



Overview and Principles of Public Procurement

State Aid and Public Procurement for European Territorial Cooperation programmes

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Brief overview of the principles of Public Sector Procurement with special consideration of European Territorial Cooperation programmes and projects:

- General considerations
- EU Directives apply
- EU Directives do not apply
- Controlling Public Procurement

WORD OF WARNING!

It is a complex matter!

This presentation is not intended to provide guidance on how EU Directives and Member States legislation should or should not be applied. It is not a substitute for due consideration of the legislation and appropriate legal advice!

Why does Public Procurement matter?

- Public Procurement is one of the most important economic factors in European Member States:
An estimated 16% of the European GDP
- Public Procurement law is **highly dynamic** and increasingly determined by European Directives
- **Lack of tendering: Among the 3 most frequent errors in previous SF period!**

- EU Procurement Directives ([2004/18/EC](#) and [2004/17/EC](#)) relate to the award of contracts for public works, supplies and services and set up detailed rules for EU-wide competitive tendering procedures.
- The Directives are designed to:
 - open up the EU's public procurement market to competition, prevent 'buy national' policies and promote the free movement of goods and services
 - foster quality, transparency and fairness
- Member States implemented the EU Procurement Directives into national law and MS legislations provide further clarification to the EU Directives.

COMMUNITY Legislation and Guidelines (most relevant) (1)

- Treaty and Value for Money Principle
- EU Procurement Directives
- [Directive 2004/18/EC](#) of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of **public works contracts, public supply contracts and public service contracts**
- [Directive 2004/17/EC](#) of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the **water, energy, transport and postal services sectors**
- Relevant case-law
- Legal Acts (e.g., (EC) [No 1564/2005](#) establishing standard forms for the publication of notices in the framework of public procurement procedures)

COMMUNITY Legislation and Guidelines (most relevant) (2)

- EU COM [Interpretative Communication 2006/C 179/02](#) on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives
- EU COM [Guidelines for determining financial corrections](#) to be made to expenditure co-financed by SF or the CF for non-compliance with the rules on public procurement

**Public Procurement Basics –
General Considerations**
Applicable Rules and Guidelines (most relevant)



MEMBER STATES Legislation and Guidelines

- MS public procurement legislation
- National / regional ERDF Public Procurement guides (if existing)

PROGRAMMES

- Programme eligibility rules (if existing)

INSTITUTIONS

- Institutional procurement rules (if existing)

**Public Procurement Basics –
General Considerations**
Applicable Rules and Guidelines (most relevant)



Does the EU Public Procurement Directive 2004/18 EC and MS implementations thereof apply?

STEP 1



Treaties and Value for Money

STEP 2

- | | |
|---|---|
| <ul style="list-style-type: none">• EU Procurement Directive• Member States public procurement legislation (similar throughout EU) | <ul style="list-style-type: none">• EU COM Interpretative Communication 2006/C 179/02• Member States public procurement legislation (vary throughout EU) |
|---|---|

STEP 3

- Member States public procurement guidelines
- Programme eligibility rules
- Institutional procurement rules
- EU COM Guidelines for determining financial corrections

Does the EU Directive apply?

STEP 1

1) The procuring body is a **‘contracting authority’ as defined in the Directive** (except for entities operating in the water, energy, transport and postal services sectors):

‘Contracting authority’ means the State, regional or local authorities, **bodies governed by public law**, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

OR

Private bodies in certain services connected with building works AND subsidised more than 50% (rarely relevant to ETC)

Does the EU Directive apply?

STEP 1

A **‘body governed by public law’** means any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and
- (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Does the EU Directive apply?

STEP 1

2) The contract is a **public works, services or supplies contract** (services listed in Annex II/2 not fully subject to Directives such as health, social and legal services)

3) The estimated value of the contract (net of VAT) **equals or exceeds the relevant financial threshold**. Very basically, for:

Service and Supply Contracts:

- Central Government: over EUR 133.000 (excl. VAT)
- Local and Regional Authorities: over EUR 206.000 (excl. VAT)

Public Works Contracts: over EUR 5.150.000 (excl. VAT)

Thresholds updated every 2 years!
Member States may also set lower thresholds!

Very basic implications

STEP 2 EU Directive Applies

Where these three pre-conditions are satisfied a contracting authority must normally:

- 1 Advertise the contract in the EU's Official Journal
- 2 Carry out procurement procedures in line with applicable law
- 3 Select bidders according to selection criteria (non-discriminatory and transparent)
- 4 Award contract according to award criteria (non-discriminatory and transparent)
- 5 Stick to the time frames

Always check Member States legislation!

