



ESIF National Procurement Requirements (ESIF-GN-1-001)

TABLE OF CONTENTS

Chapter One: Introduction	2
Chapter Two: Summary of the requirements	3
Chapter Three: The consequences of non-compliance	7
Chapter Four: Common errors and how to avoid them	25
Chapter Five: Public Procurement Law - Contracts let since 26 th February 2015	28
Chapter Six: Treaty Principles	40
Annex 1 - Useful Links	47
Annex 2 - Single Tender Justification	48
Annex 3 - Cross Border Interest Assessment Form	50
Annex 4 - Previous OJEU Thresholds	52
Annex 5 - Public Procurement Law - Contracts let prior to 26 th February 2015	54

This document is guidance on the subject of how to select suppliers of goods, works and services in projects part funded through ESIF. It does not constitute legal advice, nor does it imply any waiver of the legal obligations of recipients of ESIF grants. MHCLG is responsible for the European Regional Development Fund and DWP is responsible for the European Social Fund. In this document we use the Department, which means MHCLG in respect of the European Regional Development Fund and DWP in respect of the European Social Fund. The department does not accept any liability relating to the use of this document. Users seeking information on public procurement should refer to the relevant Public Contracts Regulations, the guidance on the Europa website and seek their own specialist advice from professional advisers.

CHAPTER ONE: INTRODUCTION

1. The purchase of goods, works and services in ESIF projects¹ is subject to rigorous audits to confirm that the selection processes comply with (i) Public Procurement Law, (ii) the Treaty Principles or (iii) National Rules as appropriate.
2. In the ERDF 2007-2013 programme, failures by grant recipients to comply with Public Procurement Law and the Treaty Principles was the leading cause of claw back of funding. In all, around 75% of all irregularities (by value) related to failures to comply with Public Procurement Law or the Treaty Principles.
3. Depending upon the characteristics of the breach, up to 100% of the grant may be recovered from the Grant Recipient if a breach of Public Procurement Law or the Treaty Principles is identified.
4. ESIF support therefore comes with a 'health warning': no organisation should apply for ESIF unless it has fully considered and planned how it will be able to demonstrate compliance with Public Procurement Law, the Treaty Principles or National Rules as appropriate in selecting the suppliers of goods, works or services part funded through ESIF.
5. This guidance is applicable to ESIF projects from the date of publication².

¹ For the purposes of this guidance, all references to ESIF shall mean the European Regional Development Fund and the European Social Fund in England.

² At audit, projects will have to demonstrate that they have met EU and national law. This guidance sets out some national rules (in particular at Chapter 6) which shall apply to procurement processes commenced on or after the date of publication as contractual requirements, unless otherwise stated.

CHAPTER TWO: A SUMMARY OF THE REQUIREMENTS

What are the Public Procurement Law requirements?

1. Public Procurement law regulates the process used to select the suppliers of public funded purchases of goods, works and services.
2. All ESIF grant recipients are required to confirm whether their proposed project is subject to Public Procurement Law, the Treaty Principles or National Rules as part of the application process. This applies equally to delivery partners.
3. Depending on the date the contract commenced, the ESIF grant recipient must make an assessment of whether:
 - a. the organisation is within the definition of a “contracting authority” under Regulation 2(1) of the [Public Contracts Regulations 2015](#) or Regulation 3 of the [Public Contracts Regulations 2006](#); and
 - b. the value of the contract meets the [thresholds](#) set out in the Public Contracts Regulations 2015 or the Public Contracts Regulations 2006
4. Where an ESIF grant recipient is (i) a contracting authority and (ii) the contract value meets or exceeds the relevant threshold, it is necessary for the ESIF grant recipient to follow the process prescribed in the relevant Public Contracts Regulations, which in most cases will involve advertising the contract opportunity in the Official Journal of the European Union. Grant Recipients in this category should follow the guidance in Chapter 5.
5. Procurement is a detailed process with many technical requirements, each stage of which should be fully recorded in order to be able to demonstrate compliance at audit.

What are the requirements arising from the Treaty Principles?

