50 questions and answers on public procurement

Updated, March 2021
Q&A on public procurement

European Regional Development Fund

Disclaimer: The Interact programme drafted the first Q&A document in February 2011. This paper is an update to the current legal framework and provides answers to questions concerning the public procurement. The questions and answers derived from the Interact workshops and seminars with the participation of representatives from DG Regio and DG Internal Market, managing authorities, joint technical secretariats, control contact points, controllers, audit authorities and Interact.

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Table of Content

Introduction

Questions and answers

A. Public procurement, the basics and the most common errors 4
B. Exceptions and modifications of the contract, splitting the acquisition into lots 6
C. Transparency requirements for below the thresholds contracts 9
D. Estimating the value of procurement 11
E. Selection and award criteria 12
F. Implementation of the public contracts, managing the public procurement risk 13
G. Verification of public procurement 14
H. Dealing with irregularities and financial corrections related to public procurement 15
I. Joint public procurement, green procurement, other ideas for improving 16

Introduction

This document compiles the most frequently asked questions and answers related to public procurement. Most of the questions were received during the Interact workshops and seminars addressing public procurement, and colleagues from Interact Office Vienna issued the document's first draft. Participants of the events included representatives from MAs, JSs, AAs, national contact points and controllers. The panels of experts included programme managers and speakers from and DG Regio and Interact.

A. Public procurement — the basics and the most common errors

1. Why is public procurement essential for projects and programmes? Is it not just adding on top of bureaucracy?

Public procurement creates opportunities and challenges equally the programmes and projects. Usually, when launching an acquisition, we deal with questions such as which elements of the public contracts we need to handle carefully to avoid errors. When using public funds, we must ensure competition in the procurement market and the best value for public money. The co-funded operations should comply with the applicable procurement rules at the EU and national levels to ensure consistency with the fundamental principles of non-discrimination, equal treatment, transparency, and publicity. EU Directives on public procurement provide explicit legislative rules in that respect.

Public procurement rules are required because we must ensure open and fair competitions between economic operators and the freedom to provide works, services, and products. Luckily, you do not need to be a lawyer or a key expert to deal with public procurement. It is sufficient to know the basics of public procurement and apply the right mindset to avoid errors. It is also helpful to be open to creative solutions and actively prevent over-interpretation of the public procurement rules.

2. Is public procurement causing errors?

Public procurement represents the most frequent source of errors. Most of them are due to fundamental failures in respecting the public procurement rules and procedures. The common errors are associated to lack of transparency and equal treatment, discriminatory criteria, artificial splitting of the contracts, and conflict of interest. It does not require sound expertise to detect these cases. It can also be helpful to accept that there will never be 100% certainty when dealing with public procurement. However, programmes can effectively manage the risk.

3. What are examples of potential systemic errors?

Systemic errors are likely to occur when dealing with public procurement. Such errors can happen either at project or programme level. An example of a systemic error could be a project partner who does not apply public procurement rules or applies rules in a wrong or inconsistent way. We should consider this error as a systemic one if it applies to other projects and programme bodies. An example of a systemic error could be a programme with no clear division of the tasks between MAs, JSs, and controllers. That leads to a situation in which neither the controller nor MA or JS check the compliance with the rules on public procurement. Another example could be a controller who does not check public procurement at all or properly according to the rules and programme´s guidelines and templates (i.e., procurement compliance checklist).

4. When an error became irregularity?

Formally the errors become irregularities if detected in the expenditure declared to the EC in interim payment applications. Thus, all the management and control system bodies have an active role in detecting errors and irregularities before the expenditures are submitted to the Commission. Similarly,

corrections that Member States may request or undertake before declaring the related expenditure to the Commission are not financial corrections.

A factsheet on errors, irregularities and applicable financial corrections is available on the Interact website:

https://www.interact-eu.net/sites/default/files/content/doc/Fact%20sheet%20-%20Errors%20financial%20corrections.pdf

A comprehensive list of examples and findings from management verifications, which may occur in the context of the implementation of public procurement processes, you can find in the Guidance for the Member States on the drawing of Management Declaration and Annual Summary EGESIF 15-0008-05 03/12/2018, Annex 2 - typology of findings from management verifications (revision 2018): https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_management_declaration_annual_summary_en.pdf

5. What does the EU public procurement regulation include? Which other documents, fact sheets, reports and guidances concerning public procurement shall be used by the programmes? Where can we find relevant information?

At the EU-level the regulation consists of three essential Directives and Guidelines on public procurement; there are also available other relevant factsheets and reports.

