



Sharing Expertise

## First Level Control in Territorial Cooperation and IPA CBC programmes under shared management

### Public Procurement

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Public procurement



### Content

- Relevant legislation and guidelines
- Main findings related to public procurement
- Considerations for ETC programme management

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Public procurement



### 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!

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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

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COMMUNITY Legislation and Guidelines (most relevant) (2)

- Legal Acts (e.g., (EC) [No 1564/2005](#) establishing standard forms for the publication of notices in the framework of public procurement procedures)
- 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

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**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)

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

**STEP 1**
YES
NO

Treaties and Value for Money

<p><b>STEP 2</b></p> <ul style="list-style-type: none"> <li>• EU Procurement Directive</li> <li>• Member States public procurement legislation (similar throughout EU)</li> </ul> <p><b>STEP 3</b></p> <ul style="list-style-type: none"> <li>• Member States public procurement guidelines</li> <li>• Programme eligibility rules</li> <li>• Institutional procurement rules</li> <li>• EU COM Guidelines for determining financial corrections</li> </ul>	<ul style="list-style-type: none"> <li>• EU COM <a href="#">Interpretative Communication 2006/C 179/02</a></li> <li>• Member States public procurement legislation (vary throughout EU)</li> </ul>
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Does the EU Directive apply?

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 125.000 (excl. VAT)
- Local and Regional Authorities: over EUR 193.000 (excl. VAT)

Public Works Contracts: over EUR 4.845.000 (excl. VAT)

Thresholds updated every 2 years! Last update: November 2009

Member States may also set lower thresholds!

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**EU Directive Applies**

Very basic implications

In cases where the EU Directives apply, a contracting authority must normally:

- Advertise the contract in the EU's Official Journal
- Carry out procurement procedures in line with applicable law
- Select bidders according to selection criteria (non-discriminatory and transparent)
- Award contract according to award criteria (non-discriminatory and transparent)
- Stick to the time frames
- Always check Member States legislation!

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### EU Directive Does NOT Apply

Member States Public Procurement Legislation  
(below threshold)

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

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### EU Directive Does NOT Apply

EU Interpretative Communication

- Outlines point of view of European Commission
- Based on the European Treaty
- Contains **minimum requirements for non-discrimination**
- **Adequate advertising:**
  - On the contracting entity's webpage AND/OR
  - On portal sites for contracting advertisements AND/OR
  - In National official journals AND/OR
  - In the 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 is not sufficient!**

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### EU Directive Does NOT Apply

EU Interpretative Communication

- Fundamental principles of the Treaty also 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

Some programmes use EU COM Interpretative Communication as basis for programme rules!

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### Programme Eligibility Rules (if any)

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

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### Findings in 2000-2006

General

- No (evidence of) tendering - contracts awarded automatically to (local) suppliers
- Contracts split up into smaller assignments to avoid specific tender procedures

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### Cases justifying derogations from publicity requirements (1):

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

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**Findings in 2000-2006**

Publication

- Inadequate publicity of invitation to tender: Tenders published at regional/national level instead of EU level
- Time frames not observed

Evaluation of offers

- Lack of transparency / objectivity in tender award procedure
- Exclusion of tenders not clearly justified
- Use of discriminatory selection or award criteria limiting parties able to tender

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**Findings in 2000-2006**

Evaluation of offers (cnt'd)

- Confusion of Selection and Award Criteria:
  - e.g. award criteria included:
    - the previous experience,
      - works carried out for contracting authority,
      - n° of permanent staff vs. temporary staff
  - **Selection:** in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability
  - **Award:** in case of award to the most economically advantageous tender, to appreciate the quality of the offer in relation to subject matter of the contract.

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**Findings in 2000-2006**

Cancellation / Appeals

Appeals from unsuccessful bidders not properly dealt with

Implementation of Contracts / Modification

Additional works or services directly awarded to the economic operator

- amount exceeds 50% of the amount of original contract,
- the circumstances invoked are not unforeseen
- even if circumstances are unforeseen, when works/services are economically or technically separable

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**Cases justifying derogations from publicity requirements (2):**  
Urgency or only one operator available

- 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.
- **Most often it could have been foreseen and/or contracts can be separated**

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**Flat rate cuts for non-compliance with tendering rules and procedures:**

- Covered in a Commission paper
- Sliding scale of cuts based on the seriousness of the irregularity. From 100% to 2%
- The longer problems go undetected, the more likely that most of the contract value will be rejected

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**General Considerations**

- Programmes 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
- 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
- In case of doubt, obtain legal advice

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### General Considerations

- Clear division of tasks between JTS and FLC is needed!
- Programmes (e.g., JTS) need to provide clear guidance to projects early on
- Controls (FLC and/or JTS) should be carried out as soon as possible after the public procurement process has occurred
- 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
- Check if all documents proving adherence to public tender rules are kept by project

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### Work is divided in 4 main parts:

- 1) LP progress report: identification of potential procurement issues
- 2) On-the-spot visit: Interview of the LP
- 3) On-the-spot visit: Walk-through of the LP procurement process
- 4) Discussion of findings

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