



INTERACT Seminar: State Aid and Public Procurement for European Territorial Cooperation Programmes
13 November 2008 | Brussels

Summary

Deficiencies in public procurement have caused major errors in the past Structural Funds period with some of the most dramatic financial corrections of INTERREG projects attributable to non-compliance with public procurement rules. The European Court of Auditors has also pointed towards lack of public procurement as one of the 3 major errors in the previous Structural Funds period. European Territorial Cooperation programmes are thus strongly encouraged to pay more attention to sound contracting.

In response to this obligation, INTERACT, together with DG Regional Policy, organised a workshop on public procurement rules applicable to European Territorial Cooperation programmes and projects on 13 November 2008 in Brussels. The legal framework and applicable guidelines as well as some tips and the main points discussed are summarised below.

The Legal Framework and Applicable Guidelines

European Union regulatory framework relevant to public procurement in European Territorial Cooperation programmes and projects is complex, comprising not only EU Directives on Public Procurement, Legal Acts implementing the Directives and a growing body of Case Law but also the general principles of the EU Treaty (e.g., non-discrimination) and the principle of sound financial management derived from general budget provisions.

- The **two main Directives** as regards public procurement are Directives 2004/18/EC ('Public Sector Directive') and 2004/17/EC ('Utilities Directive'). The Utilities Directive is similar to the Public Sector Directive but less strict and narrower in its scope. The Public Sector Directive is more relevant to European Territorial Cooperation. Both Directives had to be implemented into Member States legislation by the end of January 2006.
- **Legal Acts** provide further clarifications on the practical implementation of the Directives and establish, for example, standard forms for the publication of contract notices.
- **Public Procurement Case Law** provides clarification on the European Court of Justice's view on public procurement. The body of Case Law is continuously growing and for many programmes it can be difficult to keep track of these developments.
- **General principles of the Treaty** relevant to public procurement include non-discrimination (e.g., on grounds of nationality), free movement of goods, right of establishment (e.g., of subsidiaries) freedom to provide services, transparency, proportionality and mutual recognition (e.g., of diplomas).
- **The principles of sound financial management**, namely economy, efficiency and effectiveness, apply to contract awards in the framework of European Territorial Cooperation. Although in individual cases it can be difficult to assess value for money, the overall principle must be applied. In a very limited number of cases (e.g., very low contract values), the principles can also be applied to the procurement process itself in cases where unproportionally high costs would be associated with the choice of a certain procurement procedure. However, EU COM is likely to be more strict on the applicability of this principle (e.g., to justify derogations from advertising requirements) than most



projects, programmes or national controllers.

In addition, the **EU COM Interpretative Communication** on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives¹ is highly relevant to European Territorial Cooperation since contracts are typically below EU thresholds. According to EU Case Law and the EU COM Interpretative Communication, internal market principles of the EU Treaty apply to all planned contracts potentially relevant to the internal market, including contracts not or not fully subject to the EU Public Procurement Directives (e.g., below EU thresholds). During the workshop, EU COM confirmed that in European Territorial Cooperation, even in the absence of adequate Member States provisions, the EU COM Interpretative Communication applies. The Interpretative Communication is not directly legally binding to Member States, but it provides guidance and interpretation on the application of legally binding principles of the EU Treaty.² For contracting authorities, the most important implications are:³

- 1) To decide on a **case-by-case basis** whether or not a planned contract is of potential interest to undertakings in other Member States (i.e., relevant to the internal market). Especially in a cross-border environment, this might often be the case, even if values of planned contracts are rather small.
- 2) For all contracts potentially relevant to the internal market, to ensure that undertakings in other Member States have access to information (**adequate advertising**) and are able to express their interest (e.g., **adequate time frames**). It is therefore not sufficient to directly invite undertakings to submit offers even if the contracting authority contacts all potential bidders as this would de facto exclude potential new entrants to the market.
- 3) To ensure **impartiality and non-discrimination** (e.g., of the selection and award criteria) and an **overall transparent and objective approach**.

The contracting authority is also obliged to document the procurement process, including all decisions taken (such as the decision that a planned contract is not relevant to the internal market and thus not advertised) and must keep the documentation for reference at a later point (e.g., for First Level Control).