- The current legal framework, rules, thresholds, and guidelines consist of https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en
- Directive 2014/24/EU on public procurement
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors
- Directive 2014/23/EU on the award of concession contracts
- Public procurement — Guidance for practitioners (revision 2018) on avoiding the most common errors in projects funded by the European Structural and Investment Funds https://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018
- Guidelines for determining financial corrections (revision 2019) for non-compliance with the rules on public procurement https://ec.europa.eu/regional_policy/en/information/publications/decisions/2019/commission-decision-of-14-5-2019-laying-down-the-guidelines-for-determining-financial-corrections-to-be-made-to-expenditure-financed-by-the-union-for-non-compliance-with-the-applicable-rules-on-public-procurement
- Practical guide on identifying conflict of interest in public procurement procedures: https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/2013_11_12-Final-guide-on-conflict-of-interests-EN.pdf
- Public procurement-related information on the European Commission webpage https://ec.europa.eu/growth/single-market/public-procurement_en

EU Directives are transposed into Member States legislations and cover 'above EU thresholds' public procurements only. For the below EU threshold contracts, national regulations vary substantially across Europe. As a general remark, most public procurements for the co-funded operations financed under the EU programmes are below the EU thresholds. However, provisions laid down in the treaties regarding the common market that guide this Directive might impact these contracts. We must ensure free competition between economic operators and freedom to provide work, services, and supplies, consistency with the fundamental principles of non-discrimination, equal treatment, transparency and publicity.

Information concerning public procurement is also available on Interact website.

- Roadmap for public procurement, a step-by-step guide for procurement https://www.interact-eu.net/library?title=Public+procurement&field_fields_of_expertise_tid=All&field_networks_tid=All#2669-publication-roadmap-public-procurement

6. Public procurement rules were not written for cooperation settings. How to deal with this?

Many cooperation projects and programmes currently struggle because the potential of joint procurement is not applied, especially when several contracting authorities from different Member States implement public procurement separately. More precisely, there is no procurement procedure available to allow project partners to procure works, services, or products jointly across national borders (e.g., one joint procurement of project partners for managing the entire cooperation project). Therefore, it requires professional judgment to deal with public procurement in the current legal framework.

Another reason for uncertainties is what happened with below thresholds contracts. Most procurements are carried out for contract values below the EU thresholds. As the EU Directives do not apply to these procurements, different national rules are applied by each Member State and differ from country to country. Harmonisation of the national rules below the EU threshold would be highly desirable. Also, standardisation of procedures would help to have predicable procurements for all beneficiaries and the co-funded operations, regardless of the programme.

7. What happens if national rules contradict the EU Directives?

Member States are responsible for the accurate transposition of the EU Directives into national laws. In most cases, national rules do not contradict the Directives, but it could mislead interpretation. The Commission applies EU Directives rationale when auditing public procurement in Structural Funds programmes. In the worst cases scenario, the European Commission can act against a Member State with a formal infringement procedure. Still, this happens if there are clear infringement cases brought to the EU Commission's attention.

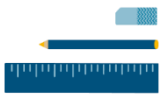
8. Are all the beneficiaries subject to public procurement rules?

It depends on the country and the programme. According to the EC Directives, private bodies are only required to apply public procurement rules if they qualify themselves as 'bodies governed by public law' (see Article 2 (1) (4) of Directive 2014/24/EU). The definition refers – among others - to the basic financing of a body ('financed for the most part by state, regional or local authorities') rather than a funding one-off through a programme. However, programme rules might require some or all private bodies to apply and observe public procurement rules' specific requirements even if the EU-Directives and national procurement rules would not oblige these legal entities to do so.

9. What should we do in case a procurement is subject to appeals?

If a contracting authority receives a complaint by an unsuccessful bidder (e.g., lack of equal treatment), must treat this seriously and effectively. Otherwise, the procurement could be considered incorrect and investigated for non-compliance with the rules on procurement. Appeals by unsuccessful bidders against a specific procurement procedure can take a long time, and the European Commission is currently taking a closer look into this issue. Appeals could impact the implementation of a project as they put the procurement procedure on hold. However, appeals do not seem to be quite frequent.

B. Exemptions and modifications of the contract, splitting the acquisition into lots



10. The Directives foresee exceptions from advertising requirements in case of extreme urgency and unforeseen events.

Exemptions from advertising requirements apply only in exceptional circumstances outlined in the Directives. These exceptions should be limited to cases where works, services and goods can be supplied only by a particular economic operator or for reasons of extreme urgency and unforeseen events. These cases refer to external factors, which need to be genuinely unpredictable. For instance, archaeological discoveries during construction work cannot be considered unexpected in old cities. In these cases, excavation work frequently leads to archaeological findings.

Internal factors generally do not constitute unforeseen extreme urgency. For instance, cases in which a contracting authority started a procurement procedure too late and cases in which a programme is threatened by de-commitment (see paragraph (50) and (80) of Directive 2014/24/EU).

