



The 2014-2020 Interreg Programme Management Handbook is composed of fact sheets. Each theme is covered by one fact sheet so that the reader can easily and quickly choose the relevant fact sheet.

Fact Sheet; **Public Procurement**

1. What is it? What is the definition of the term / theme of this fact sheet?

Procurement is the acquisition of goods, services or works from an external source. Public institutions - or private institutions equivalent to public ones - must strive to acquire goods, services or works at the best possible cost, while at the same time meeting their needs in terms of quality, quantity and timing.

The European Union has defined public procurement rules intended to promote fair and open competition for goods, services or works acquired from an external source by public institutions - or private institutions equivalent to public ones (i.e., private institutions governed by public law - see public procurement Directives for the definition).

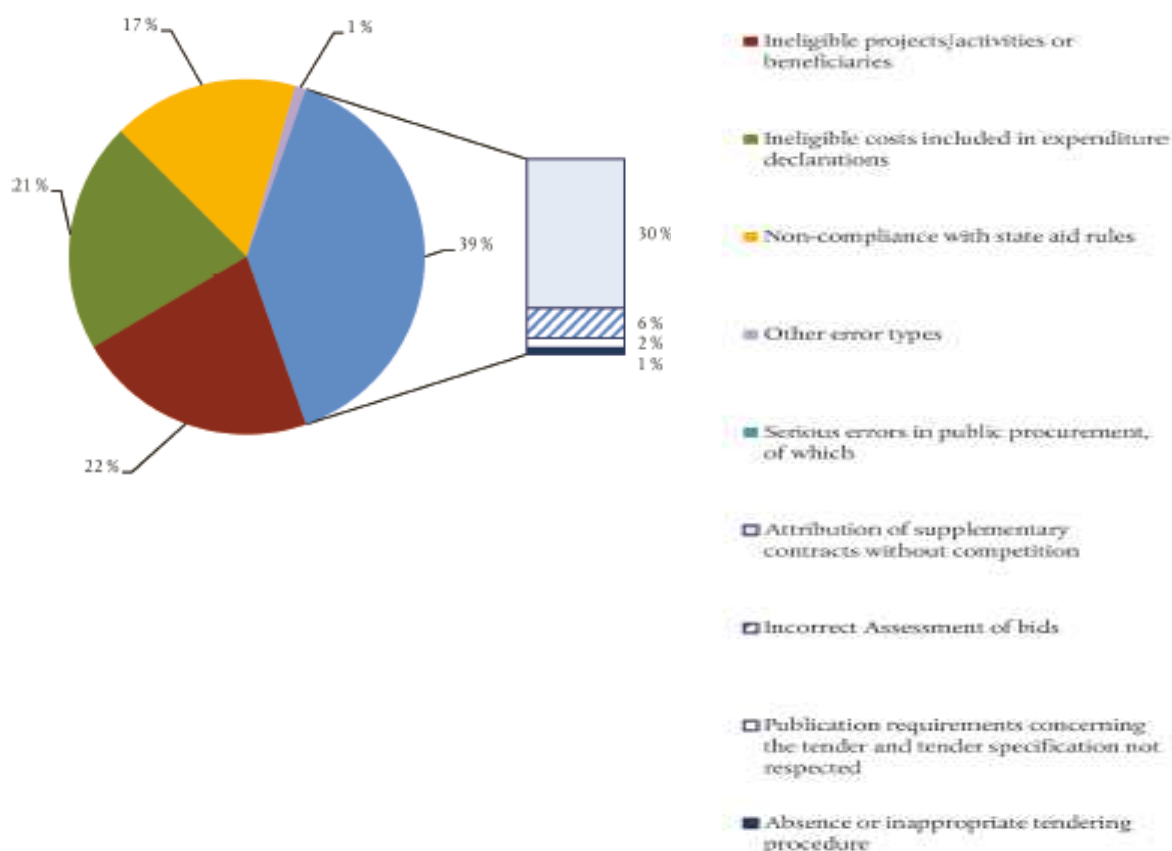
Public procurement rules apply to all procurements exceeding the so-called *public procurement thresholds*. At the time of writing this fact sheet, the public procurement threshold is EUR 134.000 for acquisition of most services by Central Government authorities. This threshold varies depending on the nature of the purchase (works, services or goods), the economic sector, and whether the acquiring body is considered central government or sub-central contracting authorities. Furthermore, thresholds are updated every second year, published on the website of DG Internal Market http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm and transferred into national laws.