- ▶ EUR-Lex
- ▶ EU Bookshop
- ▶ CORDIS
- ▶ The Publications Office
- ▶ Europe

Section II: Object of the contract

II.1) Description

II.1.1) **Title attributed to the contract by the contracting authority:**
Implementation of a business process modelling tool.

II.1.2) **Type of contract and location of works, place of delivery or of performance:**

Services.

Service category: No 7.

Main place of performance: D-Cologne.

NUTS code: DE423.

II.1.3) **The notice involves:**

A public contract.

II.1.5) **Short description of the contract or purchase(s):**

The Agency is currently setting up an integrated management system based on new EASA management standards adopted in September 2008 by its Management Board. These standards take into account both the new 16 Internal Control Standards (ICS) that have been implemented by the European Commission and ISO 9001:2008 standards recognised worldwide for quality. EASA standards promote in particular the implementation of a "process approach" within the Agency and the use of management tools such as risk management and audit. The objective is to implement an integrated management system and have it certified against ISO 9001:2008 standards.

II.1.6) **Common procurement vocabulary (CPV):**

72200000.

II.1.7) **Contract covered by the Government Procurement Agreement (GPA):**

Yes.

II.1.8) **Division into lots:**

No.

II.1.9) **Variants will be accepted:**

No.

Official Journal of the European Union /TED (Tenders Electronic Daily) <http://ted.europa.eu>

Open

- **All interested parties can submit a tender** in response to the OJEU notice (albeit only those meeting the contracting authority's selection criteria, if there are any, will be entitled to have their tender assessed).
- No negotiation with the bidders is permitted.
- There are no restrictions under the Directives as to when the procedure can be used.

Choice of procurement procedures (2)

STEP 2
EU Directive Applies - 2

- Restricted**
- All interested parties may express an interest in tendering for the contract **but only those meeting the contracting authority's selection criteria will actually be invited to submit a tender.**
 - No negotiation with the bidders is permitted.
 - There are no restrictions under the Directives as to when the procedure can be used.

Choice of procurement procedures (3-1)

STEP 2
EU Directive Applies - 2

- Negotiated
WITH prior
publication**
- Under the negotiated procedure **with prior publication**, an OJEU notice must be published.
 - Tenderers are invited to negotiate the terms of the contract with the contracting authority.
 - This procedure can only be used in the limited circumstances described in the Directive (e.g., contract specification cannot sufficiently be established).

Choice of procurement procedures (3-2)

STEP 2
EU Directive Applies - 2

Negotiated WITHOUT prior publication

- Under the negotiated procedure **without prior publication**, the contracting authority is not required to issue an OJEU notice and may negotiate directly with the supplier of its choice.
- This procedure can only be used in the limited circumstances described in the Directive (e.g., extreme urgency, for technical or artistic reasons or for reasons connected with the protection of exclusive rights)

Choice of procurement procedures (4)

Competitive Dialogue (for very complex contracts only)

Cases justifying the use of negotiated procedure without publication of a contract notice (1):

STEP 2
EU Directive Applies - 2

Urgency or only one operator available

- Extreme urgency due to unforeseeable events. *Applies to e.g. natural disasters rather than tight schedules*
- For technical or artistic reasons or reasons connected to the protection of exclusive rights: contract can only be executed by one particular economic operator. *Very limited. There is normally more than one potential supplier*

i.e. normally not applicable

Cases justifying the use of negotiated procedure without publication of a contract notice (2):

STEP 2
EU Directive Applies - 2

Additional work or services not included in the original contract

- **For additional works or services not included in the original contract, when such work:**
 - Cannot be technically or economically separated from the original contract OR
 - Is strictly necessary for its completion
- **May not exceed 50% of the amount of the original contract.**

Selection (1):

STEP 2
EU Directive Applies - 3

- **Verification of the suitability of tenderers (open procedure)**
- **Selection of candidates (restricted and negotiated procedure):**
 - **EXCLUSION:** A contracting authority **must** exclude a bidder from the procurement process, in cases where a bidder has been convicted of involvement in **organised crime, corruption, fraud or money laundering**.
 - **SELECTION (1):** A contracting authority **may** exclude a bidder from the process, in cases where certain grounds concerning the **supplier's personal position** are met (e.g. bankruptcy, professional misconduct, non-payment of social security or taxes).

Contracting Authorities can ask bidders and competent authorities (also in other MS) to provide relevant documents / information!

STEP 2

EU Directive Applies - 3

Selection (2):

- **Verification of the suitability of tenderers (open procedure)**
- **Selection of candidates (restricted and negotiated procedure):**

- **SELECTION (2):** Bidders **may** also be assessed and excluded on the basis of their **economic and financial capacity** (e.g. annual turnover for past three years) and **technical capacity** (e.g. experience of similar contracts over the past five years).