11. Some beneficiaries consider that there is only one potential supplier for a particular contract. Is this correct?

EU Directives outline exceptions that can be applied if one economic operator can only execute one particular contract due to the specificity of the works, services or supplies or reasons connected to exclusive rights protection (see Article 32 of Directive 2014/24/EU).

For instance, if a contracting authority wants to have a particular artist for an event, naturally, the service can only be delivered by this artist. Another example could be a monitoring system developed for one programme. Another programme needs to have this system. If the source codes are not freely available, the contracting authority can only acquire the electronic monitoring system by contacting the economic operator that developed the system for the first programme.

Exclusivity is a term often used, for instance, to justify a direct award of a project coordination contract to the consultant previously involved in the preparation of the project application. It is convenient for many beneficiaries to use it, but it has to be used carefully. Auditors and controllers should invariably question such a practice.

12. What justifies additional works, services or supplies?

According to EU Directives, additional works, services, or supplies not included in the initial contract are possible. In case it could not be predicted, they are strictly necessary to complete the original contract. However, the value for the additional works, services, or supplies may not exceed 50% of the initial contract.

13. According to the Directive 2014/24/EU, the purchase of certain research and development services does not fall under the procurement law. Can this be applied in a programme or a project?

Directive 2014/24/EU only applies to contracts for R&D services which are covered by the following CPV codes (a single classification system for public procurement):

73000000-2	Research and development services and related consultancy services
73100000-3	Research and experimental development services
73110000-6	Research services
73111000-3	Research laboratory services
73112000-0	Marine research services
73120000-9	Experimental development services
73300000-5	Design and execution of research and development
73420000-2	Pre-feasibility study and technological demonstration
73430000-5	Test and evaluation

Common procurement vocabulary (CPV): http://simap.ted.europa.eu/web/simap/cpv

The Commission intends to encourage research and development and be applied, where the outcomes of the R&D activities go to the contracting authority concerned. This fact should not exclude the possibility that the service provider, having carried out those activities, could promote the results if the contracting authority retains the exclusive right to use the outcomes of the R&D in the conduct of its activities.

It must be ensured that:

- the contracting authority retains the right to make use of the results of the R&D service, to make the results available to the broader public for the use in whatever means by any interested person/institution and without any copyrights on them.
- the economic operator delivering the R&D service does not get its full costs reimbursed and supports parts of its costs.
- If these points are ensured, the contracting authority can directly award the contract to the R&D service provider without the obligation to carry out a public procurement procedure.
- In some cases, auditors might not accept the application of this or other exemptions due to uncertainties related to their applicability. It is therefore highly recommended to clarify matters in advance, especially by involving procurement experts.

14. Under which circumstances is in-house contracting acceptable?

EU Directives provide the explicit legislative rules for determining which contracts can be awarded between public sector entities without a call for tender. According to the case-law of the European Court of Justice, some preconditions must be met for in-house contracting to be applicable:

- contracting authority must exercise control over the undertaking similarly to its departments, i.e. it must have a decisive influence on the controlled company's strategic objectives and important decisions
- contractor shall work in essence exclusively for the public authority (or public authorities) by which it is owned (i.e., more than 90% of the turnover is made with these public bodies)
- no direct private participation in the capital of the controlled undertaking; the only exception is in cases where a private partner's participation is required by law, provided that it does not give the private partner rights to block, control or any other form of decisive influence.

Control can be exercised by:

- one contracting authority acting alone.
- joint control by several contracting authorities, such as public service associations controlled by all the municipalities in a given area.

If management is jointly exercised, it must be ensured that:

- all-controlling contracting authorities are represented in the decision-making bodies of the controlled undertaking.
- the controlled undertaking does not pursue interests that are contrary to those of the controlling contracting authorities.

15. Can I negotiate with the bidder prior to awarding the contract?

During the selection and award steps (evaluation of the public contract), negotiation is not allowed unless explicitly foreseen by the chosen procedure (e.g., negotiated procedure). In contrast, clarifications are not understood as negotiations during the usual procedures for procurement of works, services and supplies. Frequently, we ask for clarifications because of accidental calculation, arithmetic errors, spelling mistakes. Material alteration or modifications of the tender is not acceptable (and would not be interpreted as clarifications). Clarifications should not have the effect of changing the already submitted tenders.

16. Can we amend the contracts after awarding?

A substantial amount of case law of the European Court of Justice is available on this matter. After you have awarded the contract, you cannot change the essential terms of it, and it makes no difference if the contractor or the contracting authority wants these changes. If it becomes evident that changes are artificial, the acquisition can be questioned for avoiding the correct procurement procedure. Normally, following the procurement rules, you should launch a new procurement procedure.

If the contract is amended, the changes must not alter the contract substantially in its nature and scope. However, the changes may be considered substantial if modifications, potentially, can allow another economic operator to implement the contract. If parts of the agreement are subcontracted to other economic operators, it should be indicated in the initial procurement documents. However, the evidence must be provided if the subcontractors meet all the contractor criteria for the selection and award.

