

Public procurement

➔ Background Information

The European Community has set up a number of directives with the aim of opening public procurement within the internal market to increase cross-border competition, reduce prices paid by public authorities and thus to enable the EU to reap the full benefits from an enlarged internal market.

According to the structural funds regulations the programme bodies have to ensure that the programme and the projects are implemented in compliance with the applicable EU and national rules, which include public procurement law. Thus, any purchase of goods, services or public works for the implementation of the programme or a project has to be carried out in line with the respective procurement rules. To ease the task for the project participants some basic information about public procurement shall be provided in the following.

➔ Guidance

1 Who has to apply public procurement law in the Alpine Space Programme?

In general, it is the state, regional or local authorities or bodies governed by public law who have to follow the procurement rules when purchasing goods, services and public works.

Since the projects are co-funded with public funds and as these shall be used in compliance with the principles of efficiency, economy and expediency the Alpine Space Programme foresees that also private project participants which normally would not be subject to procurement law shall follow the procurement rules of the country in which they are located.

To this end all project participants, i.e. the Lead Partner (LP) and its Project Partners (PP) shall commit themselves to obey the public procurement rules whenever they purchase goods, services or

public works for the project. They do this by signing the Application Form (AF) respectively the Partnership Agreement (PA) and the Subsidy Contract (SC) (see also factsheets 5.1 *Partnership Agreement* and 5.2 *Subsidy Contract*).

Procurement carried out by the implementing partner of a Common Transnational Activity (CTA) has to follow the public procurement rules applicable in the Member State in which the implementing partner is located in (see also Fact Sheet 6.6. *Common Transnational Activities*). In case of such a procurement in the course of a CTA the co-financing countries have to accept the national public procurement law of the Member State the implementing partner is located in (see programme's eligibility rules, chapter 2.1. and Fact Sheet 2.2. *What can be co-funded?*)

2) Who controls if public procurement has been obeyed and what are the consequences of violation of these rules?

The First Level Control (FLC) body of each project participant (see also Fact Sheet 6.2 on *Financial Control System of the Programme*) checks, inter alia, if the public procurement rules have been followed. In case of a CTA it is the FLC of the implementing partner that also checks if procurement rules have been observed by the latter (see also Fact Sheet 6.6. *Common Transnational Activities*). Therefore, project participants have to ensure that any procurement procedure is orderly carried out and documented. It is recommended to get in touch with the responsible FLC body due time before the FLC check is carried out to enquire what kind of documents and information the FLC body expects to be provided with. If the FLC body comes to the result that public procurement rules were not obeyed the respective costs are not eligible for co-funding by the programme.

In addition to the First Level Control audits are carried out by auditing bodies of the programme, of the EU or of the state the respective project participant is situated in. Several projects will be subject to these audits and the latter may include the control if public procurement rules have been obeyed. Any irregularity detected might lead to the obligation of the respective project participant to repay ERDF-funds already received.

3) Public Procurement rules on EU and national level

The EU-directives on public procurement rules shall ensure that public procurement follows transparent open procedures and that fair conditions of competition for suppliers are given. The directives only apply for purchases above certain thresholds (see Commission Regulation (EC) No.

1177/2009 which sets out the following thresholds which are valid from January 1st 2010 until December 31st 2011), namely:

- + 193.000, -- Euro exclusive of value added tax (VAT) for public supply and service contracts,
- + 387.000, -- Euro exclusive of VAT for supply and service contracts in the fields of water, energy, transport and postal services and
- + 4.845.000, -- Euro exclusive of VAT for public works contracts

Member States are obliged to transfer these directives into their national law. For purchases below the above-mentioned thresholds Member States have more flexibility in regulating their procurement law. In this respect the national rules for public procurement may vary between Member States. However, also when regulating these purchases Member States have to obey certain fundamental principles as laid down in the Treaty as well as the jurisdiction of the European Court of Justice that constantly further develops the procurement law.

The public procurement rules foresee different kinds of procurement procedures. In general it can be stated that the higher the value of a contract to be awarded the stricter the procurement rules that have to be followed (e. g. regarding the prior publication of a call for tenders or the possibility to negotiate with the bidders).

