



Technical Sheet n° 5 Public Procurement and competitive tendering within the Programme France (Channel) – England

DEFINITION

A public procurement contract is a contract that is signed in return for payment between the awarding authorities (State, Regional and Local Authorities, public organisations and associations formed by one or several of these organisations) and public or private economic operators. This contract meets the needs of these awarding authorities in terms of supplies, services and works.

Every time purchases are made, contracts are signed and external suppliers are involved in a project, Community and national rules for public procurement contracts must be observed. The purpose of these rules is to ensure transparent and fair competition, efficiency in public contracting and the sound management of public money within the European Union.

SCOPE

All public and private structures that take part in an INTERREG project must comply with advertising and competitive tendering rules, as well as related EU principles.

Your organisation must comply with national and EU competitive tendering rules that apply to it. Those rules vary according to the legal status of your organisation under the meaning of EU law (cf. corresponding technical sheet no. 8).

PUBLIC PROCUREMENTS HIGHER THAN THE APPLICATION THRESHOLDS OF THE EUROPEAN UNION

For organisations that fit in the field of application of **Directives (EC) no. 2004/17 and 2004/18** and that sign a public procurement higher than the thresholds shown in the directives, **these entirely apply in addition to the concerned national rules.**

PUBLIC PROCUREMENTS LOWER THAN THE APPLICATION THRESHOLDS OF THE EUROPEAN UNION

For public procurements that are lower than the thresholds shown in the Directives (EC) no. 2004/17 and 2004/18, or for public procurements that do not fall in the field of application of these directives, the awarding authorities must comply with the rules and principles of the EC Treaty, as well as with the fundamental norms for the signing of public procurements. These are essentially the **free access to the public order**, the non-discrimination, the **equality in terms of candidate treatment** and the **obligation of transparency** and fairness in the procedures.

The obligation of transparency “consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed” (Court of Justice of the European Union, 7 December 2000, case no. C-324/98, Telaustria).

Within the framework of the project cofinanced by ERDF on the INTERREG programme, the beneficiary must choose the most appropriate medium in order to ensure the publicity of its procurements, for each expense that is lower than the legal thresholds. The choice must be done in accordance with the interest of the contract for the European market, considering the procurement object, its amount and the common practises in the relevant sector.

Example : the procurement publicity (via a website, a newspaper, a national or European official journal, or a local paper) as well as a fair award procedure can ensure an adequate degree of publicity and transparency.

Given the cross-border interest of the projects cofinanced by ERDF, and apart from the applicable procedure, the programme recommends the beneficiary to widen the publicity of his quote request to the cross-border regions where the project shall be implemented, in order to get the largest number of quotes possible. In doing so, the beneficiary will also respect the obligation of transparency.

Beyond these recommendations, the awarding authorities shall respect the national regulations that apply to them, particularly if these are stricter than the European Law.

Furthermore, each partner is required to apply its internal procedures on procurement and on competitive tendering, which must be sent to the first-level controller at the time of the first payment claim for the project. It is on that basis that the first-level controller will carry out a control of the rules on competitive procurement.

Example: A project partner with internal rules on procurement and on competitive tendering providing for:

- 3 quotes from external providers for purchase above €1,000.
- Launching of advertisement on the organisations’ website for external service provisions above €4,000, with specifications if it is required by the need.

The first level controller has to check that internal rules have been applied in respect of national and european rules. The concerned partner will have to provide all elements necessary for this control with its payment claim.

=> For a list of items to be provided at the time of payment: cf. Annex 2: checklist of eligible and ineligible expenses, p. 79.

RECURRENT NEEDS

Finally, the rules on competitive tendering must be complied with for all provisions of service in respect of recurring needs within your structure. Thus, for recurring provisions of service (e.g. several translation orders relating to a two-year project) compliance with competitive tendering thresholds must take place by means of an evaluation of the overall cost of the structure’s requirement over a given period. If the requirement exceeds the thresholds that apply to the structure, then the recurring need cannot be covered by recourse to various service providers without adequate competitive tendering.

ELIGIBILITY OF EXPENDITURE

- The list and calendar for public procurement purchases during project duration must be specified at the time of grant application submission. The papers that form part of the contract shall be requested at the time of payment claims.
- In the case of public procurement contracts, the lead partner is under the obligation to verify that the partnership applies these rules properly. He/she will be required to reimburse part of the grant if a control on rendered service shows that there was failure to comply with the tendering rules.

Discounts or rebates granted in the tenders must be mentioned and recorded in the invoices.