As for direct procurement, it can also be allowed to adapt the contract as needed if its value stays within the threshold.

17. Which changes are still acceptable, and which not?

Modifications can be done without a new procurement procedure if:

- additional works, services, supplies became necessary but not included in the initial contract as they could not be predicted.
- the economic operator is the only one that can deliver the works, service, and supplies.

- changes shall not exceed 50% of the initial value of the contract.
- changes have been mentioned in the initial procurement documents.
- replacement of the economic operator (consequence of a takeover, acquisition, insolvency, etc.)
- the new economic operator meets the selection criteria without significant changes in the initial contract.

18. What criteria must be fulfilled to justify a splitting of the object of the acquisition?

Splitting the acquisition artificially to avoid the more complicated procedures is one of the most frequent errors. Programmes can request a list of contract awards from the beneficiaries to detect illegal splitting of the contracts. It serves as a basis to start investigating if there is sufficient reasoning for splitting the contract object and spot potential cases.

Where possible and necessary, contracting authority can choose to launch the acquisition in the form of separate lots, depending on the subject and size of the acquisitions. We must determine the cumulative value of identical or similar works, services, supplies and decide the correct procedure. However, the approach must be well justified.

19. What happens if a contracting authority participates in more than one project and procures similar services in each project? Is this considered an illegal splitting of the object of a tender?

The object of a contract is often connected to a project's timeframe and concrete partnerships or objectives. Even if similar services need to be contracted, most of the projects have different deadlines. One contracting authority can rarely plan to group several projects under a single procurement because project applications are subject to selection procedures and projects have different deadlines. There could still be such a case, but it is assumed to be rather rare.

20. Can a contract be awarded to an economic operator involved in providing information on a matter that is now subject to procurement?

Yes, it is possible. However, as bidders must be treated equally, the contracting authority has to ensure that all bidders have the same level and detail of information (i.e., like the company involved in preparing the issue). Any bidder should not have an unfair advantage over other bidders. As this could be assumed to be the case for a bidder involved in the preparation phase, solid reasoning should be prepared by the contracting authority (outlining how it was ensured that all bidders have the same information).

C. Transparency requirements for below the threshold contracts

21. There are specific transparency requirements, even for contracts not subject to the EC Directives. What are these requirements?

We need to ensure that public procurements are transparent and accessible to bidders in other Member States. Insufficient transparency is seen as a sign of limited competition. We must prove it with evidence of applying publicity measures considering EU Directives and national law's relevant provisions.

The level of publicity must be correlated to the subject and value of the contract. Therefore, for the contracts below the EU threshold and below the national threshold, these contracts are not subject to the EU Directives, are free from official formalities and excluded from most procurement requirements except the principles of sound financial management.

Please bear in mind that this makes such contracts prone to errors and no exact reference procedure for the controlled activities. In this case, the controlled activities may focus on each step of the process's management decisions. This can be prone to subjective evaluation of individual controllers. There is a need for more rigorous self-discipline in documenting all the decision processes' efforts without clear rules.

<u>For contracting authorities, the most important implications are:</u>

- Contracting authorities need to decide on a case-by-case basis whether or not a planned contract is of potential interest to undertakings in other Member States.
- For all contracts potentially relevant to the internal market, the contracting authority must ensure that undertakings in other Member States have access to information (through adequate advertising of the intended purchase) and can express their interest (e.g., through adequate timeframes).
- For all contracts potentially relevant to all economic operators, the contracting authority must ensure impartiality and non-discrimination and an overall transparent and objective approach. (e.g., selection and award criteria)
- The contracting authority is also obliged to document the procurement process, including all decisions taken (i.e., decision that the contract is not relevant to the economic operators locates in another Member State, thus not advertised). Contracting Authority shall keep the documentation for reference at a later point (e.g., for management verifications).

22. How to prove transparency in case of direct contract awards?

Contracts below the EU thresholds are mainly excluded from most procurement requirements. These can be directly awarded in non-competitive procedures and without publicity, subject only to the national law's requirements. Nevertheless, we shall observe the principles of transparency and publicity. We must ensure free competition between economic operators and freedom to provide work, services, and supplies, consistency with the fundamental principles of non-discrimination, equal treatment, transparency, and publicity. Auditors would consider the transparency rules and undertake financial corrections if the basic procurement principles are not respected, particularly the principle of transparency. We must prove it with concrete evidence of applying the relevant provisions.

Please note that for small value contracts, the proportionality principle applies as it is hard to justify administrative efforts associated with the publication of small economic values (e.g., purchasing catering service for an event). The principle of value for money applies in any case (also for direct awards of small economic value); we should take measures to ensure that money is not wasted (e.g., internet research, comparison with comparable contracts).

