



# FactSheet

## No. 4.2

# Public procurement

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Public procurement rules aim at ensuring that the purchase of services, goods and works follows transparent procedures and that fair conditions of competition for suppliers are provided.

According to the European structural and investment (ESI) funds regulations, the programme bodies have to ensure that the programme and the projects are implemented in compliance with the applicable public procurement rules. 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 relevant public procurement rules.

Public procurement law is a complex matter and many findings during financial controls in ESI-financed programmes and projects are related to procurement errors. Thus, this factsheet provides basic information about public procurement law, the relevant programme rules, most common procurement errors and further guidance on this issue.

## 1. Procurement rules

### Rules for public partners

The European Community has set up minimum requirements for public procurement. They vary depending on the type of institution making the purchase, on the nature of purchases and the relevant sector in which purchases are made (specific rules are set e.g. for supply, works or service contracts or for purchases in the water, energy and other similar sectors).

According to European public procurement law the State, regional or local authorities, associations formed by such authorities, bodies governed by public law and their associations<sup>1</sup> are obliged to follow public procurement rules when purchasing goods, services and public works. Considering the nature of the activities generally performed in Alpine Space projects, the main reference document on EU public procurement rules is the directive on public contracts for the acquisition of services, supplies and works, i.e.:

- Directive 2014/24/EU as amended by the Commission delegated regulations (EU) 2015/2170 and 2017/2365.

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<sup>1</sup> A definition of bodies governed by public law is provided in art. 2 of the Directive 2014/24/EU on public procurement and explained in the factsheet on 'Who can participate'.



This procurement directive applies to purchases whose estimated value net of value added tax (VAT) is equal to or above certain thresholds. The following table summarises the main **EU thresholds**, according to this directive as of 1 January 2018.

Nature of procurement	Type of contractor	Estimated value, excluding VAT
Public contracts for services and supply	Central Government authorities (e.g. ministries)	≤ EUR 144,000
	Sub-central contracting authorities (e.g. regions, municipalities)	≤ EUR 221,000
Public contracts for works <sup>2</sup>	Both central and sub-central authorities	≤ EUR 5,548,000

The EU rules set the general framework for the awarding of public contracts. They have to be transposed into national law. Depending on the national legal system procurement law is made on national, regional or local level. As a result, **applicable public procurement rules and thresholds vary between Member States or regions in which Alpine Space project partners are located**. Moreover, institutions may set specific internal rules for procurements. They may for instance set stricter procurement procedures or lower thresholds which shall be obeyed whenever the institution purchases something. It should be noted that **the strictest of the applicable procurement rules applies**.

It should be noted that even below the thresholds, the fundamental principles of public procurement established in the EC Treaty (transparency, effective competition, non-discrimination and equal treatment) still apply. In addition, procurement law is further developed through the jurisprudence of the European Court of Justice. It is therefore important that project participants are well aware of the public procurement rules which are applicable to them and act accordingly. In case of doubts, project participants should contact their first level control body (FLCB) beforehand. Since procurement law is a complex matter, **project participants are strongly recommended to seek legal advice if needed**. This could be provided by the legal department of the project participant. Moreover, external procurement experts (e.g. lawyers) can be contracted to provide legal support and such costs are eligible for co-financing as long as the eligibility rules on programme and national level are obeyed.

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 complied with (e.g. regarding the prior publication of a call for tenders or the possibility to invite a limited number of

<sup>2</sup> It should be noted that the procurement of works is rather uncommon in Alpine Space projects.



suppliers based on a market analyses).

The adherence to public procurement procedures has to be well documented in the framework of Alpine Space projects. Documents such as public procurement notes, terms of reference, offers, order forms and contracts have to be available for financial control and audit purposes. Thus, even where national public procurement rules allow for direct contracting for small contract values, the selection procedure has to be documented transparently (e.g. proof of market researches, documents tracing the selection of an operator and the awarding of a contract) and the observance of the principles of economic and efficient use of funds have to be proved.

It is recommended that, even where direct awarding is allowed, project participants still request offers from different providers or provide evidence of adequate market search before selecting one provider, in order to ensure an adequate level of transparency and of economical use of public funds. Also in these cases, prior contact with the FLCB is highly recommended to enquire the FLCB's expectations.

### **In-house contracting**

Public procurement rules foresee very limited and well defined exceptions. One of these concerns the so called in-house contracting. These are contractual relationships established between an authority willing to purchase services/goods/works and a provider (legal person governed by private or public law) which is under the control of this authority (administrative control, control in terms of the activities performed and financial control). These contracts fall outside the scope of public procurement if all of the following conditions are fulfilled:

- the contracting authority exercises over the provider a control which is similar to the control exercised over its own departments; and
- more than 80% of the activities of this provider are carried out in the performance of tasks entrusted by the controlling contracting authority (or by other legal persons controlled by that contracting authority); and
- no direct private capital participation in the controlled provider is given. The only possible exceptions to this rule are forms of private capital participation that are required by national legislative provisions, in conformity with the EU Treaties, and which do not exert a decisive influence on the controlled provider.

This control may be exercised directly by a single contracting authority or jointly with other contracting authorities (for further reference see art. 12 (3) of the EU directive 2014/24/EU).