6. All Contracting Authorities must respect the Treaty Principles when purchasing goods, works or services which are part funded by ESIF.
7. The relevant Treaty Principles are:
 - a. Equal treatment;
 - b. Transparency;
 - c. Non-discrimination;
 - d. Mutual recognition³; and
 - e. Proportionalitytogether the “Treaty Principles”.
8. The department does not prescribe the process to be used by ESIF grant recipients to apply the Treaty Principles - it is for the relevant organisation to design and implement a

³ In this context mutual recognition relates to recognising equivalent qualifications and certifications used in other Member States

process which demonstrates that the Treaty Principles have been fulfilled. This should however be in line with the Commission Interpretative Communication, where relevant, and take account of the Treaty Principles guidance in Chapter 6.

9. For all but the lowest value contracts, such a process will involve each of the following:
 - i. Providing sufficient information about the tender opportunity to the market to enable interested bidders to apply;
 - ii. Impartially assessing each bid against the same criteria; and
 - iii. Selecting the winning bidder on merit by reference to set criteria.
10. Organisations which correctly apply the relevant Public Contracts Regulations are considered to have demonstrated compliance with the Treaty Principles.

What are the requirements arising from this guidance?

11. This guidance is designed to achieve sound financial management of public funds⁴ and to open opportunities up to competition. These rules will apply to all Non Contracting Authorities and Contracting Authorities . For further information see the National Rules section of Chapter 6.

Record keeping requirements

12. Inadequate record keeping was a significant cause of irregularities during the ESIF 2007-2013 programme.
13. The ESIF grant recipient is responsible for collecting and keeping records to produce at audit.
14. Some applications for ESIF support refer to contracts where the supplier has already been selected. In such circumstances, it is the responsibility of the ESIF grant recipient to have checked that all the documents needed to demonstrate compliance are available for inspection at audit.
15. In cases where the grant recipient has used an external framework it is their responsibility to ensure that the relevant framework and subsequent call off documents are available for inspection at audit.
16. In the event that the procurement process is carried out by an external consultant on behalf of the grant recipient a full audit trail of the process and documentation should be retained by the grant recipient for inspection at audit.
17. Where procurement is carried out via an electronic portal or system, relevant screen shots should be taken to support the core audit trail and should be retained on the project