Despite these uncertainties, the programmes should not a priori eliminate the option to carry out direct contract awards for their projects (e.g., by completely ruling out direct contract awards). You may want to keep in mind that awarding contracts directly is an option provided by national public procurement rules to ensure that administrative procedures are proportional in low contract values. However, there is no general solution. Programmes and projects have to be creative and make informed decisions based on professional judgement.

23. Under what circumstances would it be acceptable to collect bids by telephone (e.g. small printing contract for 1.500 EUR)?

Some programmes apply the bid-of-three rule in case of low-value contracts, under the national threshold and still under the EU threshold, requesting to provide at least three quotations from the market in any form of agreement. In practice, only collecting information over the phone is insufficient to prove the reality of any process performed during the procurement process. For that purpose, it is recommended to provide written communication or agreement.

24. For direct contract awards, is it sufficient to obtain three offers to prove transparency?

For acquisitions with potential cross-border relevance, getting three quotations by contacting authorities is not sufficient since it is essential to create cross-border competition. A general solution would be to publish the planned procurement via adequate means and ask for non-binding price information (e.g., project and programme website).

25. For a call for non-binding price information, do you need a deadline?

We must provide economic operators with relevant information within an appropriate time limit by ensuring

full compliance with equal treatment and transparency principles. We must observe the object's complexity and, consequently, the time required for preparing and submitting the offers. Indeed, a non-binding offer has no legal power. Yet, it should demonstrate the economic operator ability to meet the essential terms outlined by the contracting authority and the capacity to complete the acquisition within a given timeline.

26. For a call for non-binding price information, how do you ensure value for money?

Market consultation and preliminary research significantly impact the procurement process, particularly when applying the best value for money concept. Using this criterion ensures the best quality of procurements, which allow us to accept a higher price in return for higher quality. We can do it by investigating the usual market prices. Once non-binding price information is in, the most advantageous offer is selected, and the non-binding price information becomes the requisite.

27. What happens if the award announcement is not published?

If the public procurement law foresees the announcement of awards and a contracting authority fails to do so, there is a breach of the public procurement rules. Consequently, we refer to the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement (COM Decission C (2019) 3452 final, 14/5/2019), which stated the financial correction rates in such cases.

Nevertheless, it should be verified primary if there is evidence of a clear breach of the public procurement law before deciding the appropriate financial correction level.

D. Estimating the value of procurement

28. How can we estimate the value of procurement correctly?

EU Directives and the national procurement laws indicate how to estimate the procurement value close to the real cost. In general, the preliminary market consultation allows contracting authorities to feel about the usual market price. Among other things, it should be internet research, asking others who dealt with comparable contracts, estimation based on our own experience, addressing the economic operators. You need to specify what you want, how much manpower, etc. You must undertake the research carefully and document the conclusions reached in the procurement records. However, market prices differ among different markets. This aspect can be considered when estimating the contract value (e.g., asking partners from other countries for inputs on that question).

29. What happens if the value of the contract was clearly overestimated but paid out anyway?

If there was a competitive procedure, this usually does not happen unless there were some unlawful arrangements or errors in the procurement process. Considerable overestimation thus might point towards a breach of procurement rules. For instance, if we could have implemented a contract with 25% less, we can cut 25%. We still can cut these costs, even if it has already been paid out. It can also be helpful to have programme rules saying that the programme does not accept expert fees exceeding a certain amount (e.g., 800 EUR per day). Contracting authorities can indicate in the tender documents that higher costs will not be accepted. If the contracting authority, for whatever reason, still wants to pay higher costs, then the contracting authority must pay the difference.

30. Is it correct to estimate the value of the contract as specified in the budget of the project, given that the Monitoring Committee approved the project and implicit the budget as such?

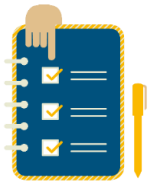
It is not recommended. When the contracting authority decides what to procure, and before starting the procurement procedure, must determine the estimated value of procurement correctly. Although it is set in the budget as approved by the monitoring committee, the contracting authority cannot omit this task. Moreover, the budget estimations are usually not accurately defined based on the market prices when starting the public procurement process. Experience shows that they are frequently overestimated. There

is also a time gap between submitting the application form (project budget included) and starting the project's implementation.

31. What are the consequences of an incorrect estimation of the value of procurement?

Failure to estimate the correct value of procurement may result in an insufficient preparation of the tender documentation, which might put at risk the entire process. Moreover, an incorrect value leads to choosing the wrong public procurement procedure.

The calculation is based on the total amount required to be paid, excluding VAT, including any potential option for modification or renewal. Suppose the use of the calculation method leads to a sub-evaluation of the estimated value. In that case, it can raise some dubious questions: e.g., are we using the method for avoiding the correct procedure? Changing the contract's value in later phases can bring the value above the threshold, invalidating the initial procedure, and related costs could be declared ineligible.



