements of Expenditure corresponded to significantly more projects under OPII, can be attributed to the fact that, generally, OPI projects have significantly higher material values than OPII projects (Table 3 refers).

Checklists used in the Detection of Errors

- 2.3.6 The AA examined the projects selected in the sample by making reference to a predefined checklist that the Authority had established. This document, which is streamlined every year to reflect new regulations in force or other criteria recommended by AA officials, is split into 11 sections. Each section represents a stage of the public procurement process, from the tender dossier to the implementation of the contract.

The Nature and Frequency of Detected Errors

- 2.3.7 The public procurement errors that were detected by the AA were of the same nature across both OPs. Table 5 presents the instances of errors, categorised according to the OP and the type of error detected.

Table 5: Type and Frequency of Errors Detected by the AA

Type of Error	OPI	OPII
Incorrect application of certain ancillary elements	9	1

2.4 The Procedure Adopted for the Detection of Errors by the Authorities

The Managing Authority

- 2.4.1** The MA served as the first level of control in the detection of errors. In terms of procedure, this level of scrutiny entailed the use of checklists designed to scrutinise specific areas concerning management verifications, one of which refers to public procurement. In addition, the MA undertook on-the-spot checks of projects, which further corroborated adherence to the conditions stipulated by the contract.
- 2.4.2** On-the-spot verifications were conducted when appropriate and as the project developed into a more advanced stage. Such verifications were in accordance with Article 13(2)(b) of Commission Regulation (EC) 1828/2006 and COCOF 08/0020/04 'Guidance document on management verifications to be carried out by Member States on operations co-financed by the Structural Funds and the Cohesion Fund for the 2007-2013 programming period.' In this context, the term 'appropriate' referred to contracts whose investment aspect was tangible, such as buildings and equipment. On the other hand, contracts having intangible direct costs, such as project management services, had their eligibility of expenditure established through the verification of endorsed interim progress reports. The principal aim of these verifications was to ensure the legitimacy of the tangible aspect of the project when reconciling this with the respective contracts. The results derived from these verifications are recorded in a Physical On-the-Spot Check Report. This Report established whether all trainees were attending regularly, the number of training sessions delivered up to the date of the spot check, as well as the level of compliance with co-financing publicity requirements. Once finalised, the Report was to be uploaded onto the SFD. The input of the Physical On-the-Spot Check Report enables the maintenance of a comprehensive audit trail for the use of accredited personnel. Accredited personnel refers to persons who had access to the SFD modules in relation to the project they were involved in.
- 2.4.3** The above-mentioned checks were in line with Article 60(b) of EC 1083/2006, which Article stipulates that the MA must verify that the co-financed products and services are delivered and that the expenditure declared by the beneficiaries for operations has actually been incurred and complies with Community and national rules.
- 2.4.4** Apart from on-the-spot checks, the MA carried out administrative verifications. Details of these verifications were recorded on a checklist in accordance with Article 13(2) (a) of Commission Regulation (EC) 1828/2006. This checklist was also used to confirm that payments claimed were legitimate prior to the Authority's recommendation for the expenditure's certification by the CA through a Statement of Expenditure. Furthermore, this document was used to check post-contract issues.

The Certifying Authority

- 2.4.5** The CA indicated to NAO that it carried out detailed reviews of the Irregularity Reports drawn up by the MA and AA. In its reviews, the CA stated that it ensured that the methodology used to categorise the irregularity, as well as the rate of financial correction applied, was in line with the COCOF guidelines. To this end, the CA also

ensured that any amounts recovered or withdrawn were deducted from claims submitted to the EC in as timely a manner as possible, preferably in the subsequent certification of funds.

- 2.4.6 Apart from carrying out the above checks, the CA was tasked with testing expenditure claimed in the Statement of Expenditure, which would have already been verified by the MA. This testing exercise was based on a stratified random sample, with the selected invoices checked in their entirety for eligibility purposes, as were their corresponding contracts.
- 2.4.7 The CA is tasked with the management of the Debtors Ledger, which provides a detailed account of all Irregularity Reports of expenditure already certified by the CA and claimed from the EC. In terms of EC Regulation 1083/2006, the CA must annually report, by March of each year, the recoveries and withdrawals through the EC database, as specified in Annex XI of Regulation 1828/2006. This Annex, entitled Annual Statement on Withdrawn and Recovered Amounts and Pending Recoveries, is essentially a form that is completed by the CA. All Irregularity Reports were logged on to a database, which the CA then reconciled with the Debtors Ledger. In the case of discrepancies, including pending corrections or omissions (that is, whether the discrepancy consisted of a withdrawal or recovery of funds), the CA advised the MA for its immediate remedial action.

The Audit Authority

- 2.4.8 The AA stated that errors were detected during annual audits, where auditors use a Public Procurement Checklist in order to determine the nature and type of errors. When an error is detected, the AA refers to the COCOF Guidelines for the determination of the type of error and for the application of a percentage rate to the irregularity. Details of errors detected by the AA and documented in its Irregularity Reports are forwarded to the MA for corrective action. In the likelihood that an error will continue to feature within the same project, the correction is extrapolated to future Statements of Expenditure during audits.

Correcting Detected Errors

- 2.4.9 When considering remedial action, the MA referred to the guidelines presented in COCOF Note 07/0037/03. The MA distinguished between two instances of error detection – one where the Authority detected errors prior to the processing of invoices by the Treasury Department, and the other where errors were detected after the Treasury had processed the invoices.

a. **Errors detected prior to Treasury's processing of invoices**

In such cases, the error is communicated to the Beneficiary concerned, who is explicitly requested not to apply for co-financing in relation to non-eligible expenditure. The Beneficiary is also provided with relevant recommendations in order to ensure that such shortcomings are not repeated in future procurement. Furthermore, the MA instructs the Line Ministry and Treasury not to co-finance the irregular expenditure, or part of the expenditure in question.

Member States are not obliged to report cases of errors identified before payments are effected and before a Statement of Expenditure is sent to the Commission. This is in line with Article 28(2)(b) and (c) of Commission Regulation 1828/2006, which elaborates on the processing of cases that are detected and

corrected by the MA or CA before any payment to the Beneficiary of the public contribution and before inclusion of the expenditure concerned in a Statement of Expenditure submitted to the Commission.

For the purpose of maintaining an adequate audit trail, such detected errors are documented in the Verification Report and in email correspondence circulated among affected stakeholders, namely the Authorities and the Beneficiary concerned. Depending on the nature of the finding, the detected error could either be based on a percentage correction on the contract value (according to COCOF Note 07/0037/03) or a quantifiable amount.

b. Errors detected after Treasury's processing of invoices

When the MA detects an error following the Treasury's processing of invoices, the Authority draws up an Irregularity Report. This Report is a document used by all stakeholders in order to adequately maintain data pertaining to detected errors. It encompasses pertinent details of the project, as well as the factor/s leading to the error in question.

The report incorporates the following seven core components:

- i. *General Information*
This section lists the high-level details pertaining to the project and Beneficiary.
- ii. *Description of the Irregularity*
The nature of the expenditure involved, as well as the factors leading to the error being committed, are among the criteria that are registered here.
- iii. *Natural and/or Legal Persons Involved in Committing the Irregularity*
- iv. *Financial Details of the Irregularity*
The amount to be reimbursed by the Beneficiary is presented here, as well as the possibility of the future suspension of funds.
- v. *Follow-up*
This section of the Report ensures that the reimbursement of funds is duly effected. To this end, a five-step approach is applied, outlining the procedure to be adopted when cancelling the associated public contribution (including any corresponding EU funds) and claiming the relevant reimbursement from the Beneficiary. The process is to be finalised within an established three-month deadline.
- vi. *Recurrence*
This refers to action taken to avoid the repetition of such irregularities.
- vii. *Other*

When an Irregularity Report is drawn up, it is circulated among the relevant stakeholders for the correction of the detected error. As already stated, the detected error is either based on a percentage correction on the contract value or a quantifiable amount, depending on the nature of the error under consideration.

The MA carries out periodic reconciliations with the CA so as to ensure that the adjustments effected by the MA were in fact included in the application for payment to the Commission.

If the Authority drawing up the Irregularity Report is not the MA, then the MA is tasked with the responsibility for forwarding the Report to the relevant stakeholders, including the CA, the AA and the Anti-Fraud Co-ordinating Service for Malta. The latter Service forms part of the IAID.

The steps to be taken by the relevant stakeholders in order to deduct the irregular amount from the application for payment made to the EC are clearly stated in the Irregularity Report. The MA subsequently deducts the error amount from the next Statement of Expenditure of the project in concern. Furthermore, and in accordance with Articles 28, 30 and 36 of Council Regulation (EC) 1828/2006, the Member State is obliged to report to the Commission those irregularities detected after certification.

2.4.10 The AA's method of correcting the detected error is more straightforward than that of the MA. When an error is detected, an Irregularity Report is drawn up and forwarded to the MA. From its end, the AA reports all financial irregularities in a document entitled Annual Control Report, which is submitted to the EC in December of each year.

Preventing Errors

2.4.11 The MA stated that should an error be considered as serious or systematic in nature, the Authority would set up a meeting with the party that committed the infringement. Such meetings are aimed at better explaining the Authority's position and establishing the way forward through guidance on what was to be avoided. In its assessment to quantify corrections, the MA takes the reoccurrence of errors into consideration.