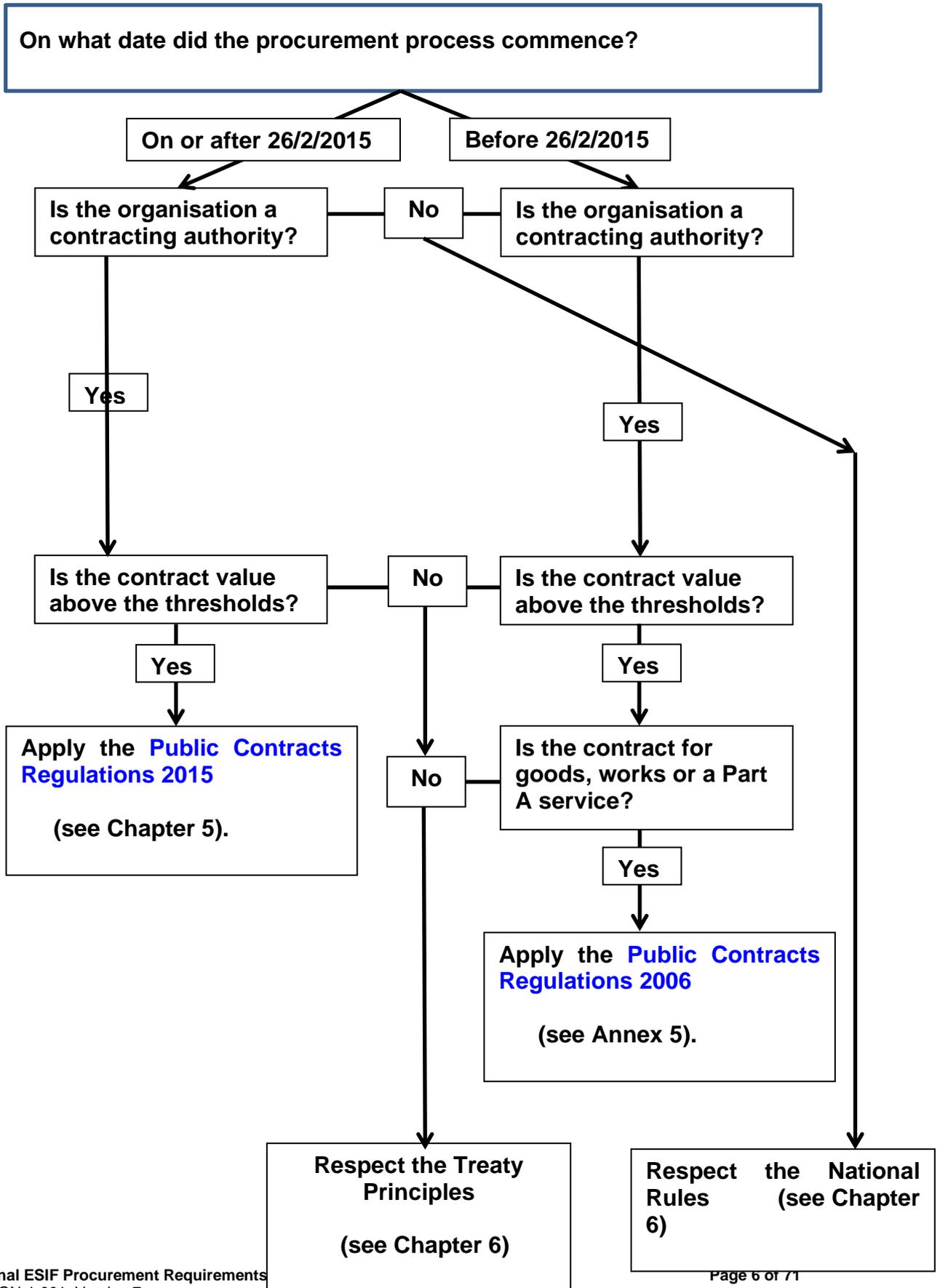
⁴ The national rules are also designed to ensure that the financial framework of ESIF is not prejudiced by the charging of excessive sums to its budget

file. In the event of an audit, access to the system may also need to be granted to the auditor.

The Social Values Act

18. The Social Values Act came into force in 2013 and places an active duty on public bodies to consider, at the planning stage, the wider economic, environmental and social benefits that can be achieved through procurement.
19. More details about the Social Values Act, including a Policy Procurement note, can be found [here](#) on the Cabinet Office section of the Gov.uk website.

Process Flow Chart



CHAPTER THREE: THE CONSEQUENCES OF NON-COMPLIANCE

1. The Commission requires that, where non-compliance with either Public Procurement Law or the Treaty Principles is identified, a correction shall be applied in accordance with its guidance⁵
2. It is important to note that the list of corrections focusses on the process applied, rather than the impact of the breach. Evidence collected to demonstrate compliance should focus upon showing that the correct process was followed.
3. Non-compliant procurements may be subject to other consequences such as a challenge under the Remedies Directive⁶ or an investigation following a complaint to the European Commission⁷.
4. If a non-compliant procurement is identified before a grant funding agreement is signed, that procurement must either be re-run compliantly or removed from the ESIF-funded project⁸; the corrections set out in this document are not applicable.

The current correction rates are set out in the 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 procurement⁹ ('Commission Guidelines').

This guidance will be used in ESIF audits carried out by the Managing Authority (desk based checks by Growth Delivery Teams or A125 National Compliance Team), the Audit Authority, DG Regio and Emploi Audit Service and the European Court of Auditors.

The corrections will be applied to breaches of procurement procedure by both contracting and non-contracting authorities where the correction procedure was launched after 14th May 2019 irrespective of the date the contract was let.