E. Selection and award criteria

32. How to avoid mixing selection and award criteria?

Contracting Authority shall secure a clear definition of selection and award criteria. Selection criteria determine which economic operator is qualified to implement the contract and include aspects such as economic and financial standing and professional and technical knowledge. Award criteria relate to the offer, and it is about deciding which works, services, and supplies meet the requirements from technical specifications in the best way.

In practice, typical selection criteria such as the bidder's previous experience, the number of permanent staff versus temporary staff, etc., are sometimes used as award criteria. Which result in a severe error of the procedure, and, in the context of procurement law, contracts could be subject to review procedures. In that context, related costs could be declared ineligible.

33. In some cases, the winning economic operator must be authorised to provide the services in its country. How to ensure this with bidders from other countries?

Contracting authority must check if the economic operator taking part in the procurement procedure fulfil requirements such as financial and technical capacity and professional reliability. It relates to the economic operator that gets the contract and all economic operators submitting the offers. Procurement rules set out which documents are required by the contracting authority to check these aspects. However, it is not always necessary to ask for all these documents (e.g., contracting authority can drop the requirements below a specific procurement value). A self-declaration of the economic operators is considered sufficient.

In general, contracting authorities shall not discriminate the economic operators from other Member States. For this reason, contracting authorities should accept certificates and declarations from bidders from different countries and avoid as far as possible costly certified translations.

34. How important is price as a criterion? Should it always be the most important criterion?

It usually depends on the work, services, and supplies to be delivered. Member States use specific public procurement procedures where price is the most important criterion. In these cases, the terms of reference need to be very precise but at the same time should not be too narrow as determining the winner.

EU Directives encourage the contracting authorities to drop the attention from the lowest price to quality of procurements, outlining examples of award criteria other than price, such as quality, aesthetic and functional characteristics, environmental aspects, and after-sale services.

Instead of using the lowest-price as the only award criteria, we can use the lowest-cost criteria, which considers all the costs incurred in the lifetime of works, services, and supplies (cost-efficiency approach).

In case we follow the MEAT concept, we focus on using quality beyond the lowest price.

The best quality-price ratio and best quality-cost ratio usually include a price or cost item, including qualitative, environmental, social aspects related to the public contract.

Value- for-money criteria allow us to accept a higher price in return for higher quality.

F. Implementation of the public contracts — managing public procurement risks

35. Who bears the responsibility for monitoring the public contracts?

The contracting authority has assumed the responsibility to monitor the public contract conditions concerning technical specifications, price, quantity, quality, functionality, and timing for delivering works, services, and supplies. The scope of procurement is met when the works, services, and supplies are delivered, and reception and payment are made according to the terms and conditions. If the outcomes expected, meet the outcomes delivered.

36. How can programmes manage the risk associated with public procurement?

There is no general answer to this, but many programmes have developed effective ways to manage the risk related to 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. It requires experience and the application of professional judgement. Large contract values are an obvious target for more guidance and control.

Let's suppose earlier checks have shown that certain kinds of beneficiaries often have a low capacity to deal with public procurement (e.g., beneficiaries usually do not apply procurement laws but are required by programme rules to follow the rules). In that case, the programme should provide more support to this type of beneficiary. It can also be handy to attach information on public procurement and applicable principles in the programme documents. In some cases, capacity checks of beneficiaries can also provide information for risk-based approaches. Useful guidance at the programme level can avoid many errors at the project level. Performing ex-ante assessments to correct in the early stages are better than financial corrections at a later point.

Targeted risk management also implies that some public procurement expertise is available within the management and control system. It is useful to identify a person within the management and control system, who takes an interest in public procurement, knows about frequent errors and is familiar with the applicable principles, including applying the transparency principle below the EU threshold and the guidance on financial corrections. It can also help build up public procurement expertise depending on the resources available. Controllers also have an active role in avoiding public procurement errors, and some expertise in the field of public procurement rules should be an advantage.

37. Should a programme have specific public procurement rules?

Programmes can establish specific public procurement rules for beneficiaries participating in cooperation projects. These rules are always stricter than national rules. For instance, some programmes require that:

- private beneficiaries, which would normally not be subject to public procurement rules, apply the rules within the programme
- all beneficiaries awarding a contract ask for three offers if the contract value exceeds a certain amount (e.g. 2.000 EUR), 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. 12.000 EUR).

Experience has shown that some of these rules are not entirely useful. For instance, requiring all partners, regardless of their legal status, to apply public procurement rules, can lead to problems due to a low capacity to deal with public procurement. At the programme level, it could be more useful to ensure that

general principles are obeyed. For instance, the contracting authority can remind private entities of the value for money principle and can monitor the application of this principle.