The contracting authority must specify non-discriminatory selection criteria in the contract notice as well as any minimum standards (e.g. a minimum turnover requirement)!

STEP 2

EU Directive Applies - 4

Award of Contract:

- **Lowest price:** The lowest priced tender wins. No other element of the tender may be taken into account
OR
- The **most economically advantageous tender (MEAT):**
Factors other than or in addition to price, like quality, technical merit, running costs and delivery period can be taken into account

The contracting authority must specify non-discriminatory award criteria and the relative weighting it gives to each of the criteria (e.g., in the contract notice).

Information and Debriefing:

EU Directive Applies - 4

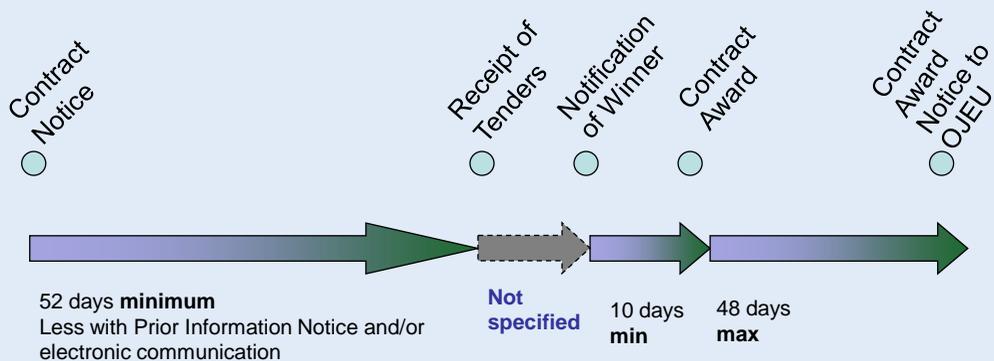
On request the contracting authority **must give** any unsuccessful bidder:

- 1) The reason why the tender/application was rejected
- 2) The relative advantages of the tender selected as well as the name of the successful bidder

Information must be provided within 15 days!