2.4.12 Apart from meetings held directly with Beneficiaries identified as having committed an irregularity, the MA organises training programmes for new beneficiaries. Such programmes provide the MA with an opportunity to emphasise the importance of adhering to the EU and national procurement regulations, particularly with respect to tendering procedures and the selection of offers, as well as other legislative requirements. Additional training programmes focus on training beneficiaries on issues pertinent to the implementation of approved projects. Such programmes are geared at providing recipients with insight into the findings and recommendations of local and pan European auditors. This type of training ensues the finalisation of audits on a number of selected projects.

2.4.13 The MA also holds meetings with the Director of Contracts in order to ensure that Beneficiaries are provided with guidance on the principles of equal treatment, non-discrimination, transparency, free movement and competition. Apart from ascertaining that these principles are being respected throughout the procurement process and by all parties concerned, through these meetings the MA seeks to elicit any pertinent changes that may be made to applicable procurement procedures.

2.4.14 On a day-to-day basis, the MA offers guidance to beneficiaries based on lessons learned and findings noted during verifications and audits. Furthermore, in view of the fact that the Department of Contracts (DoC) is responsible for public procurement across Government, the MA seeks to facilitate dialogue between this Department and the Beneficiary in order to ensure correct guidance.

2.4.15 Apart from the drawing up of Irregularity Reports, the AA issues recommendations to be taken on board by the relevant stakeholders. The recommendations, presented in the AA's annual audit report, reflected the auditors' opinion on how future similar errors could be prevented.

2.4.16 The CA stated that it endeavours to prevent errors by delivering presentations to Beneficiaries and key personnel from the various Authorities involved during the training sessions organised by the MA. The CA ensured that these presentations

highlighted the importance of affording meticulous attention to detail with respect to procurement aspects. Case studies of actual detected irregularities were presented for clarification purposes. Such training was also provided to new recruits during induction seminars.

- 2.4.17 Furthermore, the CA, at times, requested the MA to provide further clarification during its review of management verification reports and during expenditure testing. The CA stated that issues followed up in this way served to deter irregularities, as Project Leaders would, in turn, focus on these issues.

Public Procurement Education and Training within the Authorities

- 2.4.18 New MA recruits are introduced to the operating systems during their induction into the organisation. This training includes a comprehensive briefing on the applicable EU and national legal framework. The new recruits are also encouraged to attend induction courses, usually organised by the Public Administration. Such courses normally include presentations delivered by officials from the key stakeholders, including the MA, CA, AA, the DoC, the Treasury Department, and the VAT Department. Topics discussed during this type of training addressed the administrative structures and stakeholders of the Cohesion Policy, an introduction to project management, as well as the concept of publicity within co-financed projects, among others.
- 2.4.19 The MA stated that its management teams ensure that employees receive ongoing training and support on various aspects of EU funding, including information on the various aspects of the legal frameworks governing procurement. This is mainly achieved through attending relevant training programmes organised by accredited institutions and bespoke training programmes on public procurement geared at addressing noted shortcomings. The latter training programmes are organised periodically by the DoC, the MA and, at times, the AA.
- 2.4.20 In addition to the above, the MA has adopted an approach whereby new recruits are paired with senior officials within the organisation. This pairing is aimed at training employees in the conduct of checks and allows for on-the-job training on the principles applied in EU co-financing and on the checklist used at this stage of verification.
- 2.4.21 AA officials who carry out audits on EU co-financed projects attend local and foreign training. Furthermore, specialised training on updates to the public procurement legal framework is normally organised by the Centre for Development, Research and Training (CDRT), which organisation serves as Government's centralised training and development institution. AA officials also attend technical meetings organised by the EC, as well as other training seminars organised by private entities.
- 2.4.22 On the other hand, CA staff attended seminars on procurement regulations organised by the DoC in conjunction with the CDRT. The CA noted that the most recent course attended by the CA staff incorporated training on electronic procurement, which was delivered by officials of the DoC. Furthermore, the MA provided induction training to all new CA recruits, as well as to other stakeholders.

Chapter 3
An In-depth Analysis of Errors
in Public Procurement
within the Operational Programmes

Chapter 3 - An In-depth Analysis of Errors in Public Procurement within the Operational Programmes

3.1 Publicly Procured Projects for the Period 2010-2013

3.1.1 Table 6 illustrates the number of projects declared to the EC for the years 2010 to 2013 and further specifies those carried out through public procurement. The corresponding funding amounts are categorised by the OP and the financial year under which such expenses were classified.

Table 6: Projects Declared for the Period 2010-2013

Audited OP	Financial year	All projects declared to the EC in the financial years 2010-2013		Projects (declared to the EC in the financial years 2010-2013) carried out through (EU) public procurement	
		Number of projects	Eligible costs declared by Beneficiary (€)	Number of projects	Eligible costs declared by Beneficiary (€)
CF (OPI)	2010	5	46,492,690	5	46,492,690
	2011	4	14,602,183	4	14,602,183
	2012	7	34,393,526	7	34,393,526
	2013	10	51,897,634	10	51,897,634
	Sub-total	26	147,386,033	26	147,386,033
ERDF (OPI)	2010	38	29,957,436	32	18,642,637
	2011	58	79,725,259	43	65,285,276
	2012	53	68,408,954	38	47,816,627
	2013	75	114,754,437	46	91,441,638
	Sub-total	224	292,846,086	159	223,186,178
ESF (OPII)	2010	29	5,923,269	28	5,896,933
	2011	38	15,726,531	34	14,794,108
	2012	45	19,394,725	41	15,474,869
	2013	53	30,633,399	48	19,018,172
	Sub-total	165	71,677,924	151	55,184,082
Total		415	511,910,043	336	425,756,293

3.1.2 A total of 415 projects were declared to the EC during the period 2010-2013, the value of which amounted to €511,910,043. Of these, 336 projects (equivalent to 81 per cent of all projects) were effected through public procurement and were valued at €425,756,293. Hence, 83 per cent of all funding was carried out through public procurement. All 26 CF projects and 159 out of the 224 (71 per cent) ERDF projects were executed through public procurement. In monetary terms, the latter percentage increases to 76 percent, denoting that the total value of publicly procured projects within ERDF was higher in value than the value of the projects that were not publicly procured. Conversely, in the case of ESF projects, 92 per cent of the projects were carried out through public procurement, which percentage decreases to 77 per cent when calculated in terms of materiality.

3.1.3 Figure 1 and Figure 2 provide a graphical illustration of the categorisation of such projects in terms of numbers and declared expenditure.⁵

Figure 1: Categorisation of Number of Projects by OP and Public Procurement

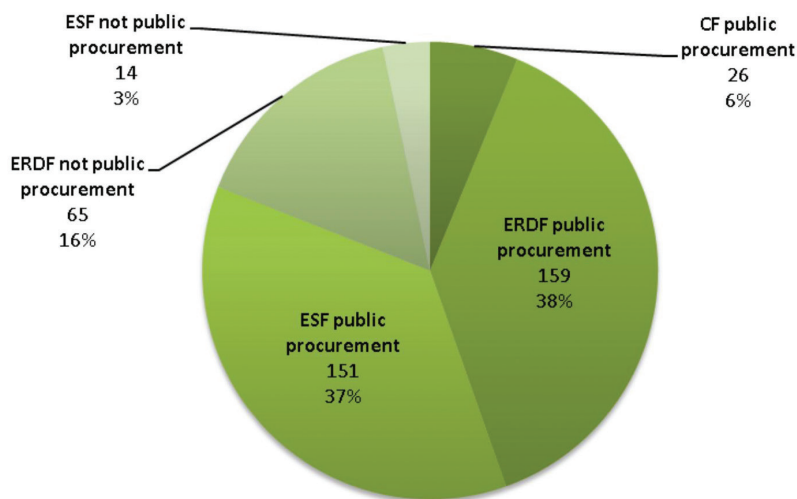
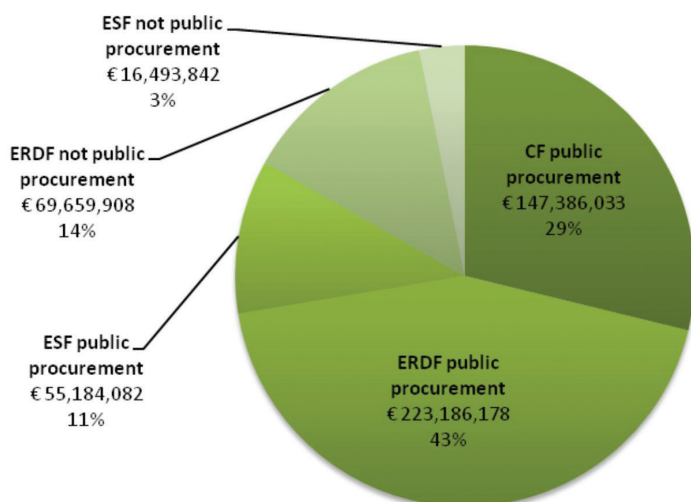


Figure 2: Categorisation of Cost of Projects by OP and Public Procurement



⁵ It should be noted that projects classified as 'ERDF not public procurement' refer to Aid Schemes and projects implemented by voluntary organisations, which are not subject to public procurement regulations.