Other examples of potentially useful programme rules could be useful to establish rules that require controllers to apply the EU guidelines for determining financial corrections. It could also be useful to require project beneficiaries to make use of transparency principles for procurements below a certain threshold.

G. Verification of public procurement

38. What is the role of MA/JS in the verification of public procurement?

MAs have the responsibility for improving the efficiency regarding implementation and verifications of public procurement. It is essential to have sound internal procedures and guidelines for public procurement and provide training sessions for the programme and project management staff, controllers, and beneficiaries. Providing training sessions can be an effective means to ensure that the programme bodies and beneficiaries are familiar with public procurement and related principles.

MAs receive many questions related to public procurement procedures. Due to the differences between national laws, it is not easy to advise. Nevertheless, providing guidance to beneficiaries is essential for preventing errors. However, it is not recommended to provide support to beneficiaries only after the projects have started the implementation stage, where, in some cases, it can be too late. Let's suppose the MAs cannot perform an in-depth check of applicants' capacities to conduct public procurement at the assessment stage. However, before the projects' implementation stage, it is essential to provide guidance and information to beneficiaries, such as written information enclosed in the programme documents.

JSs also perform pre-contracting checks of public procurements at the level of beneficiaries. For this, a risk management methodology must be in place that directs resources towards the most risky procurements. Pre-contracting checks can be handy since errors in the procedure can be found before the procurement contract is signed, avoiding the need to apply financial corrections at a later point. Control of public procurement procedures is most often considered a task of controllers rather than a task of JSs.

39. What is the role of controllers in the verification of public procurement?

Some management verifications systems foresee verifications of all public procurements, while others choose to sample. Some management verifications systems rely on administrative verifications of public procurements, while others prefer to control public procurements primarily or exclusively on-the-spot.

Controllers must check public procurement and should have expertise in the national law on public procurement. Lack of knowledge in public procurement on the side of controllers can lead to gold plating of public procurement rules. In other cases, it led to a lack of control, allowing significant errors to slip unnoticed. For verification of public procurement, they use a checklist with a list of documents to be verified. However, it is impossible to rely solely on checklists, and no checklist can substitute for lack of expertise. Overly complicated checklists can also lead to a waste of control resources.

Controllers shall check the legality and regularity of the expenditures concerning public procurement and, the reality, the existence of the procurement outcomes. Regarding the timing of control, it is recommended that verifications should be done as soon as possible since public procurement errors tend to increase if these errors are undetected.

40. Are the guidelines on financial corrections applicable to controllers?

The guidelines for determining financial corrections for non-compliance with the rules on public procurement (revision 2019) indicate what the European Commission applies, and they are binding for auditors. If already the controllers applied a financial correction in line with the guidelines, there will be no further financial corrections by the Commission. Moreover, sound control at project level (beneficiary) and high-quality management verifications are essential to avoid irregularities.

If irregularities and fraud are confirmed, controllers must apply financial corrections. Thus, the applicable flat rate for financial corrections should be determined. However, when applying financial corrections, we must ensure proportionality with the nature and gravity of irregularities (quantification of financial impact). In terms of severity, we refer to the impact on competition (i.e., transparency, equal treatment).

41. Is a controller asked to verify direct contract awards?

Controllers are expected to check first if the beneficiaries applied the programme rules and national laws on procurement. Was it allowed to award the contract directly? Have the transparency rules been applied? If not, are there sufficient reasons not to apply them? What evidence can be provided that the value for money principle has been applied?

Thus, it is required to check the national law concerning public procurement for contracts with an estimated contract value below the thresholds. For instance, in some national laws, it is not acceptable to directly award a contract with a value between 1.000 EUR to 10.000 EUR.

Some programme could also require additional checks. For instance, beneficiaries must obtain three offers, even if direct contract awards would be allowed according to national legislation. In these cases, controllers would also have to check this.

H. Dealing with irregularities and financial corrections related to public procurement

42. What are the European guidelines for financial corrections in case of non-compliance with public procurement rules?

EU Guidelines are used for determining the rates of financial corrections related to public procurement processes. This document is not binding to Member States, but Commission auditors use it as a basis to apply financial correction. Thus, it is recommended for Member States to apply similar correction rates unless stricter national rules apply. The European Commission might apply additional financial corrections when the Member States' financial corrections are considered too low.

EU guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement (COM Decision C(2019) 3452 final, 14/5/2019)

https://ec.europa.eu/regional_policy/en/information/publications/decisions/2019/commission-decision-of-14-5-2019-laying-down-the-guidelines-for-determining-financial-corrections-to-be-made-to-expenditure-financed-by-the-union-for-non-compliance-with-the-applicable-rules-on-public-procurement

43. In some cases, controllers cut all the costs connected to non-compliance with the procurement rules. Auditors and controllers do not have the same approach for applying the same (%) for financial corrections in a particular case. It means we have different financial corrections depending on when the error is observed.

