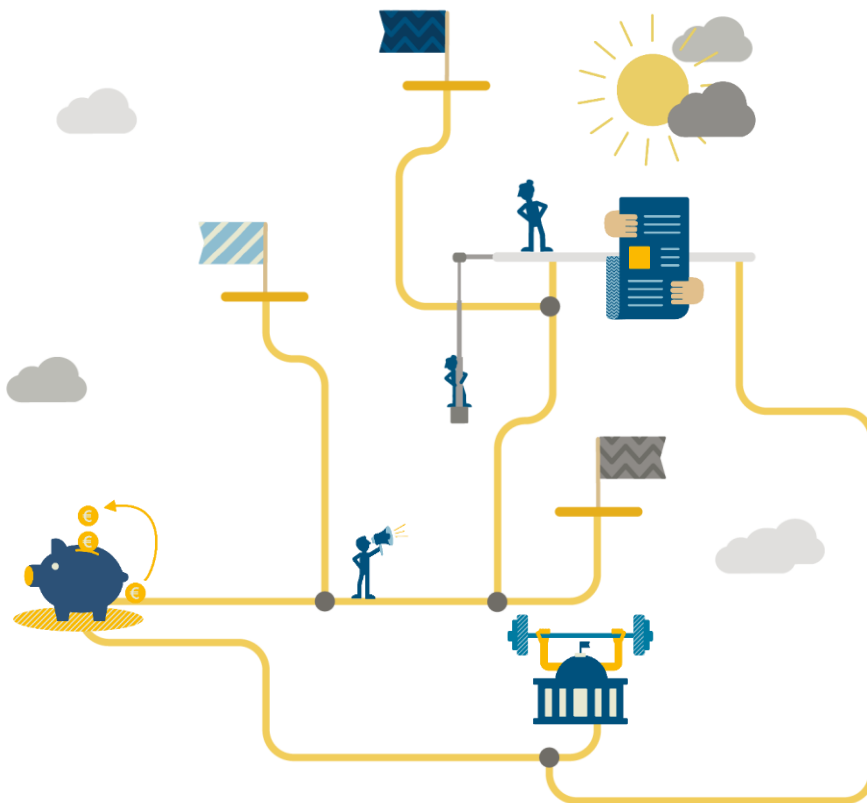


Roadmap for public procurement

Aug 2019
A step-by-step guide for public procurement



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Introduction

Public procurement represents a large amount of money spent on EU funded projects, but also one of the most frequent sources of errors. The most common errors are associated with a lack of transparency and equal treatment, discriminatory criteria, artificial splitting of the contracts and conflict of interest. Although we benefit from more flexible and straightforward rules since February 2014, specific guidelines and practical workshops, the main problems persist, and the risk of irregularities and fraud is substantial.

Failure to comply with public procurement requirements can lead to financial corrections.

When working on a daily basis with public procurement, we deal with questions such as:

- Where can we find relevant information?
- Which elements need particular attention?
- How to handle the most common errors?

It effectively introduces the need for a logical map of the process to lower the risk of errors coming from public procurement. A step by step roadmap allows us to access the key information quickly and effectively. For this roadmap, we have followed the guidelines and the factsheet on public procurement provided by the European Commission as listed below. However, we have adapted the model to the life-cycle of public procurement in Interreg. Thus, we divided the entire process of acquisition into six phases, with the key elements highlighted. The roadmap guides you alongside the process, starting from the moment of planning the acquisition until the moment when the contract ends.

This roadmap aims to remind us about the basics of public procurement. It should help everyone to understand the logic by connecting infographic elements with keywords and essential information. Programmes can use the roadmap for management staff who have an active role in the development of procedures and guidelines but also when providing specific training sessions to beneficiaries with less experience in public procurement.