2. Why we are discussing it?

Public procurement is important because operations co-funded by the Structural Funds must be in line with the applicable public procurement rules on national and EU levels, in order to ensure value for money and competition on the procurement market.

Public procurement is still the most frequent source of errors in Cohesion Policy. According to the report of the European Court of Auditors on errors in Regional Policy in the year 2013¹, failure to comply with public procurement rules accounts for more than one third of the error rate (39%) estimated by the Court for these policy areas. Other frequent error sources are declaration of ineligible expenditure and infringement of State Aid rules.

¹ http://www.eca.europa.eu/Lists/ECADocuments/AR13/AR13_EN.pdf



Source: European Court of Auditors - Annual Report concerning financial year 2013; Error Source by Type of Error - Regional Policy

3. Reference to the regulations and what is new in the 2014-2020 programming period compared with the 2007-2013 programming period

On the EU-level the Regulation consists of the directives on public procurement, legal acts implementing the Directives, and a growing body of case law:

At the time of writing this fact sheet, the following two main **Directives for Public Procurement** are:

- EU Directive 2004/17/EU - procurements in the water, energy, transport and postal services sectors (*Sector Directive*)
- EU Directive 2004/18/EU - procurements of public works, public supply and public service (*Classical Directive*)

The Sector Directive is similar to the Classical Directive but less strict and narrower in its scope. The Classical Directive is more relevant to European Territorial Cooperation. Both Directives had to be implemented into Member States legislation by the end of January 2006, and cover public procurements



above EU thresholds only. Below the EU thresholds, national regulations vary substantially across Europe. Most public procurements in Interreg are below the EU thresholds.

An updated version of these Directives will be transformed into national law by the Member States by 18 April 2016. These updated Directives are:

- EU Directive No. 2014/24/EU (*Classical Directive*)
- EU Directive No. 2014/25/EU (*Sector Directive*)

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 developments.

Another reason for uncertainties and inefficiencies is because Interreg must not only apply to national, regional and institutional and programme-specific public procurement rules, but also to:

- **the principles of the European Treaty (ensuring that certain public procurements are transparent and accessible to bidders in other Member States);** The European Commission Interpretative Communication on the Community law applicable to contract awards not wholly or fully subject to the provisions of the Public Procurement Directives outlines the opinion of the European Commission on the application of internal market principles of the EU Treaty to all planned contracts potentially relevant to the Internal Market. This includes contracts not wholly or fully subject to the EU Public Procurement Directives (e.g., below EU thresholds). 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.
- **the principle of "value for money" (ensuring that programmes and projects make the most of limited public resources);**
- **the principle of proportionality (ensuring administrative costs associated with a certain public procurement are justified in light of the value of the contract).**

Legislative framework:

- EU Directive 2004/17/EU - procurements in the water, energy, transport and postal services sectors (*Sector Directive*)
- EU Directive 2004/18/EU - procurements of public works, public supply and public service (*Classical Directive*)
- EU Directive No. 2014/24/EU (*Classical Directive*)
- EU Directive No. 2014/25/EU (*Sector Directive*)