Controllers should use the same approach for applying financial corrections to irregularities, as the European Commission provided that national rules allow them to do so. A related issue is observed in some programmes where one country applies a specific rate (%) of financial corrections, and another does not. It is recommended that the programme rules and procedures require all national authorities and the

respective structures within the management and control system to use the guidelines and have regular meetings on applying the same rates of financial corrections for similar cases.

44. Can controllers apply financial corrections, or only the managing authority, national authority undertake financial corrections?

MA has the overall responsibility and competencies regarding financial management and control. MA also has responsibilities for preventing, detecting, and correcting the irregularities MA delegates the tasks and provides a detailed description of each programme's functions and responsibilities. Thus, the programme bodies within the management and control system, through the delegated functions, can apply financial corrections if necessary. However, it depends on programme procedures, and in many countries, controllers are required to apply financial corrections for non-compliance with the rules and procedures on public procurement.

45. What happens if the opinion of the audit authority regarding a particular procurement contradicts the opinion of the managing authority?

The auditors need to be independent. If there is a disagreement, you need to convince the audit authority based on solid arguments, and they should be opened to your statements. If you cannot convince the audit authority, you probably must accept the decision.

46. What is the role of controllers in reporting errors, irregularities and fraud?

Errors and irregularities are normally treated at the programme level. Concerning fraud, it must be investigated and decided by a specialised national institution and/or the European Anti-Fraud Office. The existence of errors noticed during verification of public procurement does not mean that irregularities exist. Yet, specific areas need extra attention to confirm or exclude the potential of the errors. However, we must verify first if there is evidence of a clear breach of the public procurement law before deciding the appropriate level of financial corrections.

Specific examples and types of irregularities (basis for quantification of financial corrections) are detailed in the Guidance for the Member States on the drawing of management declaration and an annual summary, Annex 2 - typology of findings from management verifications - revision 2018 https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidance_management_declaration_annual_summary_en.pdf

I. Joint public procurement, green procurement, other ideas for improvement

47. How can projects currently carry out joint public procurements?

EU Directives state that two or more contracting authorities can undertake a public procurement to procure goods, services, and works jointly. For instance, a joint public procurement is necessary for contracting an external economic operator to support the project management activities for all partners. Carrying out individual procurements can also force beneficiaries to bend the rules to select the same contractor in all procurements. However, currently, projects carry out joint public procurement in exceptional cases only. More frequently, beneficiaries carry out procurements individually to reach a common solution.

Link to EC green public procurement training toolkit - Fact sheet – Joint procurement

https://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_joint_procurement.pdf

48. What are the options to implement jointly public procurement?

The currently available options are limited for programmes and projects. One of the options is through the exchange of information. It involves cooperation and coordination in the process but separate procurement procedures. For instance, specifications can be developed jointly and made available to all partners.

Another option is when every project partner concludes a contract with the same service provider. It must be defined at the starting point, in line with the national procurements' rules, who will be the owner of the works, service or supplies. In practice, it can be challenging to use this option since all involved partners have to ensure that they align with their national law (e.g., the national thresholds for direct contract). The procurement is also verified separately by the controllers of each partner. The advantage of this solution is that it can avoid money transfers between project partners.

Another option is the use of a central purchasing body, established specifically for this purpose. If the beneficiaries consider a central purchasing body for making the acquisitions, the beneficiaries are deemed to act in line with procurement laws.

49. What are the main challenges and benefits of joint public procurement?

Organising joint public procurement procedures under conditions of economy, efficiency, and effectiveness shall comply with the law and ethical practices on public procurement. As for the added value, we highlight inter alia, avoiding double work and reducing the risk of errors, reducing costs by implementing public procurements by lowering the administrative responsibility, efficient administrative growth with expertise in the field of public procurement, creation of the networks for exchanging know-how within the regions, price saving very attractive for the smaller contracting authorities, generating better prices due to larger volumes of purchases.

50. How can green and joint public procurement help the programmes and projects

Sharing specific examples with green procurement and joint procurement of contracting authorities across borders should significantly improve programmes' situation.

For instance, inclusion of the green requirements in the public tender documents and considering the life cycle costing of the products and external costs represent another good practice. Life cycle costs generally consist of an initial investment (e.g., construction costs) and the follow-on costs (regular payments, i.e., energy, utilities, cleaning and maintenance, irregular costs for renewal or replacement). At the same time, some life cycle costing methods also include the costs of demolition.

Joint public procurement implemented by several partners implies higher contract values, wider advertising, with more potential bidders, and higher chances to receive the economically most advantageous offers. Thus, we foster cross-border, transnational, and interregional cooperation, ensuring the economical use of public money. However, the applicability appears to be limited. Usually, programmes and project deal with low-value contracts (small procurements).