The **COCOF Guidelines for Financial Corrections** for non-compliance with public procurement rules⁴ outline financial corrections applicable to cases of non-compliance above and below EU thresholds. This document is used by EU COM to determine financial corrections and is a good information source on EU COM expectations related to procurement processes. This document is also not binding to Member States, but again it is recommended for Member States to apply similar correction rates, unless stricter national rules apply. Indeed EU COM might apply additional cuts, in cases where cuts made by the Member States are considered too low.

¹ 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.

² As stated in the introduction of the Interpretative Communication: '... The Commission sheds light on its understanding of the European Court of Justice Case Law and suggests best practices in order to help the Member States to reap the full benefit of the Internal Market. This communication does not create any new legislative rules. It should be noted that, in any event, interpretation of Community law is ultimately the role of the ECJ.'

³ For complete information please refer to the EU COM Interpretative Communication.

⁴ COCOF 07/0037/03-EN: Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement

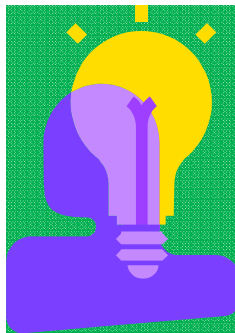


Some Tips

With public procurement we are in a **high risk area**, in particular because most contracts are service contracts, where risks are generally quite high. Programmes need to provide adequate advice to projects early on in order to avoid incorrect contract awards.

The longer infringements go undetected, the higher associated errors tend to be. Therefore controls should be carried out **as soon as possible after the contract award**. If infringements go undetected and Second Level Control or EU COM detects them, it will eventually cost more!

To ensure that requirements outlined in the EU COM Interpretative Communication are met by projects even in absence of adequate Member States legislation, programmes may want to consider **including principles** such as advertising and non-discrimination **in their programme rules**.



The definition of **bodies governed by public law** covers more bodies than typically expected. Therefore specific attention should be paid to the definition and decisions whether or not an entity is covered by this definition!

Contract awards by entities with little experience in public procurement tend to be more at risk when compared to more experienced entities. For this reason it can be useful to check the contracting authority in terms of its legal capacity and previous experience in public procurement. If at risk, guidance should be provided.

'Lack of procurement' means total absence of any public procurement process such as ad-hoc contracts without legal basis. As this frequently happened in the previous period this is an obvious target for controls.

In the contract notice, the definition of the works/services to be delivered is essential to determine value for money and the potential relevance to the internal market. For this reason, **deliverables must be clearly identified and described**. If there is a doubt the procurement will not be efficient. Many associated errors were detected in the previous period.

Splitting of contracts is contrary to the principle of open competition. The total value of the works/services must be considered and must be covered by a single contract. **A list of all contract awards for each project** can be useful.



Derogations from advertising requirements are applicable only to a very limited number of cases outlined in the Directives.

- **'Extreme urgency due to unforeseen events'** refers to external factors only. These external factors need to be truly unforeseen such as natural disasters. For instance, archaeological discoveries during construction work cannot be considered unforeseen in old cities where excavation work frequently leads to archaeological discoveries. Internal factors generally do not constitute unforeseen extreme urgency. This includes cases in which a contracting authority started a procurement procedure too late as well as cases in which a programme is threatened by decommitment (n+2/n+3).
- Likewise **technical or artistic reasons** connected to the protection of exclusive rights usually do not justify lack of advertising. 'Exclusivity' was frequently used in the previous period, for instance to justify direct awards of project coordination contracts to consultants previously involved in the preparation of the application, and should always be questioned.
- According to the COCOF Guidelines for Financial Corrections for non-compliance with Public Procurement Rules the above mentioned criteria for derogations from advertising requirements **can also be applied to contract awards below EU thresholds**.
- According to the EU COM Interpretative Communication, below EU thresholds, derogations from the advertising requirement are **also possible if the contracting authority can exclude any interest to economic operators located in other Member States** in the contract award, on the basis of a careful analysis of: 1) economic interest at stake, 2) subject-matter of the contract, 3) size and structure of the market for this service, 4) usual commercial practices in this sector, 5) the geographic location of the place of performance, and/or 6) other relevant circumstances.

A clear distinction must be made between **selection and award**. Criteria for both are outlined in the Directives. It is not allowed to use selection criteria such as economic or technical capacity of the bidders also as award criteria.