In case of small contract values national laws foresee the possibility of direct contracting, i.e. to commission a company without any need for a formalised procurement procedure. However, it has to be ensured that the principles of economic and efficient use of funds are obeyed as well as the principles of non-discrimination and equal treatment which imply an obligation of transparency. This principle of transparency obliges the contractor to ensure that any undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that it would be in a position to express its interest in obtaining the contract. That means that even in cases where national law would allow direct contracting the contractor has to decide on a case-by-case basis if or not a planned contract is of potential interest to undertakings in other Member States and thus of relevance to the Internal Market. In doing so the contracting authority should take into consideration aspects such as the estimated contract value, the size and structure of the market and the location of the place of performance. In case the contracting authority comes to the result that the contract might be of interest for undertakings from other countries it shall decide on the appropriate medium for advertising the contract. This could be the internet, national official journals, local means of publication, etc. The greater the interest of the contract to potential bidders from other Member States, the wider the coverage should be (for more information about the principle of transparency and

respective guidance see Commission Communication 2006/179/02). However, if the contracting authority can show that carrying out a procedure ensuring such transparency might cause more costs than its added value would be it might be justified in single cases not to carry out such a transparent procedure.

Some purchase can even be exempted from public procurement rules if certain, rather restrictive conditions are fulfilled. One of these exemptions is the so-called "in-house"-procurement (more information on that exemption and the respective conditions can be found in factsheet 2.5 *Affiliated Institutions*).

4) Where to get more information?

In the following it is set out where the applicable public procurement rules can be found. For more information about the applicable rules in the respective countries the Alpine Contact Points (ACP) can be contacted.

EU-directives on procurement law, Commission Communications (e.g. the above-mentioned 2006/C 179/02 on the principle of transparency) and more information about EU-procurement rules can be found on the website of the Internal Market and Services Directorate General:

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

The programme "Interact" has held several seminars on procurement law, useful documents and presentations can be downloaded from the website:

http://www.interact-eu.net/public_procurement/public_procurement/436/7267

AUSTRIA: Austrian project participants shall respect the rules set out in the Bundesvergabegesetz 2006, BGBl I Nr 17/2006, (<http://www.ris.bka.gv.at>). Please note that for all procurement procedures initialised between April 30th 2009 and December 31st 2011 the amounts up to which certain procurement procedures can be applied have been raised. For instance direct contracting is possible up to an amount of 100.000,-- Euro (exclusive of VAT) – for more details see "Schwellenwerteverordnung 2009", BGBl II Nr. 129/2009 in the version BGBl II Nr. 455/2010.

FRANCE: the threshold under which direct contracting is possible amounts to 4.000,-- Euro net, i.e. no public announcement must be done but a minimal competitive call must be ensured. For more

information French project participants shall consult the Nouveau Code des Marchés Publics and the Décret 2007 – 1303 of September 3rd 2007 in the version of January 26th 2011.

GERMANY: German project participants must act in respect of the *Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung –VgV)*. Further details about the application of the VgV are set out in the *Verdingungsordnung für Leistungen (VOL)* and in the *Verdingungsordnung für freiberufliche Leistungen (VOF)*. All documents can be found on the following website:

<http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/oeffentliche-auftraege.html>

ITALY: Italian project participants must act in respect of the Italian Public Procurement Code, Law No. 163 dated April 12th 2006. Stricter rules might be foreseen in administrative-internal rules of the local administrations.

SLOVENIA: Slovenian project participants must act in respect of the Slovenian Public procurement Law, *Zakon o javnem naročanju ZJN -2 (Uradni list RS, 128/2006, 16/2008, 19/2010)*. Direct contracting is possible for procurements below the threshold of 20.000,-- Euro (exclusive of VAT) for goods and services respectively of 20.000 Euro (exclusive of VAT) for constructions.

Reference Documents

- + Article 9 (5) and Article 60 lit a) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999
- + Fact Sheet 2.5 *Affiliated institutions*
- + Partnership Agreement (articles 4, 5 and 7), for the Partnership Agreement see also Fact Sheet 5.1 Partnership Agreement
- + Subsidy Contract (article 6), for the *Subsidy Contract* see also Fact Sheet 5.2 *Subsidy Contract*
- + Fact Sheet 6.2 *Financial Control System of the Programme*
- + Fact Sheet 6.6. *Common Transnational Activities*