Regulations and guidance documents

For this roadmap, we focus on Directive 2014/24/EU on public procurement:

https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en

The Directive only applies to contracts of a value exceeding the EU threshold. Contracts below the EU threshold are awarded using national legislation. Nevertheless, provisions laid down in the treaties regarding the common market which guide this Directive might have an impact on 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.

Make sure to check the public procurement law in your country.

Guidance on public procurement – revision 2018:

https://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018

Guidance for the Member States on the drawing of Management Declaration and Annual Summary EGESIF 15-0008-05 03/12/2018 and 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

Guidelines for determining financial corrections for non-compliance with the rules on public procurement – revision 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

Interact factsheets for errors, irregularities, fraud and financial corrections:

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

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

Public procurement roadmap



Increase efficiency, flexibility and performance in procurement by promoting economy and quality of procurement outcomes.



The stand-alone version of the roadmap is available on the Interact website, section "Library/Publications"

Roadmap for public procurement

Phase 1 - Planning

The first phase has an essential influence on the procurement process. It consists of a preliminary step when you are identifying the needs and opportunities and a decision-making step when choosing the procedure. Failure to select the correct procedure or to estimate the value of the procurement close to the real cost can result in financial limitations and additional costs to correct the errors.



The purpose of this first step is to optimise the cost to achieve the expected outcomes. A good practice is to prepare in advance a procurement strategy to make the processes more transparent. Also, developing a plan for further acquisitions is a very effective way to confirm what, how and when to be procured.

Having such a plan visible for the general public it can:

- Reduce ambiguity by determining how we achieve the acquisitions
- Ensure transparency by providing a clear description of the processes
- Provide equal access to the relevant information
- Approach the market to acknowledge how the economic operators respond
- Increase the effectiveness by visualising the outcomes
- Promote economy and efficiency with the best value of public funds

Main activities in the planning phase:

- Define what is necessary to procure and how to implement the processes
- Preliminary research and market consultation to identify opportunities
- Determine the estimated value of procurements (but also the cumulative value of similar items)
- Decide the procedure considering the EU and national thresholds (see also the programme rules)
- Prioritise the acquisitions and define the timeframe for each specific activity

Preliminary research and market consultation have a significant impact on the process. The aim is to ensure the best value for money and quality of procurements. However, any involvement of economic operators in this phase must not affect the competition further.

Estimation of the contract value is also essential. The calculation is based on the total amount required to be paid, excluding VAT but including any potential option for modification or renewal. If the use of the calculation method leads to a sub-evaluation of the estimated value, it can raise some dubious questions: e.g. are we using the method for avoiding the correct procedure? Changing the value of the contract in later phases can bring the value above the threshold and this invalidates the initial procedure.

Key considerations:

- EU and national thresholds should be considered to determine the applicable procedure
- Directive 2014/24/EU only applies to contracts *above* the EU threshold
- Contracts *below* the EU thresholds follow ‘simplified procedures¹’, substantially excluded from the procurement requirements of the above Directive and subject to the provisions of the national law

If the estimated value is divided into smaller parts but still having identical or similar objects of procurement, it can be considered as splitting the acquisition artificially to avoid the more complicated procedures. We must determine the cumulative value of identical or similar works, services, supplies, and decide the correct procedure. Where possible and necessary, we can choose to launch the acquisition in the form of separate lots, depending on the subject and size of acquisitions. However, the approach must be well justified.

Key elements we should decide in the planning phase:

- Market opportunities for the current needs (the needs have been identified for a project already approved)
- Possible solutions and limitations
- Budget required from which the procurement is funded (financial resources, that is normally project budget and own resources)
- Scope and subject matter of the contract (in the form of works, services, supplies)
- CPV code (a single classification system for public procurement)
- Estimated value including possible options for renewal of the contract, and/or additional works, services, supplies
- Procurement procedure, how to group the objects of the acquisition, if a single acquisition or divided into lots
- Timeframe, estimated date for launching the acquisition, deadlines for submission, evaluation, awarding and implementation
- Staff responsible for procurement