Selection and award processes must be transparent, with committed and neutral persons in the evaluation committee. Documentation of the processes must include the results and reasoning for reference at a later point (e.g., in case of complaints by

A contracting authority is not allowed to use **discriminatory selection and award criteria** that de facto exclude undertakings from other Member States. It is also not allowed to use criteria that can be fulfilled by one undertaking only.

Negotiation during contract selection and/or award is not allowed unless explicitly foreseen by the chosen procedure (e.g., negotiated procedure).

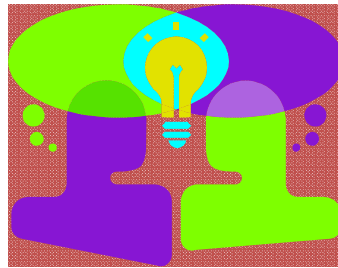
Dealing with complaints: In case a contracting authority receives a complaint by an unsuccessful bidder (e.g., for alleged absence of equal treatment), this must be treated seriously and completely with adequate staff, otherwise the procurement could be



Questions and Answers Session

Q: In the last programming period, there was some uncertainty regarding the use of *ad-hoc contracts* between public authorities (or bodies governed by public law) signed for the implementation of a project. In case a public authority (or body governed by public law) enters into such a contract with another public authority (or body governed by public law), are related costs considered staff costs or external expertise?

A: *This seems to be a deliberate try to escape public procurement and there should be a financial cut, it does not matter if the second body is public or not. Contracted bodies are normally considered external expertise.*



Q: What procurement rules must be followed by *NGOs*?

A: *Programme and Member States rules should apply. Programmes may also decide to establish the same rules for all types of final beneficiaries (e.g., the requirement for privates to observe public procurement rules), unless this is contrary to Member States provisions.*

Q: What documents need to be verified by the *JTS* as part of check on public procurement during project assessment and during project implementation?

A: *It is risky to start checks only after the project has started, where it can be too late. If not possible for the JTS to perform an in-depth check of applicants' capacities to conduct public procurement at the assessment stage, at project start there should be guidance and information by the JTS on public procurement. If possible this should be complemented by direct support to beneficiaries (e.g., in selecting the correct procurement procedure).*

Q: Should public procurement be applied to *private partners*?

A: *If a programme thinks there is a good reason for applying public procurement rules to private partners, it is a decision of the programme to be respected. Since private partners receive EU funding they need to respect such programme rules. However, participation in European Territorial Cooperation must remain attractive to private partners and strict rules may be discouraging. It also depends on the project and the project partnership.*

Q: Ensuring *cross-border transparency* (below the EU thresholds): would it be enough to announce contract notices on the website of the *JTS*?

A: *The extent of publicity must be related to the type of contract and the type of potential bidders. For instance, in case of a local construction works contract, potential bidders are not likely to know the website of the JTS or to visit it spontaneously. Presently EU COM guidelines are stricter than most Member States legislation below EU thresholds. The Interpretative Communication is not binding at this point for Member States, but it refers to various principles of the Treaty, which all Member States must observe.*

Q: How to assess the *relevance to the internal market*?

A: *There is case law about the relevance to the internal market, which can be consulted. Low-value contracts are also excluded, but what constitutes 'low value' is not defined.*

Q: How to define the principle of *proportionality* in the context of public procurement?

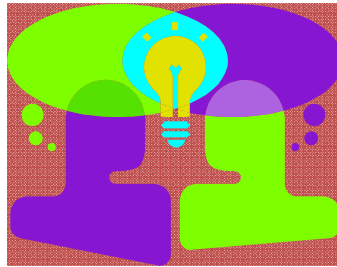
A: *The proportionality principle applies but within a strict framework, and contracting authorities need to*



document all the steps followed and the reasons behind. If you decide that a procurement process is unproportionally heavy, you need to carefully justify your decision.

Q: Can we **restrict publication** to the country of the Managing Authority?

A: *No, you need to consider the relevant area (programme area, larger, or EU-wide) depending on the market identified for the service concerned and the need to include all potential bidders.*



Q: What are the public procurement rules applicable to **IPA-CBC programmes** [CBC programmes between (potential) candidates and Member States]?

A: *PRAG rules apply to the whole programme territory (both EU-side and non-EU side), according to article 121 of the IPA Implementing Regulation (Regulation (EC) 2499/2007).*

Q: What is the **legal basis** of the Interpretative Communication of the Commission? How to use it?