The corrections will apply to procurements above threshold (OJEU procurements) and below threshold (sub-OJEU procurements)

2.1. Contract notice and tender specifications

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
1	Lack of publication of contract notice Or unjustified direct award (i.e. unlawful	Article 31 of Directive 2014/23/EU	The contract notice was not published in accordance with the relevant rules	100%

⁵

https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/GL_corrections_pp_irregularities_annex_E_N.pdf

⁶ 2007/66/EC

⁷ http://ec.europa.eu/atwork/applying-eu-law/index_en.htm

⁸ This is because Regulation 2013/1303/EU article 122(2) requires Member States to prevent irregularities.

⁹ C(2019) 3452

	negotiated procedure without prior publication of a contract notice)	Articles 26, 32 and 49 of Directive 2014/24/EU Articles 44, 67 to 69 of Directive 2014/25/EU	(e.g. publication in the <i>Official Journal of the European Union</i> ('OJ') where the Directives require this. This also applies to direct awards or negotiated procedures without prior publication of a contract notice, if criteria for using them are not fulfilled. Same as above, except for the fact that publicity was made by other adequate means (19)	25%
2.	Artificial splitting of works/services/supplies contracts	Article 8(4) of Directive 2014/23/EU Article 5(3) of Directive 2014/24/EU Article 16(3) of Directive 2014/25/EU C-574/10, Commission/Allemagne, T-358/08, Espagne/Commission et T-384/10, Espagne/Commission	A works project or proposed purchase of a certain quantity of supplies and/or services is artificially subdivided into several contracts. As a result, each contract for the part of the works/supplies/services is below the threshold of the Directives, thus preventing its publication in the OJ for the whole set of works, services or supplies at stake (20) Same as above, except for the fact that publicity was made by other adequate means, in the same conditions as set	100% (this correction applies if the contract notice covering the works/supplies/services at stake was not published in OJ, although required by the Directives) 25%

			out in point 1 above.	
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18 The mentioned case-law refers to the provisions of Directives 2004/17/EC and 2004/18/EC. However, the provided interpretation may be relevant also for the provisions of 2014 Directives.

19 Adequate means of publicity means that the contract notice was published in a way that ensures that an undertaking located in another Member State has access to appropriate information regarding the public procurement before it is awarded, so that it would be in a position to submit a tender or express its interest to participate in obtaining that contract. In practice, this is the case when (i) the contract notice was published at national level (following the national legislation or rules in that regard) and/or (ii) the basic standards for the advertising of contracts were respected (see more details on these standards in section 2.1 of the Commission interpretative communication n° 2006/C 179/02).

20 The same approach is applicable, mutatis mutandis, to contracts subject only to national public procurement rules and where the artificial splitting of works/supplies/services prevented its publication in accordance with these rules.

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
3	Lack of justification for not subdividing contract into lots	Article 46(1) of Directive 2014/24/EU	The contracting authority does not provide an indication of the main reasons for its decision not to subdivide into lots.	5%
4	Non-compliance with time limits for receipt of tenders or time limits for receipt of requests to participate (21). Or Failure to extend time limits for receipt of tenders where significant changes are made to the procurement documents	Articles 27 to 30, 47(1) and (3) and 53(1) of Directive 2014/24/EU Articles 45 to 48, 66(3) and 73(1) of Directive 2014/25/EU	<p>The reduction of the time limits set in the Directives is more than or equal to 85% or the time limit is equal to/less than 5 days.</p> <p>The reduction of the time limits set in the Directives is more than or equal to 50% (but below 85%). (22)</p> <p>The reduction of the time limits set in the Directives is more than or equal to 30% (but below 50%). or The time limits were not extended where significant changes are made to the procurement documents (23)</p> <p>The reduction of the time limits set in the Directives is less than 30%.</p>	<p>100%</p> <p>25%</p> <p>10%</p> <p>10%</p> <p>5%</p>

21 These time limits are applicable to open procedures, restricted procedures and competitive procedure with negotiation.

Attention is also drawn to Article 47(1) of Directive 2014/24/EU: "When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 27 to 31".

22 For example, considering the minimum time limit for receipt of tenders of 35 days (under Article 27 of Directive 2014/24/EU), two scenarios could occur: (1) the time limit applied by contracting authority was 10 days, which means a reduction in the time limit of 71,4% [= (35-10)/35], thus warranting a 25% financial correction; (2) the time limit applied by contracting authority was 10 days, but minimum time limit could be 15 days (since prior information notice was published), which means a reduction in the time limit of 33% [= (15-10)/15], thus warranting a 10% financial correction.