The common procurement vocabulary (CPV): <http://simap.ted.europa.eu/web/simap/cpv>

Examples of errors that potentially can occur in the planning phase:

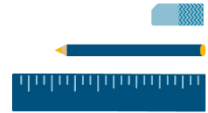
- Artificial splitting of the estimated value of the acquisition, but also
- Lack of justification for not launching the acquisition in the form of separate lots²
- Irregular prior involvement of economic operators

¹ Please bear in mind that the closer the amount to whatever the threshold (national or EU) the higher consideration should be for the correct value and the procedure. However, always respecting the principles and the sound financial management practice.

² Please check your national regulations, if such obligation exists and under what conditions (e.g. to encourage SME's participation).

Phase 2 - Preparation

Preparation of the tender documentation includes parts from the planning phase, when we decided what to procure, the estimated value and selection of the procedure. Failure to identify these elements may result in an insufficient preparation of the tender documentation, which might put at risk the entire process.



Essential public procurement documents:

- Prior information notice
- Contract notice
- Contract award notice
- Award documentation
- Invitations to candidates
- Contest notice
- Terms of Reference
- Technical Specifications
- Any additional report concerning selection and awarding
- Notification of the results
- Procurement contract

Standard forms for public procurement: <https://simap.ted.europa.eu/>

When preparing the tender documentation, we should take into account the estimated value of procurement. Thus, EU and national thresholds should be considered:

- *Above EU threshold* provisions of Directive 24/2014/EU should be applied
- *Under the EU threshold but above the national threshold*, the national law applies but considering the general principles of EU law
- *Under the EU threshold also under the national threshold*, the contracts are subject to a simplified procedure by using the national law and the principles of sound financial management³

If economic operators are involved in the first phase (prior market consultation), we should avoid involving these organisations in the preparation of the tender documentation. We must take all the measures to prevent cases of conflict of interest and unequal treatment.

The basic principles must be observed as preconditions for an effective procurement process:

- Equal opportunities for any economic operator,
- Free access to the relevant information and resources
- Open, fair, transparent and non-discriminatory competitions

³ Chapter 7 of the Financial Regulation: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1046&from=en>

Economic operators should be provided with all necessary and accurate information to submit the tenders in full, in time.

In this phase, we should check if:

- The principles of public procurement are respected (the basic principles of non-discrimination, equal treatment, and transparency)
- There is a justification for choosing a particular procedure (rationale)
- Selection and award criteria are clearly defined, non-restrictive, and different from each other
- Selection criteria are objective and non-discriminatory
- Award criteria are proportional and appropriate for the subject of procurement
- Calculation method for scoring award criteria is described (only the award criteria are scored, the selection criteria refer to eligibility and qualification)

Examples of errors that can potentially occur in the preparation phase:

- Failure to describe in detail the selection and award criteria
- Failure to provide information on how the award criteria are scored
- Referring to a particular brand or specific economic operator

Phase 3 - Publication

Publicity can increase competition and the number of potential participants. For sure correct publicity will diminish the risk of irregularities and financial corrections. We must ensure a sufficient level of publicity. When using public funds, lack of advertising and insufficient transparency is seen as a sign of limited competition. We must prove it with evidence of applying publicity measures considering the relevant provisions of EU Directives and national law.



The level of publicity must be correlated to the subject and value of the contract:

- *Above EU threshold*, the contracts are subject to a competitive tender, where advertising on the Official Journal of EU for public procurement is compulsory
- *Below EU threshold but above the national threshold*, the contracts are subject to a competitive tendering where applying national legislation concerning publicity (simplified rules apply with shorter deadlines and publicity at the national level as opposed to advertising at the EU level)
- *Below EU threshold and still below national threshold*, the contracts are in general free from official formalities and excluded from the most procurement requirements except the principles of sound financial management⁴

⁴ Please bear in mind that this makes such contracts prone to errors as well as there can be no clear reference procedure for the controlled activities. In this case the controlled activities may focus on the management decisions of each step of the process. This can be prone to subjective evaluation of individual controllers. In the 'lack of rules' more rigorous self-discipline in documenting all the steps of the decision processes may be required.