- In the event of a public works contract, the retention becomes eligible if it is actually paid once the contract balance is fully settled.
- Retention still unpaid at programme payment closure is not eligible.

WHAT ARE THE CONSEQUENCES OF NON COMPLIANCE WITH COMPETITIVE TENDERING RULES ?

In case of non-compliance or partial compliance with the rules on advertising and competitive tendering, the European Commission suggests a system of financial corrections. First-level controllers are invited to apply the correction system in case of non-compliance with the rules on competitive procurement.

The correction system is set out in a specific note from the European Commission (cf. point IV of the box entitled "Legal Sources"), but it can be summarised as follows, with relation to contracts that are below the threshold requiring application of European directives:

Irregularity	Explanation	Recommended correction
Non-compliance with an adequate level of advertising and of transparency	Contract awarded without adequate competitive tendering, which implies non-compliance with the principle of transparency	25% of the amount of the contract
Application of illegal selection and / or award criteria	Application of illegal criteria (e.g. restrictions) that discourage certain bidders	5% to 10% of the contract, depending on the seriousness
Violation of the principle of equality of treatment	E.g. arbitrary negotiation with certain candidates, or privileged treatment given to a candidate	5% to 10% of the contract, depending on the seriousness

Legal sources

I. Community legislation

On every structural funds beneficiaries

[Article 7 of decree no. 2011-92 of 21 January 2011, amending decree no. 2007-1303 of 3 September 2007 determining the national rules on the eligibility of expenses of programmes that are co-financed by structural funds for the period 2007-2013](#)

On public works contracts, public supply contracts and public service contracts

Directive (EC) no. 2004/18 of the European Parliament and 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 (EC) no. 2005/75 of the European Parliament and the Council of 16 November 2005, correcting Directive (EC) no. 2004/18 on the coordination of procedures for the award of public works contract, public supply contracts and public service contracts.

On public contracts in the water, energy, transport and postal services sectors: Directive (EC) no. 2004/17 of the European Parliament and the Council of 31 March 2004, coordinating the procurement procedures of private organisations operating in the water, energy, transport and postal services sectors.

Legislation correcting Directives no. 2004/18/CE and no. 2004/17/EC

Commission Directive (EC) no. 2005/51 of 7 September 2005 amending Annex XX to Directive (EC) no. 2004/17 and Annex VIII to Directive (EC) no. 2004/18 of the European Parliament and the Council on public procurement.

Commission Regulation (EC) no. 1422/2007 of 4 December 2007 amending Directives (EC) no. 2004/17 and no. 2004/18 of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts.

For procurements that are not covered by the European Directives on public procurements

Interpretative Communication from the Commission no. 2006/C 179/02 of 23 June 2006 in relation to the European Union Law concerning the signing of procurements that do not fall (or partially fall) into the scope of the Directives "Public procurements".

Standard forms for the publication of notices: Commission Regulation (EC) no. 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives (EC) no. 2004/17 and (EC) no. 2004/18 of the European Parliament and of the Council.

II. French legislation

Decree no. 2006-975 of 1 August 2006 on public procurement code.

Statutory instrument of 3 August 2006, on the application of public procurement code.

Statutory instrument of 29 December 2009 in relation to best practise concerning the public procurements.

Modified edict no. 2005-649 of 6 June 2005 in relation to procurements signed by certain public or private bodies that do not fall into the scope of public procurements.

Modified decree no.2005/1308 of 20 October 2005 in relation to procurements signed by awarding authorities mentioned in article 4 of the edict no. 2005-649 of 6 June 2005 in relation to procurements signed by certain public or private bodies that do not fall into the scope of public procurements.

Modified decree no. 2005-1742 of 30 December 2005 establishing the rules that apply to procurements signed by awarding authorities mentioned in article 3 of the edict no. 2005-649 of 6 June 2005 in relation to procurements signed by certain public or private bodies that do not fall into the scope of public procurements.

III. English legislation

2006 N°5 - The Public Contracts Regulations 2006.

2006 N°5 - The Utilities - Contracts Regulations 2006.

2007 N°3542 - The Public Contracts and Utilities Contracts (Amendment) Regulations 2007.

IV. Financial corrections to be applied in case of non-compliance with rules on advertising and on competitive tendering

Guidelines for determining financial corrections which should be applied to expenditure co-financed by the Structural Funds or the Cohesion Funds for non-compliance with the rules on public procurement (European Commission, COCOF 07/0037/03-EN)