4. Challenges and frequently-asked questions

- Do I need to become a public procurement expert? Many public procurement irregularities are due to very basic flaws such as a complete lack of public procurement procedures. Often it does not require substantial expertise to detect these cases. Also, it can be helpful to accept that there will never be 100% certainty when dealing with public procurement. Instead, Interreg programmes are learning how to manage the risk in an effective way.
- Can public procurement errors be systemic to a specific programme or country? Public procurement errors can be systemic if they are likely to occur repeatedly in a subset of public procurements of an Interreg programme. Such errors can happen at the level of the beneficiary and/or the Interreg programme. An example of a systemic error of a beneficiary is a project partner who does not apply public procurement rules at all, or applies rules in a wrong or inconsistent way. For this beneficiary, the error could be considered systemic (as it must be assumed that it also applies to other cooperation projects of the beneficiary). In the past, such errors happened quite often. An example of a systemic error at the level of the Interreg programme would be a first level controller who does not check public procurement, or a programme that has no rules for the division of tasks between FLC and MA/JS, leading to a situation in which neither FLC nor MA/JS checks public procurement.
- Should an Interreg programme have programme-specific public procurement rules? Some Interreg programmes established public procurement rules for beneficiaries participating in cooperation projects. These rules are always stricter than national rules. For instance, some Interreg programmes require that:
 - private beneficiaries, which would normally not be subject to public procurement rules, apply the rules,
 - all beneficiaries awarding a contract ask for three offers if the contract value exceeds a certain amount (e.g., EUR 2.000), even if a direct contract award would be allowed according to national rules. All beneficiaries awarding a contract publish the contract notice if the contract value exceeds a certain amount (e.g., EUR 12.000).

Experience has shown that some of these rules are more useful than others. For instance, requiring private partners to apply public procurement rules can lead to problems due to the low capacity of many private partners to deal with public procurement. One may also raise the question why Structural Funds programmes should be stricter than procurement law itself. Furthermore, requiring private companies to apply the rules can discourage them from participating, even though they are eligible in many programmes.

Typical challenges for Interreg programmes dealing with public procurements - frequent errors, derogations from the rules, etc. - are compiled in the INTERACT document **50 Q&A on Public Procurement in European Territorial Cooperation (ETC) Programmes**.

5. Good practice examples

- Many Interreg programmes have developed effective ways to manage the risk inherent in public procurements. Usually, the first step is to move away from a one-size-fits-all approach towards



informed considerations of the risk associated with certain types of procurements or beneficiaries. This requires experience and the application of professional judgment.

- Large contract values are an obvious target for more guidance and control. If previous checks have shown that certain kinds of beneficiaries often have a low capacity to deal with public procurement (e.g., privates that usually do not have to apply procurement law but are required by a programme to follow the rules), the Interreg programme should provide more support to this type of beneficiary. In some cases, capacity checks of beneficiaries can also provide information for risk-based approaches. Good guidance at programme level can avoid many errors at project level.
- Risk management also implies that some public procurement expertise is available in the MA/JS, as well as on the side of the FLC and other programme bodies that are in close contact with the project partners, such as contact points.
- First level controllers are the key to avoiding public procurement errors, and some knowledge of the field and of national rules can be expected from controllers. Controllers such as JS staff are rarely experts in public procurement, and training of controllers should be encouraged and supported. FLC coordinating bodies should be available to ensure that the same standards and quality is applied also in de-centralised FLC systems. In some programmes, MA/JS also undertake on-the-spot sample checks in order to obtain a better picture of the quality of FLC checks related to public procurement.
- The timing of checks is a key factor. As a general rule, early measures (e.g., contact with FLC bodies) are better than financial corrections at a later point. It can also be very useful to provide information on public procurement and applicable principles at an early stage, attaching it to the subsidy contract.

6. Reference to other, more detailed papers

- INTERACT document 50 *Q&A on Public Procurement in European Territorial Cooperation (ETC) Programmes*: www.interact-eu.net/.../INTERACT_Factsheet_Fifty_Q&A_on_Public_Procurement_in_ETC_Programmes_09.02.2011.pdf
- HIT *Model FLC Checklist* available on the INTERACT website: http://www.interact-eu.net/focus_on_etc_2014/2014_2020_interact_s_help_and_support/512/17407
- Public procurement Checklist used by EC auditors for public procurement, entitled: *Article 16 Checklist - Public Procurement; Objective: To ensure compliance with national and/or EU public procurement rules.*