23 Cf. Article 47(3)(b) of Directive 2014/24/EU.

24 Where the electronic access was offered but the period of access has been shortened, then the above rates of 25%, 10% or 5% apply accordingly

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
5	Insufficient time for potential tenderers/candidates to obtain tender documentation or Restrictions to obtain tender documentation	Article 29 and 34 of Directive 2014/23 EU Articles 22 and 53 of Directive 2014/24/EU Articles 40 and 73 of Directive 2014/25/EU	Time for economic operators (i.e. potential tenderers/candidates) to obtain tender documentation is too short (i.e. less than or equal to 50% of the time limits for receipt of tenders set in the tender documents, in line with relevant provisions), thus creating unjustified obstacles to the opening up of public procurement to competition.	10%
			Time for economic operators (i.e. potential tenderers/candidates) to obtain tender documentation is reduced but the reduction is less than 80% of the time limits for receipt of tenders, in line with relevant provisions.	5%
			Time for economic operators (i.e. potential tenderers/candidates) to obtain tender documentation is equal to or less than 5 days. or	25%

			Same as above and no publicity (of the extended time limits) was made by other means (see conditions in point 1 above). or Failure to extend time limits for receipt of tenders where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders (27).	10%
7	Cases not justifying the use of a competitive procedure with negotiation or a competitive dialogue	Article 26(4) of Directive 2014/24/EU	Contracting authority awards a public contract by a competitive procedure with negotiation or a competitive dialogue in situations not foreseen by the Directive	25%

25 Except of cases where the conditions established in the quoted 2nd and 3rd paragraphs are complied with. In such cases, no correction is applied.

26 Or extended time limits for receipt of requests to participate; these time limits are applicable to restricted procedures and negotiated procedures with publication of a contract notice.

27 Cf. Article 47(3)(a) of Directive 2014/24/EU. In the event of an accelerated procedure as referred to in Article 27(3) and Article 28(6) of said Directive, that period shall be four days.

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
8	Non-compliance with the procedure established in the Directive for electronic and aggregated procurement (28)	Articles 33 to 39 of Directive 2014/24/EU Articles 51 to 57 of Directive 2014/25/EU	The specific procedures for electronic and aggregated procurement (29) have not been followed as established in	10%

			<p>the applicable Directive and the non-compliance could have had a deterrent effect to potential tenderers (30).</p> <p>Where the non-compliance led to the award of a contract to a tender other than the one that should have been awarded, this is considered a serious irregularity (31).</p>	25%
No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
9	Failure to publish in the contract notice the selection and/or award criteria (and their weighting), or conditions for performance of contracts or technical specifications.	<p>Articles 31, 33, 34, 36, 37, 38, and 41, and Annex V (points 7.c and 9) of Directive 2014/23/EU</p> <p>Articles 42, 51, 53, 56 to 63, 67, and 70, Annex V part C (points 11.c and 18), and Annex VII of Directive 2014/24/EU</p> <p>Article 60, 71, 73, 76 to 79, 82, and 87, Annex VIII and Annex XI, A (points 16 and 19), B (points 15 and 16) and C (points 14 and 15) of Directive 2014/25/EU</p> <p>Principle of equal treatment</p>	<p>a) Failure to publish in the contract notice (32) the selection and/or award criteria (and their weighting).</p> <p>b) Failure to publish in the contract notice³³ the conditions for performance of contracts or technical specifications.</p> <p>c) Neither the published contract notice nor the tender specifications describe in sufficient detail the award criteria and</p>	<p>25%</p> <p>10%</p> <p>10%</p>

		mentioned in Article 18 of Directive 2014/24/EU Case-law: ECJ-07/2016 Dimarso, ECJ-11/2010 COM vs Ireland, ECJ-01/2008 Lianakis	their weighting, with the effect of unduly restricting the competition (i.e. the lack of sufficient detail could have had a deterrent effect to potential tenderers) (34). d) The clarifications or additional information (in relation to selection/award criteria) provided by the contracting authority were not communicated to all tenderers or published.	10%
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28 Except for the cases where the irregularity is already covered by other types of irregularities set out in these guidelines.