3.2 Errors Detected by the Managing Authority during the Period 2010-2013

- 3.2.1 The amounts referred to in the preceding section provide the context for a more detailed analysis of the errors detected between 2010 and 2013. The NAO analysed all errors detected by the MA during the audit period, which accounted for a total of 19 errors. In the case of OPI (CF and ERDF), four types of errors were detected, corresponding to eight errors in total, while the remaining 11 errors corresponded to OPII. To this end, Table 7 and Table 8 provide a record of where and when errors were detected within OPI and OPII, respectively.
- 3.2.2 The analysis of data presented in Table 6 and Table 7 indicates that the amount of irregular expenditure as a percentage of the value of publicly procured projects for OPI was that of 0.18 per cent.⁶ On average, the amount of financial corrections applied corresponded to approximately 18 per cent of the detected irregular expenditure. When analysing this average percentage in more detail, it can be noted that this varied significantly between error types, from the five per cent registered under Error 24 to the 25 per cent recorded under Errors 2 and 22. While the spread of errors across the various categories was largely uniform, the most recurrent error was that relating to the 'Breach of Principle of Equal Treatment'. Each of the cases listed in Table 7 is expounded upon in greater detail further on in this Chapter.
- 3.2.3 A high-level analysis of Table 8 illustrates that the percentage of irregular expenditure on publicly procured projects under OPII was 2.97 per cent,⁷ that is, notably higher than that of OPI. Furthermore, as in the case of OPI, the error categorised as 'Breach of Principle of Equal Treatment' featured prominently within OPII, with six attributable instances. A number of differences emerge when comparing the two OPs. First, the percentages of financial corrections applied to the irregularities varied between 9 and 69, with the former registered under Errors 5 and 24, and the latter recorded under Error 23. Second, notwithstanding the greater disbursement of funds under OPI, the errors detected in OPII were higher, accounting for a total of €42,094 (€158,713 less €116,619) more in terms of financial corrections than those registered in OPI.

⁶ The 0.18 per cent calculation of irregular expenditure as a percentage of publicly procured projects under OPI was arrived at as follows – the total eligible cost declared by the Beneficiaries with respect to CF (€147,386,033) and ERDF (€223,186,178) projects carried out through public procurement was that of €370,572,211. The amount of irregular expenditure detected by the MA with respect to OPI was that of €648,708, which when considered as a percentage of €370,572,211, amounts to a 0.18 per cent irregularity.

⁷ The 2.97 per cent calculation of irregular expenditure as a percentage of publicly procured projects under OPII was arrived at as follows – the total eligible cost declared by the Beneficiaries with respect to ESF projects carried out through public procurement was that of €55,184,082. The amount of irregular expenditure detected by the MA with respect to OPII was that of €1,637,509, which when considered as a percentage of €55,184,082, amounts to a 2.97 per cent irregularity.

Table 7: OPI Public Procurement Errors Detected by the MA for the period 2010-2013

Type of error		Financial year	Errors detected by the MA through administrative verifications		
			Number of projects	Amount of irregular expenditure (€)	Amount of financial corrections (€)
Contracts subject to EU public procurement directives					
A. Selection of the type of procedure					
2	Non-compliance with the advertising procedure (but advertised to some extent)	2011	1	228,980	57,245
		2012	1	144,790	36,197
		Sub-total	2	373,770	93,442
B. Tendering procedure					
5	Failure to state all the selection and contract award criteria in the tender documents or tender notice	2013	1	70,560	7,056
		Sub-total	1	70,560	7,056
Contracts not or not fully Subject to the EU public procurement directives (below thresholds)					
22	Attribution of contracts without competition in the absence of extreme urgency or for complementary works brought about by unforeseeable events	2011	1	7,080	1,770
		2013	1	21,187	5,297
		Sub-total	2	28,267	7,067
24	Breach of the Principle of Equal Treatment	2010	1	51,151	2,558
		2013	2	124,960	6,496
		Sub-total	3	176,111	9,054
Total				648,708	116,619

Table 8: OPII Public Procurement Errors Detected by the MA for the period 2010-2013

Type of error		Financial year	Errors detected by the MA through administrative verifications		
			Number of projects	Amount of irregular expenditure (€)	Amount of financial corrections (€)
Contracts subject to EU public procurement directives					
B. Tendering procedure					
5	Failure to state all the selection and contract award criteria in the tender documents or tender notice	2011	1	594,510	59,451
		2012	1	184,008	9,200
		Sub-total	2	778,518	68,651
7	Unlawful selection and/or contract award criteria laid down in the tender procedure	2013	1	648,613	64,861
		Sub-total	1	648,613	64,861
C. Management of contracts					
10	Reduction in the scope of the contract without proportional reduction in the value of the contract	2013	1	31,388	3,139
		Sub-total	1	31,388	3,139
Contracts not or not fully subject to EU public procurement directives (below thresholds)					
23	Application of unlawful selection and/or contract award criteria	2012	1	8,750	5,994
		Sub-total	1	8,750	5,994
24	Breach of the principle of equal treatment	2010	2	358	24
		2011	2	6,999	350
		2012	2	162,883	15,694
		Sub-total	6	170,240	16,068
Total			11	1,637,509	158,713

3.3 Errors Detected by the Audit Authority during the Period 2010-2013

3.3.1 NAO analysed all 10 errors detected by the AA between 2010 and 2013. Table 9 and Table 10 present the details pertaining to errors detected by the Authority, categorised according to their financial year and OP.

3.3.2 Rendered immediately evident in Table 9 and Table 10 is the fact that the vast majority of errors detected by the AA corresponded to OPI. NAO is of the opinion that this situation might be attributable to the sampling approach adopted by the AA, which is geared towards projects with considerable materiality, among other criteria. Given the greater incidence of projects with a higher value under OPI, this might influence the sampling of more projects within OPI and therefore result in more errors being detected in this Programme. NAO noted that the amount of irregular expenditure detected as a percentage of publicly procured projects stood at 0.25.⁸

⁸ The 0.25 per cent calculation of irregular expenditure as a percentage of publicly procured projects under OPI was arrived at as follows – the total eligible cost declared by the Beneficiaries with respect to CF (€147,386,033) and ERDF (€223,186,178) projects carried out through public procurement was that of €370,572,211. The amount of irregular expenditure detected by the AA with respect to OPI was that of €916,157, which when considered as a percentage of €370,572,211, results in a 0.25 per cent rate of irregularity.

The average percentage of financial corrections applied to errors detected by the AA was that of 6.75 per cent, which varied between five per cent in the case of Error 24, and 25 per cent as recorded with respect to Error 3. One public procurement irregularity was detected by the AA with respect to OPII. This amounted to €462, as did its corresponding financial correction.

Table 9: OPI Public Procurement Errors Detected by the AA for the period 2010-2013

Type of error		Financial year	Errors detected by the AA through administrative verifications		
			Number of projects	Amount of irregular expenditure (€)	Amount of financial corrections (€)
Contracts subject to EU public procurement directives					
A. Selection of the type of procedure					
3	Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or the absence of an unforeseen circumstance for complementary works and services or for supplies.	2013	1	57,252	14,313
		Sub-total	1	57,252	14,313
C. Management of contracts					
12	Incorrect application of certain ancillary elements	2012	4	615,843	32,283
		2013	3	140,770	10,099
		Sub-total	7	756,613	42,382
Contracts not or not fully subject to EU public procurement directives (below thresholds)					
24	Breach of the principle of equal treatment	2013	1	102,292	5,115
		Sub-total	1	102,292	5,115
Total			9	916,157	61,810

Table 10: OPII Public Procurement Errors Detected by the AA for the period 2010-2013

Type of error		Financial year	Errors detected by the AA through administrative verifications		
			Number of projects	Amount of irregular expenditure (€)	Amount of financial corrections (€)
Contracts subject to EU public procurement directives					
C. Management of contracts					
12	Incorrect application of certain ancillary elements	2012	1	462	462
Total			1	462	462

3.4 Errors Detected by the European Commission during the period 2010-2013

3.4.1 The EC detected one error in its reviews of Malta’s OPs, as illustrated in Table 11. Although this was the sole error detected by the EC, the reimbursable amount was significantly higher than the aggregate sum of those detected by the MA and AA. The financial correction raised by the EC is equivalent to 73 per cent of the aggregated financial corrections effected by the MA, CA, AA and the EC itself. In terms of amount of irregular expenditure detected, this accounted for 54 per cent of the aggregated irregularities detected by the Authorities and the EC.

Table 11: OPII Public Procurement Errors Detected by the EC for the period 2010-2013

Type of error	Financial year	Errors detected by the AA through administrative verifications			
		Number of projects	Amount of irregular expenditure (€)	Amount of financial corrections (€)	
Contracts subject to EU public procurement directives					
A. Selection of the type of procedure					
2	Non-compliance with the advertising procedures	2012	1	3,786,104	946,526

3.5 A Review of Detected Errors

3.5.1 This Section of the Report provides details on the errors, including the rationale employed with respect to decisions taken by the stakeholders that detected such irregularities. In its review of already detected errors, NAO referred to the related Irregularity Reports. As noted in Chapter 1, NAO verified the five highest irregularities by obtaining the relevant documentation retained by the Beneficiaries concerned or the DoC.