Before recurring to any exemption to public procurement rules, project participants should assess carefully whether the contractual relationships they intend to enter actually fulfil the stringent conditions set by public procurement rules. In case of doubts, the programme strongly recommends that public procurement procedures are followed and procurement experts are consulted.

### **Green public procurement and other horizontal aspects**

Interreg Alpine Space strives for an innovative and sustainable development of the Alpine area. Public procurement rules allow for horizontal aspects such as the protection of the environment, social considerations (e.g. advancement of women, better integration of migrants) or the enforcement of innovation to be taken into account when purchasing a product, service or work. Project participants are thus invited to make use of this possibility whenever possible. These aspects may be integrated into public procurement procedures for instance by the following means:

- taking these horizontal aspects into account in the planning of the procurement or the specification of services (e.g. a study on a certain topic may take into account the different needs of men and women);
- setting specific selection and award criteria (e.g. preference given to equipment with low electric power consumption or assessment taking into account the life-cycle-costs of equipment when analysing the offers of the potential providers);
- including specific clauses in the contract with the provider of the service, good or work (e.g. foreseeing that certain tasks are performed through the involvement of disabled persons and establishing a contract penalty in case this is not respected).

It should be kept in mind that a balance is to be ensured between the promotion of these horizontal aspects and the need to provide fair conditions of competition for suppliers. Attention is thus to be paid that they do not result in a discriminatory treatment among providers of similar services/supplies/works.

## **Rules for private partners**

The above mentioned Directive 2014/24/EU (article 2) lists the type of organisations that are subject to public procurement rules (i.e. State, regional or local authorities, associations formed by such authorities, bodies governed by public law and their associations<sup>3</sup>); other actors such as private companies, NGOs or other

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<sup>3</sup> As mentioned above, a definition of bodies governed by public law is provided in art. 2 of the Directive 2014/24/EU on public procurement and explained in the factsheet on 'Who can participate'.



associations of private bodies are normally not subject to public procurement law.

However, Alpine Space projects are co-financed with public funds and these funds shall be used in compliance with the principles of efficiency, economy and expediency. Therefore, Interreg Alpine Space sets simplified **programme rules** for procurements of those actors that are not subject to the EU Directive on public procurement.

Type of contractor	Estimated value of the contract, excluding VAT	Requirements
Private actors (e.g. private companies, NGOs or other associations of private bodies) that are not subject to the EU Directive 2014/24/EU on public procurement  (i.e. <u>not</u> the State, regional or local authorities, associations formed by such authorities, bodies governed by public law and their associations)	EUR 5,000 or higher	Perform and document adequate market search (e.g. collecting offers from at least 2 different market operators, internet price comparison)
	EUR 50,000 or higher	Publication of terms of reference for the purchase on:  - Interreg Alpine Space website

The purchase process of these private project partners shall be documented using a form provided by the programme.

## 2. Most common procurement errors

Experience made in ESI-funded programmes has revealed the following as being the most common procurement errors:

- Insufficient publication of procurement procedure (e.g. direct award without any prior notification, notification only on national or regional instead of EU-level)
- Imprecise definition of the subject-matter of the contract to be awarded
- Excessively short deadlines for the submission of tenders
- Mix-up of selection and award criteria



- Use of discriminatory or dissuasive selection or award criteria
- Unlawful splitting of contracts
- Use of wrong procurement procedure
- Unlawful application of exemption rules
- Unlawful negotiation during award procedure
- Modification of a tender or criteria during evaluation
- Unlawful substantial contract modification or purchase of additional works, services or supplies.

Project participants are therefore asked to pay special attention to avoid similar errors.

### 3. Enforcement of procurement rules and consequences in case of violation

For each project participant, the FLCB checks inter alia if the applicable procurement rules have been respected. Therefore, project participants have to ensure that any procurement procedure is orderly carried out and documented. Additional controls may also be carried out by auditing bodies of the programme, the EU or of the EU-Member State where the project participant is located.

Project participants risk losing ERDF financing if they cannot provide documentary proof of compliance with European, national, local and their own internal public procurement rules or with the programme rules on procurement mentioned above. If a procurement error is detected, the Commission Decision C (2013) 9527, of 19 December 2013 on the guidelines for determining financial corrections to be made for non-compliance with public procurement rules, will apply. If non-observance of the programme rules for purchases by private partners is detected, a financial correction will apply of 10% of the value of the contract that is reported to the programme.

### 4. Where to find more information and support?

An overview on the applicable EU public procurement rules is available at the dedicated website of the European Commission:

- [http://ec.europa.eu/growth/single-market/public-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm)



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## Reference documents

- Directive on public procurement 2014/24/EU as amended by the Commission delegated regulations (EU) 2015/2170 and 2017/2365.
- Commission Decision C (2013) 9527 of 19 December 2014 on guidelines for determining financial corrections for non-compliance with public procurement rules.

## Annexes and related factsheets

- Purchase form for private project partners
- Procurement documentation: guidance for public project partners
- Factsheet Who can participate
- Factsheet What can be co-financed
- Factsheet Financial control system
- Factsheet Project greening