Please check the national law concerning publicity measures for procedures with an estimated contract value below the thresholds.

We must include information in standard form when advertising procedures for public procurement. It should be published in full in one of the official languages of the Member State where the contracting authority is located. Depending on the value and complexity of procurement, we can advertise at the EU level but also at the national level. However, when advertising at the national level, we must not include different information from the one published at the EU level.

If documentation is incomplete and clarification is needed, we must provide economic operators with relevant information, within an appropriate time limit by ensuring full compliance with the principles of equal treatment and transparency. We must observe the complexity of the contracts and time required for preparing and submitting the tenders. Economic operators must be equally informed, at the same time, in the same manner.

In this phase, we should ensure that:

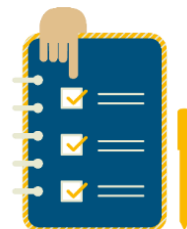
- Tender documentation complies with EU procurement rules
- The information has been published and simultaneously dispatched to all candidates
- Time limits for the essential steps of the process are respected
- Clarifications have been provided equally and identical to all candidates by using the same communication tools when initially published

Examples of errors that can potentially occur in the publication phase:

- Lack of publication of the procurement package
- Lack of publication of the contract notice
- Non-compliance with the time limit for receipt of tenders
- Failure to extend/lack of publicity of the extended time limit when the procurement documents are significantly changed
- Restriction to obtain tender documents
- Excessively short deadlines for submission of the tenders
- Deadlines set not in compliance with the legal provisions
- Not dispatching equally identical information to all candidates if clarifications are needed

Phase 4 - Selection

Any economic operator registered in the EU and EEA has the legal right to participate in public procurement processes in other EU countries. These economic operators have the right to participate in open competitions with no limitations in terms of the number of participations and locations.



Compulsory requirements:

- The economic operator must have the *technical and financial capacity*, and professional ability to implement the contract
- The staff of economic operators must have the necessary *skills, qualification and experience* to deliver the procurement outcomes

When assessing the tenders, we should take into consideration if economic operators meet the selection criteria (eligibility and qualification) and if they are not in one of the situations that can lead to exclusion by:

- Administrative decision
- Breach of obligations (social security charges, taxes etc.)
- Professional misconduct
- Distortion of competition
- Conflict of interest
- Bankruptcy
- Corruption
- Fraud
- Participation in a criminal organisation
- Money laundering
- Terrorist activities
- Human trafficking

In terms of errors, *conflict of interest*⁵ is one of the key elements. Any potential conflict of interest can arise when persons involved in procurement procedures may influence the outcomes of procurement by involving *family, personal interests, professional affiliation, political or national affinity, and having a direct or indirect, financial or non-financial interest* which can affect integrity and impartiality in the context of the procurement process. We must take appropriate measures to avoid, identify and remedy conflicts of interest.

Confidentiality may also be considered, which aims at the protection of confidential and sensitive data provided by economic operators that cannot be disclosed if they are declared as confidential.

Please check the national law for specific requirements concerning conflict of interest and confidentiality.

In this phase, we should check if:

- Tenders have been received, registered, and simultaneously opened (report signed)
- There is no discrimination based on preferences about the nationality of tender
- There is a decision for the assignment of the evaluation committee
- Evaluation committee members signed a conflict of interest declaration (if mandatory)
- Tender documentation describes all the selection criteria
- Selection criteria (eliminary criteria for eligibility and qualification) have been applied following the predetermined method

⁵ Practical guide on identifying conflict of interest in public procurement procedures.