Error 2 – Non-compliance with the advertising procedure (but advertised to some extent)

3.5.2 The MA detected this error twice, once in 2011 and again in 2012. The 2011 error related to a project entitled ‘Modernising the University of Malta’s Control Systems Engineering’, while the project corresponding to the 2012 error was entitled ‘Fort St Elmo Heritage Experience – Museum and Rampart Walk’. The error detected by the EC also falls under this category and resulted in the project, entitled ‘Professional Development Programme for MCAST Staff and Students’ Top-up Degrees’, registering a deduction in funding of approximately €1 million. The ensuing paragraphs provide an analytical account of the error type under review.

Modernising the University of Malta’s Control Systems Engineering – 2011, MA, OPI

3.5.3 In the case of this error, Article 90 of Council Regulation (EC, Euratom) 1605/2002 was infringed, which Article stipulates that when a contract exceeds certain thresholds, its related contract notice should be published in the Official Journal of the European Union (OJ). The MA noted that the tender had been published twice, yet the DoC failed to include details of the contract notice in the OJ for the second publication.

- 3.5.4 However, the contract in question had been advertised to some extent, as it was published in the Malta Government Gazette. This document was readily available through the Department of Information website, thereby allowing economic operators located in other Member States to access the contract notice. Furthermore, the Notice of Publication was also made available through the DoC website.
- 3.5.5 As per the Guidelines for Determining Financial Corrections under Error 2, the MA applied the 25 per cent correction to the applicable contract amount of €228,980. The amount of irregular expenditure determined by the MA was established as €57,245, of which €48,658 were payable to the EU, while €8,587 were payable to the Treasury Department.
- 3.5.6 A review of supporting documentation by the NAO confirmed the MA's finding. This Office verified that, although the first call for tenders was issued in the OJ, there was no reference to the second instance of publication in this Journal.

Fort St Elmo Heritage Experience – Museum and Rampart Walk – 2012, MA, OPI

- 3.5.7 The irregularity found within this project resulted from a breach of Article 103 of EC 966/2012 and Article 35(2) of Directive 2004/18/EC. This project was in breach of EC Regulations due to the fact that the estimated value of the two contracts exceeded the EU threshold for public service contracts and the Contracting Authority did not publish the contract notice in the OJ.
- 3.5.8 The Contracting Authority, however, did publish the Call for Tenders in the Malta Government Gazette, as well as in two local newspapers. The published call was also accessible from the Grand Harbour Regeneration Corporation website. Of note is the fact that although the contract was awarded without fully complying with the advertising requirements established as per the EC Public Procurement Directives, it was still advertised to allow economic operators located abroad access to the contract. In fact, one of the two contracts was awarded to a foreign economic operator.
- 3.5.9 In view of the above, the MA applied a financial correction of 25 per cent to the irregularity amount listed in the two invoices, which totalled €36,197. In its Irregularity Report, the MA noted that any other invoices issued under these two contracts were to reflect the 25 per cent correction on the public eligible value of the invoice concerned.
- 3.5.10 As indicated, this irregularity featured in the highest five cases that the NAO sought to verify. The documentary evidence reviewed by NAO in relation to this error confirmed findings as in fact reported by the MA, with no record of relevant contract notices published in the OJ by the Contracting Authority.

Professional Development Programme for MCAST Staff and Staff and Students' Top-up Degrees – 2012, EC, OPII

- 3.5.11 Detected by the Directorate General for Employment, Social Affairs and Inclusion, this error related to training costs. During the EC's review of the tender in concern, it was noted that the Beneficiary did not follow public procurement procedures in line with the provisions of Directive 2004/18/EC. The Beneficiary had requested a derogation from the application of the national public procurement legislation on grounds that the types of services that were to be provided were research and

development. However, in the auditors' opinion, the services provided within the contract did not fulfil the requirements of research and development and should have been considered as education and vocational education services.

3.5.12 According to the EC auditors' assessment, the contract was relevant to the internal market, taking into consideration its high value, limited number of local providers, and its subject matter. After due analysis of the documentation provided, the Commission's auditors concluded that the level of advertising was insufficient to enable the tender to be wholly open to competition. Hence, the award procedure was inadequate and a correction of 25 per cent, amounting to €946,526, was due in connection with the requirement of an adequate degree of advertising.

3.5.13 Being the largest irregularity, this error featured in the highest five that the NAO verified. The documentary evidence referred to with regard to this error was, in fact, as reported by the EC. A critically important aspect of the documentation reviewed was the request by MCAST to DoC for the exemption from the public procurement procedure regulating such expenditure. NAO noted that the request put forward by MCAST strongly emphasised the research component of this project, which could have influenced DoC in its approval of the departure from an open call advertised within the EU market to a direct contract.

Error 3 – Attribution of contracts without competition in the absence of extreme urgency

Cirkewwa Ferry Terminal – 2013, AA, OPI

3.5.14 This error, as detected by the AA, constituted additional works carried out by the Beneficiary but not classified as arising out of extreme urgency brought about by unforeseeable events or circumstances. According to the COCOF Guidelines, the full amount was to be deducted from the project's funding. However, this can be reduced to 25 per cent "where the total of additional works/services/supplies contracts (whether or not formalised in writing) awarded without complying with the provisions of the Directives does not exceed the thresholds of the Directive and 50 per cent of the value of the original contract." Since the cost of the additional works amounted to €57,252 and the total contract value stood at €10,683,282, the reduction from 100 per cent to 25 per cent was possible and subsequently applied.

Error 5 – Failure to state all the selection and contract award criteria in the tender documents or tender notice

3.5.15 The MA detected this error once in OPI (in 2013) and twice in OPII (once in 2011 and another time in 2012). The error spanned across three projects and the Authority's analytical reviews are presented in the ensuing paragraphs.

Second Step Training Programme – 2011, MA, OPII

3.5.16 The error under review amounted to €59,451, the nature of which involved the procurement of training services. In this regard, the tender document failed to adequately explain the methodology that was to be adopted in the evaluation process, thereby failing to fully adhere to the principles of public procurement. In this respect, the tender document fell short of:

- a. Clearly stating the scoring methodology – bidders were not informed of the basis on how the additional information they submitted would be scored.

- b. Clearly distinguishing between the selection and award criteria – certain award criteria, such as the certification signed by competent authorities, should have been presented as selection criteria.

3.5.17 According to the COCOF Guidelines, the financial correction for this type of error should vary between 5 and 25 per cent. The MA established that a 10 per cent correction was to be applied to this contract. This percentage was arrived at after considering that:

- a. The call was advertised according to the applicable legal frameworks; and
- b. The results were published and the procurement procedure allowed for appeals to be made through an independent body (the Public Contracts Appeals Board).

Strengthening Information Management Units and Other Related Functions through Specialist Training Programmes – 2012, MA OPII

3.5.18 In its review of this contract, the MA noted inconsistencies in the tender document that rendered the awarding procedure inadequate. This, in turn, led to shortcomings by the Adjudication Board, particularly in its failure at ensuring compliance with award criteria as stipulated in the tender document. More specifically, and further to its review, the MA noted that the winning bid was not the cheapest compliant offer. In view of this irregularity, the MA decided on a financial correction of five per cent, amounting to €9,200.

Technical Assistance – 2013, MA, OPI

3.5.19 The error came to light after the conduct of an administrative verification by the MA on 16 January 2013. Although the contract was compliant with the advertising rules of the public procurement directives, the tender document failed to sufficiently describe the award criteria. More specifically, the Instructions to Tenderers section within the tender document stated that “*this is a fee-based contract*” and bidders were invited to quote a rate per unit of measurement. This document, however, did not specify the unit of measurement; moreover, the Contracting Authority did not provide an estimate of the quantities required. This error amounted to €7,056, equivalent to 10 per cent of the €70,560 invoiced amount.

3.5.20 The MA also noted that the contract called for the services of a qualified and experienced ICT Engineer, with a relevant degree in ICT and the respective warrant or equivalent. However, the expert proposed by the winning bidder was neither in possession of the relevant degree nor the equivalent qualifications.

Error 7 – Unlawful selection and/or contract award criteria laid down in the tender procedure

Employability Programme – OPII, MA, 2013

3.5.21 A number of shortcomings were noted by the MA with respect to this project, namely:

- a. Ancillary documentation was not available, including letters of appointment of members on the Evaluation Committee and the requisite Declarations of Impartiality.
- b. The established selection criteria within the Instructions to Tenderers were frequently disregarded.

- c. Some shortlisted (and contracted) bidders were not compliant with the specifications stipulated in the terms of reference of the tender document.
- d. Bidders were awarded contracts for items that they had not tendered for.
- e. A number of submitted bids were not retained in file.
- f. Occasionally, the Interviewing Board signatories, tasked with selecting bidders, were not the persons nominated by the Beneficiary's Chairperson (designated with the responsibility to appoint the Board).
- g. Training was delivered beyond the expiration of the established year-long contract, with payments made to this effect without an addendum in place.
- h. Supporting documentation of the delivery of training was missing in its entirety.
- i. Instances of missing attendance sheets.
- j. Trainers were, at times, paid for sessions that they did not deliver.
- k. On some occasions, the time stated in timesheets differed from the timetable, resulting in an over claim in the number of hours declared.
- l. Inconsistencies were noted between the time schedules on the timesheets and those on the attendance sheets.