29 The procurement procedures concerned are: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, centralised purchasing activities and central purchasing bodies.

30 For example: the term of a framework agreement exceeds four years, without duly justification.

31 If the non-compliance means that the contract notice was not published, then the rate of correction is to be determined in accordance to point 1 above.

32 Or tender documentation if this is published together with the contract notice.

33 Or tender documentation if this is published together with the contract notice.

34 Except if the award criteria and their weighting were clarified by the contracting authority in sufficient detail, upon request of tenderers, before the deadline for submission of tenders.

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
10	Use of - criteria for exclusion, selection, award or - conditions for performance	Articles 36, 37, 38 and 41 in relation to Article 3 of Directive 2014/23/EU Articles 42, 56 to 63, 67 and 70 in relation to Article 18(1), Annex VII of Directive 2014/24/EU	Cases in which economic operators could have been deterred from tendering because of exclusion, selection and/or award criteria or conditions for performance of contracts that include unjustified national, regional or local preferences.	25%

	<p>of contracts or</p> <p>- technical specifications</p> <p>that are discriminatory on the basis of unjustified national, regional or local preferences</p>	<p>Articles 60, 76 to 79, 82 and 87 in relation to Article 36(1), Annex VIII of Directive 2014/25/EU</p>	<p>This is for example the case when there is a requirement to have, at the time of submission of the tender:</p> <p>(i) an establishment or representative in the country or region; or</p> <p>(ii) tenderers' possession of experience and/or qualification in the country or region (35);</p> <p>(iii) tenderers' possession of equipment in the country or region.</p> <p>Same as above except for the fact that a minimum level of competition was still ensured, i.e. a number of economic operators submitted tenders that were accepted and fulfilled the selection criteria.</p>	<p>10%</p>
11	<p>Use of</p> <p>- criteria for exclusion, selection, award or</p> <p>conditions for performance of contracts or</p> <p>- technical specifications that are not discriminatory in the sense of the previous type of irregularity but still restrict access for economic operators</p>	<p>Articles 36, 37, 38 and 41 in relation to Article 3 of Directive 2014/23/EU</p> <p>Articles 42, 56 to 63, 67 and 70 in relation to Article 18(1), Annex VII of Directive 2014/24/EU</p> <p>Articles 60, 76 to 79, 82 and 87 in relation to Article 36(1), Annex VIII of Directive 2014/25/EU</p>	<p>This refers to criteria or conditions that, despite not being discriminatory on the basis of national/regional/local preferences, still lead to restricting access for economic operators to the specific public procurement procedure, as exemplified in the following cases.</p> <p>1) cases in which the minimum capacity levels of ability for a specific contract are related but not proportionate to the subject matter of the contract;</p> <p>2) cases where, during the evaluation of tenderers/candidates, the selection criteria were used as award criteria;</p> <p>3) cases where specific trademarks/brands/standards are required³⁶, except where such requirements relate to an ancillary part of the contract and the potential impact on the</p>	<p>10%</p> <p>10%</p> <p>10%</p>

			<p>EU budget is only formal (cf. Section 1.4).</p> <p>Cases in which restrictive criteria/conditions/specifications were applied but still a minimum level of competition was ensured, i.e. a number of economic operators submitted tenders that were accepted and fulfilled the selection criteria.</p> <p>Cases in which the minimum capacity levels of ability for a specific contract are manifestly not related to the subject matter of the contract.</p> <p>or</p> <p>Cases where the exclusion, selection and/or award criteria or conditions for performance of contracts led to a situation where only one economic operator could submit a tender and this outcome cannot be justified by the technical specificity of the contract in question.</p>	<p>5%</p> <p>25%</p> <p>25%</p>
12	Insufficient or imprecise definition of the subject-matter of the contract (37)	<p>Article 3 of Directive 2014/23/EU Article 18(1) of Directive 2014/24/EU Article 36 of Directive 2014/25/EU</p> <p>Cases C-340/02, <i>Commission/France</i> EU:C:2004:623 and C-299/08, <i>Commission/France</i> EU:C:2009:769</p> <p>C-423/07, <i>Commission/Espagne</i></p>	The description in the contract notice and/or the tender specifications is insufficient or imprecise in a way that may not allow potential tenderers/candidates to fully determine the subject matter of the contract, causing deterrent effect potentially restricting the competition (38).	10%