A: *The Interpretative Communication indicates that Treaty principles must be applied below EU thresholds and is the basis for corrections by the Commission. The only question is 'how much', and the Guidelines for Financial Corrections for non-compliance with public procurement rules provide transparent information for applicable financial corrections. EU COM decisions based on these documents may be criticised by a Member State, but there is no case to date. The principle is that in case of non-compliance, warning is not sufficient, a correction has to be made, be it by the Commission or the Member States (Member States also may have guidelines for financial corrections).*

Q: What is the law applicable to **joint tenders**?

A: In these cases there is only ONE contracting authority. This authority has to follow EU and programme rules as well as the rules of its own country. Project partners can have agreements outlining, for instance, the procurement procedure, a description of value for money and the delivery of products to different partners. But such agreements between partners are not within the scope of public procurement. It could be that national rules forbid such solution, but in principle, if you can prove value for money (e.g., having only one partner doing the procurement for the entire partnership saves time or money), then it is possible. However it is not compulsory for projects to use this solution.

Q: Whose **responsibility** is the correct implementation of public procurement in a project? How can a Managing Authority thoroughly check the tender procedures and the requirements in different countries without speaking the language(s)? What level of cooperation/consultation can be provided by the participating countries in Territorial Cooperation programmes on public procurement?

A: *First Level Controllers have a key-role to play in this regard since they must also check public procurement. The JTS also has a role and function in checking public procurement and this is also why a JTS should be staffed internationally. Member States must provide the JTS with all necessary information in order to be able to perform these checks.*

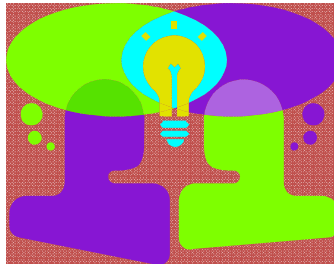
Q: In a limited tender, under what circumstances would it be acceptable to collect bids by **telephone** (e.g. small printing contract for EUR 1,500)? If this is acceptable, what documentation would be required?

A: *Phone offers are not sufficient to prove the reality/existence of the process.*



Q: In cases where three offers are requested (supported by a web announcement) but **only one offer** is received, what should be done?

A: *It is usually fine, but procurement might have to be cancelled if you detect shortcomings in the procedures (e.g., lack of advertisement) or the use of selection or award criteria that can be fulfilled by one bidder only. If this is not the case, depending on Member States legislation, a contracting authority can be allowed to continue with the procurement even if fewer offers are received. In some Member States, requesting 3 offers can automatically open specific procurement procedures such as a negotiated procedure without prior advertising. In these cases it can be better to request 'non-binding price information' instead.*



Q: If a limited tender has recently been completed for a similar service in the same location (e.g., a conference venue) can you **use the same bids** as the basis of choosing the service provider for the new service?

A: *No. Potential new entrants to the market must not be excluded from the process.*

Q: In a limited tender, what should be done if **unsuccessful bidders attempt to submit a new bid** at a lower price than the successful bidder?

A: *This case should not occur since the price of the winner should not have been made public.*

Q: Can the **status of a company as a project partner make public procurement avoidable**? A City Council leads a project on waste management. The City Council wants to build an Education Center on Waste Management.

They work with a company in charge of building the Education Center. To carry out the project, they have decided to take the company as a partner for their project. Is that contrary to rules on Public Procurement? Do we have to tell them to withdraw the company from the partnership and to launch a call for proposals to recruit a company to build up their education center?

A: *Entities acting as partners usually have to co-finance. An entity that gets all costs reimbursed normally cannot act as a partner but is a sub-contractor. A clear distinction also has to be made between a subsidy (i.e., an approved project) and a sub-contract (which requires public procurement). If the purpose of the project is to acquire works or services, which would have been acquired anyway even if the project ends up not being approved, the principle of additionality is not observed and the subsidy is not justified.*

Q: What if there is a **difference between what was planned to be purchased** (in the conditions of the tender) **and the effective delivery**?

A: *This must be checked ex-post and corrected financially. A good contract must contain provisions for penalties, and these provisions should be respected. If not, a financial correction is needed. Even if it is not foreseen in the contract, the general principles of all legal systems provide remedies in case of non-fulfilment of the contract by the contracting authority or by the contractor. Therefore the contracting authority will be able to receive the full services tendered, to cancel the contract, to reduce the price or to ask for judicial protection.*