3.5.22 The MA established a 10 per cent financial correction applicable as a result of the shortcomings in project management and control systems. This irregularity, which resulted in a financial correction of €64,861, was among the highest five corrections. However, further to discussions with the Beneficiary, this Office decided not to verify this irregularity as this process was deemed unfeasible due to the fragmented nature of the expenditure concerned.

Error 10 – Reduction in the scope of the contract without proportional reduction in the value of the contract

Dignity for Domestic Violence Survivors – 2013, MA, OPII

3.5.23 This error related to deliverables and services of an awareness-raising campaign. In its review of the final report drafted by the Beneficiary, the MA noted that it did not comprise the necessary level of detail to provide assurance of the delivery and distribution of wall signage and posters. Furthermore, no documentation regarding public relations activities, as stipulated in the contract, was found in file.

3.5.24 The MA applied a 10 per cent financial correction to all related expenses, consisting of a partial application of the recommended percentage in view of the fact that the deliverables in question were partially effected. The value of the financial correction established with respect to this project was that of €3,139.

Error 12 – Incorrect application of certain ancillary elements

Furnishing and Equipping of the Chemistry and Biology Building Extensions – 2012, AA, OPI

3.5.25 The AA detected three errors within this project. In the first case, the selected bidder submitted a bid bond equivalent to €1,300; however, the corresponding tender dossier had stipulated that the value of the bid bond should have been that of €1,400. As a consequence, a five per cent financial correction was applied to the contract amount of €16,604, resulting in an €830 deduction from the project at the Beneficiary's cost.

3.5.26 In the second and third cases, the Beneficiary erroneously procured two additional items that were not specified in the tender document. The cost of the items,

comprehensively amounting to €1,569, was deducted in its entirety from the project's funding.

Manufacturing Research Platform – 2012, AA, OPI

3.5.27 This error was committed after a failed open procedure for the contract, when the Beneficiary subsequently directly negotiated a contract with the University of Malta on the basis of Article 16(3) of the Public Procurement Regulations. This Article states that, *“These regulations shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or administrative provision which is compatible with the EC Treaty.”* The AA was of the opinion that no such exclusive rights were in place with respect to the contract in question. Hence, this Article should not have been resorted to in order to award the contract. After taking into consideration the fact that the tender was initially offered in the open market, a financial correction of five per cent was applied to the value of the contract, resulting in a €29,884 setback for the Beneficiary.

3.5.28 This irregularity was among the five selected for NAO's verification. This Office noted that, prior to initiating negotiation procedures, the Beneficiary had sought advice from the DoC. Through correspondence exchanged in this respect, the Beneficiary asked the then Director of Contracts if it could enter into direct negotiations with a supplier and was informed that the proposed contracting procedures were in line with the Public Contracts Regulations. In NAO's view, while the AA was correct in classifying this shortcoming as an error, the Beneficiary's culpability is somewhat mitigated or shared with the DoC, whose advice was appropriately sought.

Strategic Educational Pathway Scholarships – 2012, AA, OPII

3.5.29 With respect to this error, the Beneficiary entered into an agreement for the leasing of equipment. Another agreement was subsequently entered into with the same supplier for the provision of further services relating to the same equipment at an additional cost. However, these services should have been provided under the first agreement at no further cost. In this regard, the AA deducted the full amount relating to the second agreement that the Beneficiary had entered into, that is, €462.

Restoration and Rehabilitation of the Historic Fortifications of Malta and Gozo – 2013, AA, OPI

3.5.30 In this case, the AA noted that the Beneficiary had included a number of modifications to the contract without obtaining the necessary approvals. In this regard, the AA sought to obtain justifications; however, these were considered inadequate by the Authority. The AA subsequently decided on a 25 per cent financial correction to the contract value, amounting to €2,144.

Archaeological Heritage Conservation Project – 2013, AA, OPI

3.5.31 Two errors were detected within this project. One consisted of an additional payment for work that had already been included in the final amount of the original contract. More specifically, the contractor was required to *“prepare all necessary drawings and documentation for the submission of the relevant Full Development Application/s to MEPA, follow-up of the same application, including submission of any additional requirements and amendment requested”*. However, €1,416 was paid to the Contractor for drawings and documentation prepared with respect to the

inclusion of water reservoirs. Hence, it transpired that the full amount claimed and reimbursed to the Beneficiary constituted ineligible expenditure and was deducted from the project's funds.

3.5.32 The other error related to the award of a contract not being carried out in the correct manner. This contract was initially issued under two lots. However, while Lot 2 was awarded, Lot 1 was cancelled following an evaluation of offers due to a lack of necessary funds. This Lot was subsequently awarded through a direct contract. The AA noted that:

- a. The price for Lot 2, amounting to €110,828 (excl. VAT), exceeded the budget published in the contract notice, which was set at €92,500 (excl. VAT); and
- b. The budget for Lot 1, initially set at €70,000, was increased in order to award the Lot through a direct contract.

3.5.33 After the AA's consideration of the above, and following the contradictory procedure with the MA, a five per cent financial correction was effected on the contract amount of Lot 2, amounting to a deduction of €6,539 from the project's funding amount.

Error 22 – Attribution of contracts without competition in the absence of extreme urgency or for complementary works brought about by unforeseeable events

Developing National Environmental Monitoring Infrastructure and Capacity – 2011, MA, OPI

3.5.34 In this case, the original contract was awarded correctly following a transparent and competitive procedure. However, this was followed by a supplementary contract for other services without adequate competition and in the absence of extreme urgency brought about by unforeseeable events. The irregularity was quantified at 25 per cent of the additional contract, amounting to a financial correction of €1,770.

Birkirkara Heritage Route: Discovering Our Past by Uncovering Historical Gems – 2013, MA, OPI

3.5.35 During a management verification exercise carried out by the MA, it was noted that a request for the approval for additional funds to cover additional costs was sent to the Authority on 2 November 2012. Although the MA did not assent to this request, largely due to the limited information and feedback provided, the Beneficiary nevertheless treated additional costs as eligible expenditure and subsequently submitted the related invoices to the MA. Following additional clarifications obtained, the Authority agreed to pay 75 per cent of the additional expenditure, thereby automatically applying a 25 per cent financial correction. The irregularity was quantified by identifying the relevant non-approved activities from the invoices and corresponding Bills of Quantities and then paying 75 per cent of these expenses. The value of the financial correction applied to this project was that of €5,297.

Error 23 – Application of unlawful selection and/or contract award criteria

Promoting Lifelong Learning among Civil Society Organisations' Voluntary Staff – 2012, MA, OPII

3.5.36 This error was committed within one project and consisted of the utilisation of the incorrect award criteria. More specifically, the tender document indicated that the award criteria were to be based on the principle of the most economically

advantageous offer; however, a different set of criteria was used during the evaluation stage. The evaluation committee gave no weight to the financial aspect of the tender, whereas experience was factored in when this should not have been so. The MA maintained that the outcome would have probably changed had the correct criteria been applied.

3.5.37 Moreover, the MA noted that invoiced expenditure was for 20 participants, whereas the supporting attendance sheets recorded the signatures of seven participants. Therefore, only part of the invoice was deemed eligible for co-funding.

3.5.38 After taking into consideration the above shortcomings, the MA applied a 10 per cent financial correction on the seven participants, as per COCOF Guidelines. Furthermore, no co-funding was provided with respect to the other 13 participants that the MA was invoiced for. In total, the financial correction applied was that of €5,994.

Error 24 – Breach of the principle of equal treatment

3.5.39 This irregularity was detected 10 times within public procurement projects during the period under consideration. The first nine instances described hereunder related to those detected by the MA, while the last instance was detected by the AA.

A Super-computing Laboratory for the University of Malta – 2010, MA, OPI

3.5.40 In this case, a Departmental Tender was awarded to a bidder who, despite not submitting the mandatory bank guarantee, was nevertheless considered administratively compliant following an intervention by one of the technical evaluators. This technical evaluator, who also was a member of another separate committee, stated that the bidder had submitted the relevant document as part of a tendering procedure for another tender. However, the MA noted that, based on the principles of transparency and equal treatment, the winning bidder should have been disqualified on grounds of administrative non-compliance, given that every tender is a separate process and every bid should be treated on its own merit, irrespective of the quality and content of other bids.

3.5.41 After deliberating on the financial correction that was to be applied, the MA decided on a five per cent charge to the project, that is, €2,557. This deduction was applied due to the fact that, despite the administrative non-compliance, the bidder was technically compliant, had delivered the required goods on time and as requested in the tender document, and offered the cheapest bid.

Specialised Research and Development on Occupational Health and Safety – 2010, MA, OPII

3.5.42 This error was straightforward, in that the Beneficiary did not opt for the cheapest bid for the purchase of a toner. A 10 per cent financial correction was applied in relation to this expense, amounting to €12.

Employability Programme – 2010, MA, OPII

3.5.43 Following an analysis of the procurement of training services, the MA noted that a particular bidder did not meet the eligibility criteria but was nevertheless contracted. More specifically, the bidder in concern did not possess the required qualifications. This error cost the Beneficiary a five per cent correction, which amounted to €12.

Dignity for Domestic Violence Survivors – 2011, MA, OPII

3.5.44 This error consisted of the Beneficiary not selecting the cheapest quotation for the procurement of a venue for training. Although the selected bidder had ultimately reduced the prices of certain items in the invoice and ended up as the cheapest bidder, the cheapest option available at evaluation stage was not selected. Hence, this was considered to constitute an error and a five per cent deduction, amounting to €223, was applied to the invoiced amount relating to the procurement in question.