13	Unjustified limitation of sub-contracting	Articles 38(2) and 42 of Directive 2014/23/EU Articles 63(2) and 71 of Directive 2014/24/EU Article 79(3) and 88 of Directive 2014/25/EU Case C-406/14, EU:C:2016:652, <i>Wrocław – Miasto na prawach powiatu</i> , paragraph 34	The tender documentation (e.g. technical specifications) imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks that would be concerned.	5%
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35 The definition of the selection criteria must not be discriminatory or restrictive and be linked to the subject-matter of the contract and proportionate. In any case, where a sufficiently precise description of the specific selection criterion required is not possible, the reference used in the selection criteria needs to be accompanied by the words "or equivalent", in order to ensure the opening up of competition. When these conditions are in place, no financial correction is warranted.

36 Without allowing for an equivalent trademark/brand by not using the compulsory quote "or equivalent".

37 Except where: (i) the Directives allow for negotiation or (ii) when the subject-matter of the contract has been clarified after publication of the contract notice, and such clarification was published in the OJ.

38 E.g. it has been established though the complaints or notifications during the tendering that the tender specifications are insufficient for the possible bidders to determine the subject matter of the contract. However, the number of questions made by potential tenderers is not an indicator that an irregularity exists, provided the questions are adequately answered by the contracting authority, in line with Articles 47(3) and 53(2) of Directive 2014/24/EU.

2.2 Selection of tenderers and evaluation of tenders

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
14	Selection criteria (or technical specifications) were modified after opening of tenders or were incorrectly applied.	Articles 3(1) and 37 of Directive 2014/23/EU Articles 18(1) and 56(1) of Directive 2014/24/EU Article 36(1) and 76(1) of Directive 2014/25/EU	The selection criteria (or technical specifications) were modified during the selection phase or were incorrectly applied during the selection phase, resulting in acceptance of winning tenders that should not have been accepted (or rejection of tenders that should have been accepted (39) if the published selection criteria had been followed.	25%

15	Evaluation of tenders using award criteria that are different from the ones stated in the contract notice or tender specifications	Article 41 of Directive 2014/23/EU Articles 67 and 68 of Directive 2014/24/EU Article 82 and 83 of Directive 2014/25/EU	The award criteria (or respective sub-criteria or weightings) stated in the contract notice or tender specifications (1) were not followed during the evaluation of tenders, or (2) additional award criteria not published (40) were used in that evaluation.	10%
	Or Evaluation using additional award criteria that were not published	Cases C-532/06, <i>Lianakis</i> , EU:C:2008:40, paragraphs 43-44 and C-6/15, <i>TNS Dimarso</i> , paragraphs 25-36	Where the two cases above-mentioned had a discriminatory effect (on the basis of unjustified national/regional/local preferences), this is a serious irregularity.	25%

39 Unless the contracting authority can clearly demonstrate that the rejected tender would in any case not have won and that therefore the irregularity did not have any financial impact.

40 In the terms of Article 67(5) of Directive 2014/24/EU and the related case law.

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
16	Insufficient audit trail for the award of the contract	Article 84 of Directive 2014/24/EU Article 100 of Directive 2014/25/EU	The relevant documentation (set out in applicable provisions of the Directives) is insufficient to justify the award of the contract, resulting in a lack of transparency. Refusing access to the relevant documentation is a critical irregularity, since the contracting authority does not provide the evidence that the procurement procedure complied with the applicable rules.	25% 100%
17	Negotiation during award procedure, including modification of	Articles 37(6) and 59 of Directive 2014/23/EU	The contracting authority allowed a tenderer/candidate to modify its tender (41) during evaluation of offers,	25%

