

Factsheet N°12

Focus on public procurement

Version N°7 of 13 July 2017

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I. What is public procurement?

The public procurement rules define the tendering and publicity procedures applicable to different threshold values. Any contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition

During the implementation of a project, virtually all project partnerships buy goods and services externally: for example external auditors are hired to carry out the first level control, a project and finance manager is hired to assist the lead partner with the organizational and administrative aspects of project implementation, catering and technical equipment for conferences and meetings is ordered. Whenever purchases are made and contracts are awarded to external suppliers, the public tendering rules principles must be observed.

Three levels have to be taken into consideration:

1. the EU public procurement directives;
2. national rules;
3. internal rules applicable to the partner organisation.

Member States implemented the EU Procurement Directives into national law. Member States provide further clarification to the EU Directives through instruments such as:

- national public procurement legislation;
- national / regional ERDF Public Procurement guides (if existing).

In case national/regional rules set stricter requirements (such as for publicity and free competition with lower thresholds than those established by the European Directives, for instance), then the **stricter rules must be applied**.

II. How to comply with public procurement rules?

The levels that trigger the obligation to issue a call for tender procedure are the following:

- European level
- National/regional level
- Internal level

In case of doubts about the specific rules applying to the specific case, the Joint Secretariat recommends that projects refer to the following sources:

- The Internal market web-site: http://ec.europa.eu/internal_market/publicprocurement/index_en.htm
- The designated first level controller;
- The National public procurement Authority.

Be aware that the fundamental principles of transparency, non-discrimination and equal treatment also apply for purchases and subcontracted activities below the threshold values. Basically, below and above the thresholds the main difference for public contracts is the degree of publicity and formality of the tendering procedure: EU wide tender vs. tender announced in national/regional media, request for three offers ("bid-at-three") etc.

Central to ensuring adherence to the public tender rules is the documentation, which usually consists of the following (these are examples that can vary according to the specific procedure to apply in the different Member States and on a case by case level):

- Terms of reference (sufficiently specified, including clear information to candidates on award and weighting criteria);
- Request for offers or procurement publication/notice;
- Offers/quotes received;
- Report on assessment bids (evaluation/selection report) including:
 - justification for the procedure chosen in the light of the identified needs;
 - evaluation of the offers in the light of the previously announced award and weighting criteria;
- Letters of acceptance and rejection;
- Contract, including any amendments and/or renewals (with evidence that these did not modify the economy on the market and that there was no modification of the object of the initial contract);
- Evidence that the payments made match with the contract (invoices and proof of payment);
- Proof of delivery of goods or services.

III. Points of attention

- Lack of compliance to public procurement rules was one of the **main audit findings** of the 2007-2013 programming period. Whenever auditors detect a public procurement finding, the responsible partner has to repay the amount of ERDF concerned by the finding.
- Public procurement rules and principles are applicable to **all public authorities and bodies governed by public law** and therefore also apply in the context of their participation to an Interreg 2 Seas project.
- **Private bodies** participating in an Interreg 2 Seas project, and receiving public ERDF and/or national/regional/local funding, have to comply with the public procurement procedures applicable to their organization according to the European, national and internal rules.
- Evidence that the choice made regarding **publicity requirements** (sufficient degree of advertising) is in compliance with the EU Directives and the national applicable legislation (depending on the thresholds) has to be available. Project partners shall keep a record of every step of the public procurement procedure for first level control and audit purposes.
- The greater the interest of the contract to potential bidders from other Member States, the wider the coverage should be. So depending on the nature of the services and goods, an **EU-wide advertising** may be advised even if the value of the contract is below the EU-threshold.
- The applicable tendering procedure changes according to the **contract value**. When calculating the value of a contract, the maximum total amount that may be paid during the entire contract period (including renewal periods) needs to be estimated. That means that partners cannot exclude the value of potential renewal periods of the contract in order to stay below a certain threshold so as to avoid a given tendering procedure.
- In calculating the contract value not only must the value of the contract in question be considered, but also all **direct awards of the same type** that the authority has implemented or will implement during the financial year.
- Procurement may not be divided into **several smaller procurements** in order to come in below the amount limit for direct awards.
- In case of a **direct award procedure** for reasons of urgency, it has to be proven that the urgency is occasioned by circumstances that the contracting authority could not have foreseen. Insufficient planning by the contracting authority does not confer the right to a direct award.
- In case of a direct award procedure for technical reasons/exclusivity, it must have been ruled out that any other supplier than the one being contracted is capable to provide the requested services and this upon objective criteria. With regard to project management services for example, a direct award of procedure for technical reasons/exclusivity cannot usually not be justified. The fact of having worked already with a certain external provider in the past, having been satisfied by the work quality and wanting to benefit from the knowledge the provider acquired thanks to having worked with the partner organization in the past and on similar subjects, do not represent a sufficient justification for a direct award. If objective proofs do not exist, an open tender still has to be organized. Its outcome will then prove if there is really no equivalent alternative on the market.
- A project partner shall remain solely responsible concerning compliance with its obligations in the field of public procurement.
- Project partners cannot contract one another in the framework of the same project. This is due to the fact that the roles of project partner and service provider are different and in general not compatible. Nevertheless, observer partners can act as a supplier of goods or services of a project partner as long as the following conditions are fulfilled:
 - The observer plays a key role in the project and its implication as observer is fundamental for the successful delivery of the project (for this reason, the observer cannot leave the project to act as external provider only since this would impact the project delivery).
 - The observer has won the procurement in compliance with the applicable European, national, local and internal public procurement rules of the project partner;

- It can be proved by the project partner and the observer that the latter did not benefit of any undue advantage (such as position-related knowledge, non-public information, etc.) which could lead to a distortion of the open competition principle and a discriminated treatment of candidates in the framework of the attribution of the contract;
- It can be proved by the project partner and the observer that the attribution of the contract is done in absence of any conflict of interest.
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- Projects which cannot prove the award of contracts in compliance with public tendering procedures **risk losing the ERDF grant**. Due to the complexity of public procurement matters, project partners are invited to work closely with their legal department to ensure the compliance of awarded contracts with EU, national and internal public procurement rules.