Care Creates Change in People's Lives and the Environment – 2011, MA, OPII

3.5.45 When awarding a contract for the temporary services of teaching staff, the Beneficiary selected a service provider who did not meet all the eligibility criteria as stipulated in the tender document. In addition, MA stated that the awarding of training groups was not in line with bids. A five per cent correction was applied to the corresponding contract, equivalent to €127.

Creating a Knowledge Transfer Framework and a Technology Entrepreneurship Training Programme – 2012, MA, OPII

3.5.46 When awarding the contract for the provision of publicity services, the selected service provider did not meet one of the selection criteria stipulated in the tender document. At bidding stage, the selected service provider had not provided details of similar services provided or items produced during the years 2009, 2010 and 2011 above a €3,000 threshold. In view of this, the MA applied a five per cent correction to the contract amount that had been paid up to the date of detection. The financial correction applied with respect to this error was that of €594.

Empowering Pyrotechnicians for Longevity and a Safer Quality of Workplace – 2012, MA, OPII

3.5.47 This error was noted by the MA in three contracts within this project and involved Training, Research, and Project Management. Furthermore, various related shortcomings were identified in this regard, namely:

- a. The tender award criteria that were to be applied for all three tenders was the Most Economically Advantageous Tender, yet this was not subsequently indicated within the tender document.
- b. Bid bonds entered into by the bidders were for a shorter period than that requested in the tender document. Under such circumstances, bidders should be considered administratively non-compliant; however, such bids were accepted, considered valid, and contracts subsequently awarded.
- c. The tender document specified that bidders were to indicate whether sub-contracting was to be undertaken; however, this information was not included in all the bids received.
- d. Management verifications carried out by the MA revealed a probable link between the two operators contracted for the delivery of training, research and project management, and the appointed individuals involved in the project partnership and discussion.
- e. Performance guarantees were not furnished.

3.5.48 In view of the above, the MA decided on the highest financial correction percentage applicable, which in this case was that of 10 per cent. In total, the irregularities related to these contracts amounted to €15,100.⁹

Rehabilitation and Restoration of Closed Landfills – 2013, MA, OPI

3.5.49 Procurement for these services was sought directly from the market without the necessary approvals and without providing the necessary justification required for the amount involved, the urgency associated with this procurement and restrictions of choice as well as availability. In view of the fact that the Beneficiary had limited the opportunities for economic operators to compete in the open market for these contracts, the MA set a 10 per cent correction on the value of the contract, amounting to €496.

Ćirkewwa Ferry Terminal – 2013, MA, OPI

3.5.50 The error related to this project involved the lease of a temporary infrastructure. After two failed attempts at procuring the required services, the Beneficiary requested the relevant Ministry's approval to opt for a request for quotations, which would subsequently lead to a direct contract. In its request, the Beneficiary had specified that it would, "invite all the companies who participated in either one or the other of the previous tenders to quote for the supply and lease of the passenger shelter at Ćirkewwa for a shorter 18 month period". However, one of the bidders that participated in the first call was not requested to submit a quotation. The MA quantified this irregularity at five per cent, amounting to €6,000, excluding VAT.

Restoration and Rehabilitation of the Historic Fortifications of Malta and Gozo – 2013, AA, OPI

3.5.51 With respect to this error, the AA stated that certain selection criteria initially specified in an open call for tenders were changed when the cancelled open procedure was replaced by a negotiated procedure. The cancellation of the open procedure and the permission to start a negotiated procedure is allowed under the Public Procurement Regulations; it was the changes to the terms of reference that were considered in breach of such Regulations. As a result of the latter, it was deemed that the contract was awarded in breach of the principle of equal treatment and a financial correction of five percent of the value of the contract, equivalent to €5,115, was recommended and effected.

3.6 Errors Detected by the Beneficiaries

3.6.1 During its analysis of detected errors, NAO noted that two Beneficiaries detected a public procurement error, which in total amounted to €7,167. Details relating to these errors are presented hereunder, each classified according to its corresponding project.

Care Creates Change in People's Lives and the Environment – 2011, Beneficiary, OPII

3.6.2 The contract within which the error was detected related to the temporary services of a career mentor. The service provider did not honour the contract and provide the services agreed to. In view of this, a 60 per cent error rate was applied to the

⁹ The MA indicated that this project was subsequently withdrawn and all expenditure cancelled.

contract value, amounting to €2,376. The Beneficiary subsequently informed the service provider that the contracted services were no longer required and that no future payments were going to be effected on this contract.

- 3.6.3 Further to this error, the Beneficiary noted that it had improved the management of the project by separating the operational and administrative functions and fine-tuned its support function. The Beneficiary also stated that these measures had prevented the recurrence of similar future irregularities.

Professional Development Programmes and Top-up Degrees – 2011, Beneficiary, OPII

- 3.6.4 In this case, the Beneficiary noted that a particular training programme was not delivered in accordance with its corresponding contract. The training programme was declared complete on the Beneficiary's system, but further checks indicated that the delivery of the programme was not actually completed. The value of the financial correction applied was €4,791.

- 3.6.5 The Beneficiary noted that, although the irregularity was detected by its own internal control system, all invoices were rechecked. Furthermore, the Beneficiary indicated that it would be paying greater attention when checking attendance sheets and training certificates.

3.7 Follow-up Action and the Authorities' Recommendations

- 3.7.1 During its analysis of detected irregularities, the NAO noted that the various Authorities and stakeholders provided recommendations for the prevention of future potential irregularities. This Office categorised the main recommendations, which are presented in the ensuing paragraphs.

- 3.7.2 A frequent recommendation related to the publication in the OJ of contract notices of tenders whose estimated values exceeded the EU threshold. In this regard, the MA emphasised the importance of double-checking in order to avoid such occurrences.

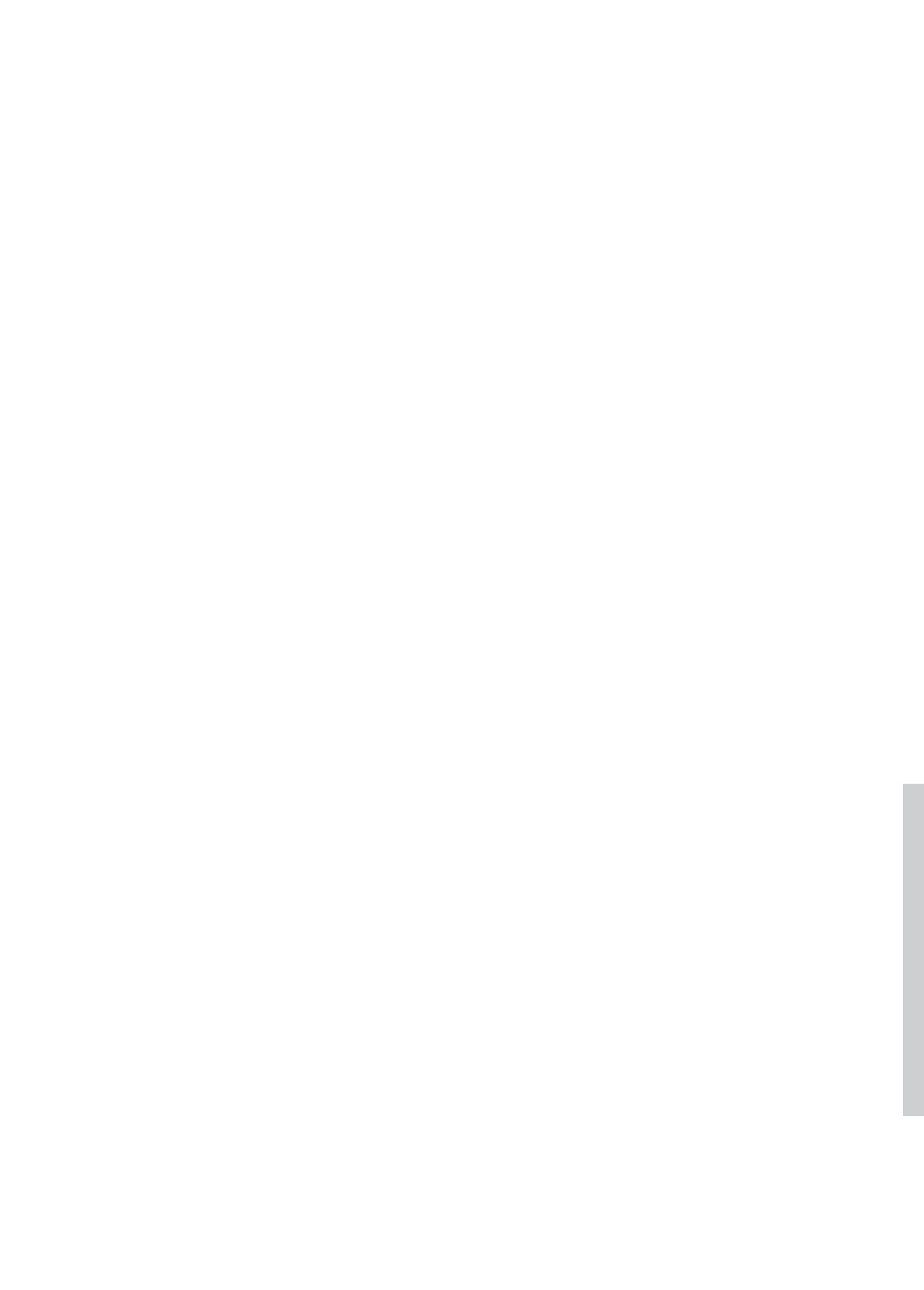
- 3.7.3 Beneficiaries were sent reminders of the importance of stating clear selection and award criteria in the tender document, abiding by the stipulated contractual conditions, and providing a consistent audit trail. One of these Beneficiaries was also advised that amounts payable should always correspond to real expenditure incurred. Another Beneficiary was advised, through an on-the-spot check report, to be constantly vigilant in order to ensure that the contractual obligations of the service providers were respected and that better evidence of deliverables was maintained, as per the Manual of Procedures.