- There is no modification of selection criteria during the evaluation, which may result in acceptance of tender that should not have been accepted if the initial selection criteria had been followed
- There are no grounds for exclusion and situations for conflict of interest
- There is a decision concerning the tenders selected

Examples of errors that potentially can occur in the selection phase:

- The decision for designating the members of the evaluation committee is missing
- Declaration referring to conflict of interest is missing (decision signed by each member of the evaluation committee)
- Restricting economic operators based on unjustified local, regional, national preferences
- Failure to state the selection criteria in the contract notice
- Discriminatory criteria for selection, as regards the conditions for performance of the public contract
- Unlawful selection criteria
- Selection criteria not proportionate with the subject matter of the contract
- Modification of selection criteria during the selection procedure
- Lack of transparency and equal treatment during the selection procedure
- A decision concerning the selected economic operator missing
- Conflict of interest with an impact on the selection
- Bid rigging - fraudulent scheme resulting in non-competitive procurement

Phase 5 - Award

Selection of economic operators and awarding the contract are distinct steps. Selection is about determining which economic operator is qualified to implement the contract and meet the selection criteria (eliminatory requirements) whereas awarding is about deciding which works, services, and supplies meet the requirements from technical specifications in the best way (depending on the award criteria).



In this phase, we should check if:

- The offer complies with the requirements, conditions, and award criteria stated in tender documents
- Works, services, supplies meet the award criteria
- Which offer meets the award criteria best

Award criteria include:

- Lowest price
- Lowest cost
- Best quality-price ratio
- Best quality-cost ratio
- Best value for money
- MEAT

Key consideration concerning award criteria:

- We may consider using the *lowest-price* as the only award criteria.
- By contrast, when using the *lowest-cost criteria*, we take into account all the costs incurred in the lifetime of works, services, supplies (cost-efficiency approach)
- In case we follow the *MEAT* concept, we focus on using quality beyond the lowest price
- *Best quality-price ratio and best quality-cost ratio* usually include a price or cost item, but including qualitative, environmental, social aspects related to the public contract
- *Value-for-money criteria* allow us to accept a *higher price in return of higher quality*
- In case we apply for a fixed price (per item) the award criteria only refer to qualitative aspects of works, services, supplies
- *In case tenders appear to be abnormally low*, we should request clarifications from economic operators regarding the price or costs proposed, but not excluding the tenders without justification, which can lead to financial corrections

When applying the MEAT concept, we use individual criteria (the list is not exhaustive):

- Price
- Quality
- Sustainability
- After-sales service
- Functional features
- Technical assistance
- Delivery time and conditions
- Environmental performance

When applying the value of money concept, we don't assess only the price criteria, but we assess the relationship between resources allocated and outputs delivered at the right:

- Price
- Quantity
- Quality
- Time
- Place

When assessing the *life cycle cost*, we take into consideration all the costs that potentially can incur in the lifetime of works, services, and supplies in terms of:

- Technical advantages and functionality
- Social, environmental and innovative aspects
- Service, maintenance and assistance provided

In this phase, we should check if:

- The value of the contract has not been artificially split to be directly awarded
- There is no underestimation of the values (the contracts are just below the threshold whereas the cumulated value is above the relevant threshold)
- Tender documentation describes all the award criteria (method for scoring the tenders)

- Award criteria were not modified during the evaluation, resulting in the acceptance of other offers that should not have been accepted if the initial criteria had been followed
- Discriminatory technical specifications are not applied
- The evaluation report is documented with conclusions concerning the recommended award
- There is an award decision
- Results of the award process have been notified to the successful, unsuccessful tenderers
- Fundamental principles of transparency and fair competition have been followed

Examples of errors that potentially can occur in the award phase:

- Modification of the award criteria from the contract notice/technical specifications
- Wrong application of the calculation method for scoring the award criteria
- The use of additional award criteria that have not been published
- Negotiation during the award procedure
- Modification of the tender
- Insufficient audit trail for the award of the contract
- Unjustified rejection of abnormally low tenders
- Conflict of interest with an impact on the outcomes
- Non-transparent award procedure

Phase 6 - Implementation

The contracting authority has assumed the responsibility for monitoring of meeting the conditions of the public contract, concerning technical specifications, price, quantity, quality, functionality, and timing for delivering of works, services, and supplies.