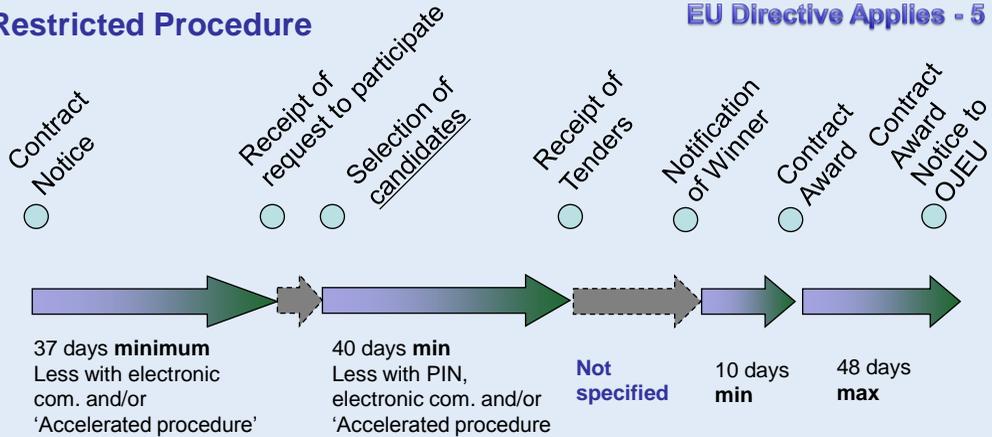
**Minimum Time Scales
Open Procedure**

EU Directive Applies - 5



Minimum Time Scales
Restricted Procedure

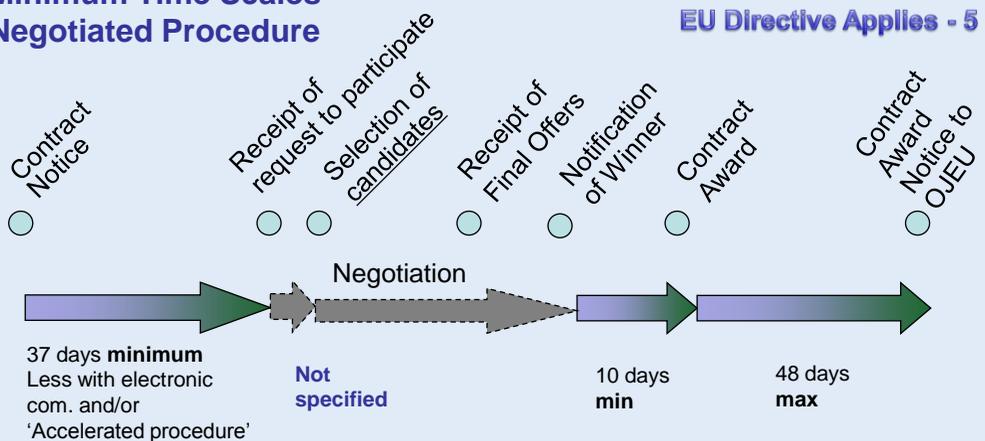
STEP 2
EU Directive Applies - 5



Minimum number of selected candidates: **5**

Minimum Time Scales
Negotiated Procedure

STEP 2
EU Directive Applies - 5



Minimum number of selected candidates: **3**

Public Procurement Basics –
Below EU Threshold or
Services listed in Annex II B of 2004/18/EC



STEP 2

EU Directive does NOT Apply

In ETC the Directive do NOT apply to the majority of contracts.

In these cases, the following still apply:

- 1 Principles of the Treaty and EU COM [Interpretative Communication 2006/C 179/02](#)
- 2 Principle of value for money
- 3 MS public procurement legislation and procurement guidelines (if any)
- 4 EU COM [Guidelines for determining financial corrections](#) (see presentation of EU COM)

In addition there can be applicable programme eligibility rules and/or institutional rules!

Public Procurement Basics –
Below EU Threshold or
Services listed in Annex II B of 2004/18/EC



STEP 2

EU Directive does NOT Apply - 1

Principles of the Treaty

Fundamental principles of the Treaty to be observed:

- **Non-discrimination** on grounds of nationality (Article 18 TFEU [ex Article 12]) and equal treatment
- **Free movement of goods** and prohibition of quantitative restrictions on imports and exports and measures having equivalent effect (Article 34 [ex Article 28])
- **Right of establishment** (Article 49 et seq. [ex Article 43 et seq.]), also including activities as self-employed persons
- **Freedom to provide services** (Article 56 et seq. [ex Article 49 et seq.]),
- **Transparency, proportionality and mutual recognition**

Also applies above threshold!

Principles of the Treaty

EU Directive does NOT Apply - 1

- The European Court of Justice has confirmed that the Internal Market rules of the EC Treaty apply also to contracts outside the scope of the Public Procurement Directives
- Commission [Interpretative Communication](#) on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)
- Principles of the Treaty apply specifically to **intended contracts, which might potentially be of interest to economic operators located in other Member States** (case-by-case based on value, geography, sector concerned, etc.)

Principles of the Treaty –

EU Directive does NOT Apply - 1

EU Interpretative Communication

Fundamental principles of the Treaty imply obligation to ensure **adequate advertising**:

- On the contracting entity's webpage AND/OR
- On portal sites for contracting advertisements AND/OR
- National official journals AND/OR
- Official Journal of the European Union

Undertakings in other MS must have access to appropriate information and be in a position to express their interest

Contacting potential suppliers not sufficient!

Principles of the Treaty –
EU Interpretative Communication

EU Directive does NOT Apply - 1

- Fundamental principles of the Treaty imply obligation to **ensure impartiality** of the contract award procedures:
- **Non-discriminatory description** of the **subject matter** of the contract
- **Non-discriminatory** description of **conditions**
- **Mutual recognition** of diplomas, certificates etc.
- **Appropriate time-limits**
- **Transparent and objective approach**

Programmes can use EU COM Interpretative Communication
as basis for programme rules!

Principle of Value for Money

EU Directive does NOT Apply - 2

The principles of economy, efficiency and effectiveness apply:

- **Economy:** appropriate timing, quantity and quality and at the best price
- **Efficiency:** best relationship between resources employed and results achieved
- **Effectiveness:** attaining the specific objectives set

Also applies above threshold!