- 3.7.4 A Contracting Authority regulated according to Schedule 3 of the Malta Public Procurement Regulations was advised to consult the DoC for future procurement processes, especially with regard to the preparation of the Terms of Reference. Contracting Authorities that fall under Schedule 3 of the Public Procurement Regulations can administer their own public procurement in accordance with the provisions of these Regulations.

- 3.7.5 The MA emphasised to a number of Beneficiaries that all new tenders should be considered separately and by means of example, the submission of required documentation with respect to one tender does not waive the requirement to submit similar documentation for another tender. Another Beneficiary was reminded that

the applicable Grant Agreement stated that no amendment or variation to the terms of the Agreement would be effective unless the MA agreed to it in writing.

- 3.7.6 Beneficiaries were instructed to ensure that they strictly adhered to the conditions of approval granted by the Direct Orders Section with the Ministry of Finance. They were also advised to ensure that no economic operator was discriminated against and that the principle of equal treatment was respected. Another Beneficiary was informed to strictly adhere to the eligibility criteria established in the tender document.
- 3.7.7 A Beneficiary was made aware that, as stipulated in the Manual of Procedures, savings on the project could only be used after the required MA approval is obtained; while another Beneficiary was advised to ensure that all set budgets were adhered to.
- 3.7.8 The AA informed a Beneficiary that variations relating to additional works should only be classified as eligible if arising out of extreme urgency brought about by unforeseeable events or an unforeseeable circumstance.



Chapter 4

Conclusions

Chapter 4 - Conclusions

- 4.1.1 Irregularities detected during the period 2010 to 2013 accounted for 1.64 per cent of the value of projects declared to the EC and carried out through public procurement. In terms of actual amounts, out of the €425,756,293, €6,997,691 were classified as irregular expenditure. This irregularity resulted in a financial correction of €1,291,297, equivalent to 0.3 per cent of the total value of projects carried out through public procurement, that is, €425,756,293.
- 4.1.2 At the level of OP, a notable disparity is recorded in terms of irregularities detected and subsequent financial correction under each Programme. While the irregularities detected in OPI amounted to €1,564,865, those in OPII amounted to €5,432,826. As a percentage of the value of projects carried out through public procurement, the irregularities detected in OPI accounted for 0.43 per cent of the total of €370,572,211. On the other hand, the irregularities corresponding to OPII accounted for 9.85 per cent of the total value of publicly procured co-financing, that is, €55,184,082. The financial corrections applied as a result of the irregularities detected were €178,429 for OPI and €1,112,868 for OPII. These financial corrections, when considered as a percentage of declared expenditure, represent 0.05 per cent in the case of OPI and 2.02 per cent in the case of OPII. A detailed classification of such amounts and percentages, categorised according to the Authority responsible for detection, is presented in Table 12.
- 4.1.3 It has to be clarified that while the MA reviewed all projects and therefore, the reported irregularities correspond to the population of projects carried out through public procurement, the AA and EC only reviewed a sample of projects. Therefore, the reported irregularities, financial corrections and relative percentages reflect the scope of reviews undertaken by the various Authorities and do not represent an absolute or comprehensive account of all errors.

Table 12: Detected Irregularities and Financial Corrections

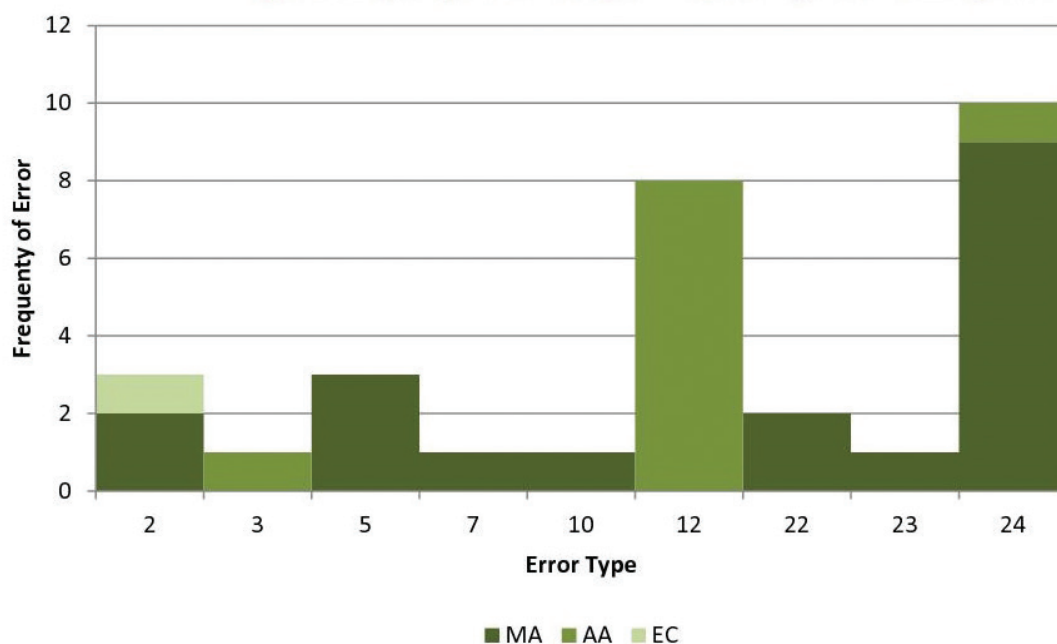
Stakeholder	OP	Declared value of projects (€) ¹ [A]	Irregularities detected (€)[B]	Irregularities detected (%) [B/A * 100]		Financial corrections (€) [C]	Financial corrections (%) [C/A * 100]	
MA	OPI	370,572,211	648,708	0.18	0.43	116,619	0.03	0.05
AA			916,157	0.25		61,810	0.02	
EC			0	0		0	0	
Beneficiary			0	0		0	0	
MA	OPII	55,184,082	1,637,509	2.97	9.85	158,713	0.29	2.02
AA			462	0		462	0	
EC			3,786,104	6.86		946,526	1.72	
Beneficiary			8,751	0.02		7,167	0.01	
Totals	OPI & OPII	425,756,293	6,997,691	1.64		1,291,297	0.30	

Note:

1. Projects as declared to the EC in the financial years 2010 to 2013 and carried out through public procurement.

4.1.4 The categorisation of errors as presented in Figure 3 clearly illustrates the frequency of detected irregularities by the Authorities. Immediately apparent is the high incidence of Errors 12 and 24, namely, the ‘Incorrect application of certain ancillary elements’ and the ‘Breach of the principle of equal treatment’. In the latter case, the vast majority of irregularities were detected by the MA, while in the former, the errors were all detected by the AA. The remaining irregularities were detected in uniformly low frequencies across the other error types.

Figure 3: Frequency of Error Categorised by Error Type and Detecting Authority



application of public procurement regulations resulting in the incorrect method of procurement to contract management-related shortcomings. Irregularities classified under this Error included the cancellation of a tender later awarded by means of a direct contract, as well as an incorrectly valued bid bond. Other shortcomings were the procurement of items not specified in the tender document, the incurrence of variations without prior approval from the MA, the double-payment of certain items and poor budgetary control.

- 4.1.6 Error 24 was the most frequently detected irregularity, with the majority of cases identified by the MA. This error occurred at various stages of the procurement process. Irregularities relating to the commencement of the procurement process entailed the inappropriate or incorrect application of the procurement method adopted. At times, the error involved a lack of clarity with respect to the tender award criteria, which should have been clearly indicated in the tender document. Administrative shortcomings identified included the acceptance of bank guarantees not in line with requirements and the failure of a selected bidder to submit evidence of past experience. Other errors related to the failure on the part of the Contracting Authority to adhere to the eligibility criteria stipulated in the tender document and to select the cheapest offer, as well as the absence of the requisite performance guarantees.
- 4.1.7 Although the incidence of irregularities is most pronounced in Errors 12 and 24, the materiality of errors detected by the Authorities does not reflect this distribution. As illustrated in Figure 4, the most significant irregularity in terms of materiality is that of Error 2, that is, the 'Non-compliance with the advertising procedures (but advertised to some extent)'. Three irregularities were classified under this error type, with two detected by the MA and one by the EC. All three errors were the result of failure on the part of the Contracting Authorities to adequately advertise the project in the OJ. In the case of the EC detected error, this situation arose as a result of the misclassification of the project as 'research and development' instead of 'education and vocational education services'. This misclassification led to an erroneous procurement method, which consequently resulted in the failure by the Contracting Authority to advertise appropriately.
- 4.1.8 Figure 5 clearly illustrates the increased detection of errors by the Authorities in the period under review. Irregularities detected gradually increased from three in 2010 to 11 in 2013, with the AA registering a notable increase in error detection in the final two years under review and the MA maintaining a consistent error detection rate.
- 4.1.9 In its review of errors detected by the Authorities, NAO noted that the MA registered the highest incidence of error detection, equivalent to 59 per cent of all irregularities. Possible explanations for this are the fact that the MA is the first line of verification, therefore increasing the probability of detection, and that its breadth of review is wider than that of the other Authorities.