The scope of procurement is met when the works, services, and supplies are delivered, and reception and payment made according to the terms and conditions. Thus, the cycle of public procurement is completed, and we can *close the contract*.

When the public contract ends, a good practice is to revise the *outcomes expected against the outcomes delivered*, providing that what has been planned is done. It may help as a learning exercise for further acquisitions.

Key considerations concerning the implementation period and the execution period:

- *Implementation period*, between the date when the parties signed the contract (unless stated differently in the contract at a later date) until the date when works, services, supplies are received, and the final payment is made
- *Execution period*, between the date when the contract enters into force (the date when the public contract is signed) until all the legal provisions and specific arrangements set in the contract are met unless otherwise stated

Key considerations concerning modification and termination of the contract:

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 (as a consequence of a takeover, acquisition, insolvency, etc.)
- The new economic operator meet the selection criteria, without significant changes in the initial contract

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 can potentially 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 criteria that the contractor has met for the selection and award.

If the contract is in breach of EU or national law or the contract is the subject of substantial modifications, which can require a new procurement procedure, the contracting authority can terminate the contract during its term (cease the public contract).

In the phase of implementation, we should check if:

- The contract has been signed in compliance with the standard formats or otherwise agreed
- Clauses and provisions have been respected concerning technical and financial offers

Examples of errors that can potentially occur in the implementation phase:

- Substantial modifications of the original contract
- Reduction in the scope and the subject matter of the contract for the same economic offer
- Additional works, services, supplies are offered without competition (e.g. values above 50% of original offer, etc.)

Verification of public procurement

The Managing Authority has the responsibility for preventing errors and improving the efficiency regarding implementation and verifications of public procurement. In practice, it is essential to have in place sound internal procedures and guidelines for public procurement, and to provide training sessions for the programme and project management staff, controllers and beneficiaries.



Examples of best practices for *ex-ante verification of procurements, before a contract is signed*:

- Training on public procurement to improve knowledge of procurement legislation, its objectives and principles (improved knowledge is always better than more control)
- Pre-verification of procurement documents before launching the procedures, especially for strategic projects (in case there is no national structure responsible with verification and publication of the procurement)
- Administrative/on the spot verifications and rectifying the errors in the very early phase

Examples of best practices for *ex-post verification of procurements, if the contract has been signed*:

- Sample checks based on risk considerations
- Administrative and on the spot verifications (monitoring, control, and audit)
- Formal/informal communication between bodies responsible for implementation, monitoring, controlling public procurement

Focus on ex-ante assessment; better to correct in early stages instead of applying financial corrections.

The existence of errors noticed during verification of public procurement does not mean that irregularities and fraud exist, but particular areas need extra attention to confirm or exclude the potential. Errors and irregularities are normally treated at the programme level. Internal procedures and training on these should be in place. Concerning fraud, it must be investigated and decided by a specialised national institution and/or the European Anti-Fraud Office.

Key considerations:

- We must verify first if there is evidence of a clear breach of the public procurement law before deciding the appropriate level of financial correction
- If irregularities and fraud are confirmed, we must determine the applicable flat-rate for financial corrections
- If financial corrections apply, 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, transparency, equal treatment

Specific examples of irregularities 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

The criteria and financial correction rates are specified in the Guidelines for determining financial corrections for non-compliance with the applicable rules on public procurement - revision 2019

https://ec.europa.eu/regional_policy/en/2019/guidelines-for-determining-financial-corrections-for-non-compliance-with-the-applicable-rules-on-public-procurement