**Public Procurement Basics –
Below EU Threshold or
Services listed in Annex II B of 2004/18/EC**



**Member States Public
Procurement Legislation
(below threshold)**

**STEP 2
EU Directive does NOT Apply - 3**

Several possibilities, including:

- Provisions below EU threshold similar to those above (i.e., some principles of EU procurement procedures also apply to procurements below threshold)
- (Additional) provisions ONLY applicable to below-threshold procurements exist
- No provisions for procurements below EU threshold - Treaty principles and value for money still apply

**Public Procurement Basics –
Additional Provisions**



**Programme Eligibility Rules
(if any)**

**STEP 3
Additional Provisions**

Programmes can (and often do) set special rules on procurement, including:

- Require all partners (i.e., including privates) to observe public procurement rules
- Set programme thresholds for advertising
- Set requirement to request at least 3 offers
- Set further limits to direct contract awarding

Institutional Procurement Rules (if any)

- Vary widely

General Considerations

- Programmes / First Level Control should aim to ensure that **public procurement rules** are complied with and that the principles of the **Treaty** have been respected as well as the principles of **value for money**
- Programmes need to provide **clear guidance to projects early on!!!**
- EU COM recommends that MS develop **guidance on public procurement for beneficiaries** (see EU COM Guidance document on management verifications) e.g., as part of the supporting documents for the programmes
- Controls should be carried out **as soon as possible** after the public procurement process has occurred

General Considerations

- **In sample checks, intensity of controls may vary** according to risk factors such as the value, type of contract and (lack of) experience of the contracting authority
- A **list of new contracts with all claims** for each project is useful (FLC)
- Check if all **documents** proving adherence to public tender rules **are kept by project** (FLC)
- In case of doubt, obtain **legal advice**

Things to check (potentially)

FLC often checks specifically for frequent errors (e.g., lack of public procurement, exceedance of threshold through splitting up into smaller assignments, in-house contracting).

Comprehensive checks can also include, for example:

Specification Stage:

- Has the correct tender procedure been used?
- Have brand names or other references been avoided, which favour or eliminate potential providers or services?
- Has it been sufficiently advertised?

Things to check (potentially)

Selection Stage:

What was the basis for rejecting applicants (unsuitability, financial soundness, technical capacity or ability not suitable (e. g., non-satisfactory track record)?

- Evidence that principles have not been correctly announced?
- Evidence that principles have not been consistently applied?

Things to check (potentially)

Award Stage:

What was the basis for contract awarding (Lowest price? MEAT)?

- Evidence that principles have not been correctly announced?
- Evidence that principles have not been consistently applied?
- Evidence that additional candidates have been included, who did initially not request to participate (restricted or negotiated procedure)?

For all Stages:

- Have decisions been documented?
- Has the time frame been observed?

Some documents that can be useful:

- Justification for use of the selected procedure
- Copy of the relevant publication (adequate level of advertising ?)
- Names of tenderers, successful or otherwise
- Tender evaluation reports (proper selection and award?)
- Contract details – e.g. value
- Reasons for abandoning a procedure (if applicable)
- Complaints submitted by tenderer (if any) and replies

Example of Literature



- Literature exists also in other MS
- INTERACT can add information to the INTERACT website

ISBN: 978-8364-9975-0



Thank you for your attention!

Q & A

Interpretative Communication

E.g., Principle of Transparency

Below EU threshold, **national legislation** can foresee that advertising is only required on a national level (or not required at all – e.g., direct contracting possible).

According to **EU case law and the EU COM Interpretative Communication**, publication is required for all planned contracts that are **potentially relevant to the internal market**.

Present situation

Based on recent case law, it has become **uncertain if certain provisions in national legislation are in accordance with EU primary law.**

EU Commission Interpretative Communication outlines the approach of the EU Commission.
Not directly binding for MS.

Present situation

When is a planned contract relevant to the internal market?

Interpretative Communication (decided by contracting authority on a case-by-case basis):

- Low economic value → not relevant (value not specified)
- Consider value, geography, sector concerned, market, etc.

EU Case law:

- Introduced certain thresholds for economic value, above which a contract was found to be relevant to the internal market : e.g., contract value above 12.000 EUR annually.

Present situation

In addition, **economic considerations** apply to the choice of contracting procedures:

- In case **unproportionally high costs** would be associated with the choice of a certain procurement procedure → Exclusion from transparency can be justified.
- EU COM likely to be more critical on this than many projects.
- Contracting authority needs to provide justification

In-house Contracting

According to some Member States rules and case law, there are pre-conditions that must be met in order for in-house contracting to be applicable:

- The Contracting authority has to have full control over the contractor (i.e., like it was its own department).
- The contractor works in essence exclusively for the public authority (or authorities) by which it is owned.

Based on EU case law, there are 3 potential cases for **in-house contracting**:

- Contracting of an entity held by **public AND private owners** (*in-house contracting DOES NOT apply!! Even if the private share is tiny it is unlikely that the company is controlled like a department of the public body*).
- Contracting of an entity held by **one (or more) public owner(s)** (*in-house contracting applies in cases where the conditions apply*).
- **Contracting of one public body** by another public body (*in-house contracting DOES MOST OFTEN NOT apply!!*). *It is unlikely that one public authority has full control over another public authority.*