4.1.10 Although the MA registered the highest incidence of errors, the value of these irregularities accounted for 33 per cent of all the errors detected by the Authorities and Beneficiaries. On the other hand, although only one error was detected by the EC, this accounted for 54 per cent of the value of all irregularities. With regard to the corresponding financial corrections applied, those imposed by the MA and the EC made up 21 per cent and 73 per cent of the value of all corrections, respectively. The reimbursable amount with respect to the financial correction applied by the EC was significantly higher than the aggregate sum of those detected by the other Authorities.

Figure 4: Values of Irregularities and Financial Corrections Categorised by Error Type

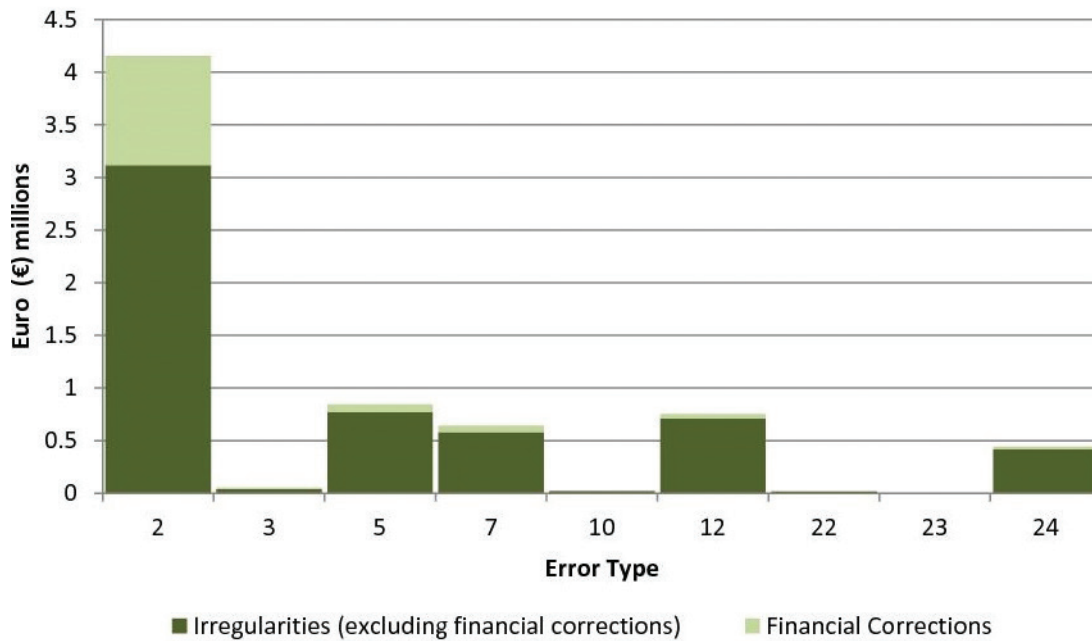
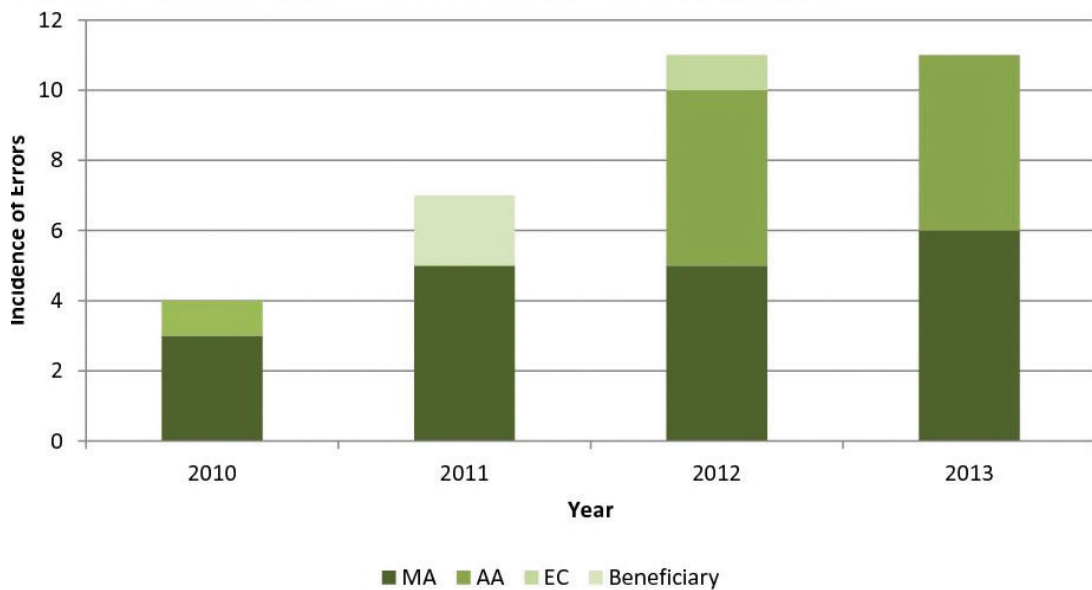


Figure 5: Incidence of Errors Categorised by Detecting Authority/Beneficiary and Year



4.1.11 In light of the NAO's review of the errors detected by the Authorities, the following observations are made:

- a. This Office's concern is drawn to the error detected by the EC, which was the most significant error reviewed in terms of materiality and corresponded to a financial correction of approximately €1 million. The Contracting Authority, in its request to DoC for its exemption from an open call for tenders, could have conditioned the Department to grant approval that was in effect not warranted. Furthermore, NAO noted that the Authorities did not detect any public procurement-related irregularities within what in effect was a substantially funded project. This shortcoming might indicate the need to review the system with which projects are selected for verification.
- b. In one particular case, the MA deducted 25 per cent of the additional expenses claimed yet settled the remaining 75 per cent. NAO noted that these additional expenses had originally been refused by the MA on the basis of the limited information and feedback provided by the Beneficiary. Nonetheless, the Beneficiary included such expenditure in invoices submitted to the Authority, of which 75 per cent, equivalent to €15,891 were reimbursed by the MA through Treasury. Although clarifications supporting the Beneficiary's request were provided, NAO maintains that acceding to expenditure that was initially not approved should be approached with caution.
- c. Finally, this Office encourages greater coordination among the Authorities in order to more comprehensively detect errors. The CA may consider it appropriate to widen its scope of review in efforts directed towards the detection of irregularities.

Appendices

Appendix A: Financial Corrections as per COCOF Note 07/0037/03

Error	Irregularity	Recommended Correction
1	Non-compliance with the advertising procedures	100 per cent of the value of the contract
2	Non-compliance with the advertising procedures (but was advertised to some extent)	25 per cent of the value of the contract
3	Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or the absence of an unforeseen circumstance for complementary works and services or for supplies	100 per cent of the value of the contract ¹
4	Additional works or services exceeding the limit laid down by the Directives provided in unforeseen circumstances	100 per cent of the amount exceeding 50 per cent of the value of the original contract
5	Failure to state all the selection and contract award criteria in the tender documents or tender notice	25 per cent of the value of the contract ²
6	Application of unlawful contract award criteria	25 per cent of the value of the contract ²
7	Unlawful selection and/or contract award criteria laid down in the tender procedure	25 per cent of the value of the contract ³
8	Insufficient or discriminatory definition of the subject matter of the contract	25 per cent of the value of the contract ²
9	Negotiation during the award procedure	25 per cent of the value of the contract ²
10	Reduction in the scope of the contract (1)	Value of the reduction in the scope plus 25 per cent of the value of the contract
11	Reduction in the scope of the contract (2)	25 per cent of the value of the final scope
12	Incorrect application of certain ancillary elements	2, 5, or 10 per cent of the value of the contract, according to the seriousness of the irregularity and whether a repeat occurrence
21	Non-compliance with the requirement of an adequate degree of advertising and transparency	25 per cent of the value of the contract

22	Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or for complementary works and services brought about by unforeseen circumstances	25 per cent of the value of the contract(s)
23	Application of unlawful selection and/or contract award criteria	10 per cent of the value of the contract ⁴
24	Breach of the principle of equal treatment	10 per cent of the value of the contract ⁴

Notes:

1. In cases where the total value of supplementary contracts (whether or not formalised in writing) awarded without complying with the provisions of the Public Procurement Directives do not exceed the thresholds of the Directive and the 50 per cent of the value of the original contract the correction may be reduced to 25 per cent.
2. This amount may be reduced to 10 or 5 per cent depending on the seriousness of the irregularity.
3. A financial correction of 100 per cent of the value of the contract may be applied in the most serious cases when there is a deliberate intention to exclude certain bidders.
4. This amount may be reduced to 5 per cent depending on the seriousness of the irregularity.

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