	the winning tender during evaluation	<p>Articles 18(1) and 56(3) of Directive 2014/24/EU</p> <p>Articles 36(1) and 76(4) of Directive 2014/25/EU Cases C-324/14, <i>Partner Apelski Dariusz</i>, EU:C:2016:214, paragraph 69 and C-27/15, <i>Pippo Pizzo</i> EU:C:2016:404</p>	<p>where the modification leads to the award of the contract to that tenderer/candidate.</p> <p>or</p> <p>In the context of an open or restricted procedure, the contracting authority negotiates with any tenderer(s) during the evaluation stage, leading to a substantially modified contract in relation to the initial conditions set out in the contract notice or tender specifications.</p> <p>or</p> <p>In concessions, the contracting authority allows a tenderer/candidate to change the subject matter, award criteria and the minimum requirements during negotiations, where the modification leads to the award of the contract to that tenderer/candidate.</p>	
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41 Except of negotiated procedures and competitive dialogue and where the Directives allow the tenderer/candidate to submit, supplement, clarify or complete the information and documents.

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
18	Irregular prior involvement of candidates/tenderers towards the contracting authority	<p>Articles 3 and 30(2) of Directive 2014/23/EU</p> <p>Article 18(1), 40 and 41 of Directive 2014/24/EU</p> <p>Articles 36(1) and 59 of Directives 2014/25/EU</p> <p>Joint Cases, C21/03 et C34/03, <i>Fabricom</i> EU:C:2005:127</p>	Where the prior advice of a tenderer to the contracting authority leads to a distortion of the competition or results in a violation of the principles of non-discrimination, equal treatment and transparency, in the conditions indicated in Articles 40 and 41 of Directives 2014/24/EU(42)	25%

19	Competitive procedure with negotiation, with substantial modification of the conditions set out in the contract notice or tender specifications	Article 29(1) and (3) of Directive 2014/24/EU Article 47 of Directive 2014/25/EU	In the context of a competitive procedure with negotiation, the initial conditions of the contract were substantially altered (43), thus requiring the publication of a new tender	25%
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42 Such advice is irregular no matter whether it occurs at the moment of the drafting of the tender documentation or during the preceding project application procedure.

43 See last line of Article 29(3) of Directive 2014/24/EU.

No	Type of irregularity	Applicable law (18)	Description of the irregularity	Rate of correction
20	Unjustified rejection of abnormally low tenders	Article 69 of Directive 2014/24/EU Article 84 of Directive 2014/25/EU Joins Cases C-285/99 <i>Lombardini</i> and C-286/99 <i>Mantovani</i> EU:C:2001:610, paragraphs 78 to 86 and Case T-402/06, <i>Spain/Commission</i> , EU:T:2013:445, paragraph 91	Tenders that appeared to be abnormally low in relation to the works/supplies/services were rejected but the contracting authority, before rejecting those tenders, did not question in writing the respective tenderers (e.g. requesting details of the constituent elements of the tender, which it considers relevant), or where such questioning exists but the contracting authority is not able to evidence that it has assessed the replies provided by the tenderers at stake.	25%
21	Conflict of interest with impact on the outcome of the procurement procedure	Article 35 of Directive 2014/23/EU Article 24 of Directive 2014/24/EU Article 42 of Directive 2014/25/EU Case C-538/13, <i>eVigilo</i> EU:C:2015:166, paragraphs 31-47	Whenever an undisclosed or inadequately mitigated conflict of interest has been identified, according to Article 24 of the Directive 2014/24/EU (or Article 35 of Directive 2014/23/EU or Article 42 of Directive 2014/25/EU), and the tenderer concerned was successful in securing the	100%

23	Modifications of the contract elements set out in the contract notice or tender specifications, not in compliance with the Directives	<p>2014/24/EU Article 89 of Directive 2014/25/EU Case C-496/99P, <i>Succhi di Frutta</i> EU:C:2004:236, paragraphs 116 and 118</p> <p>Case C-454/06, <i>Presstext</i> EU:C:2008:351</p> <p>Case C-340/02, <i>Commission v. France</i> EU:C:2004:623</p> <p>Case C-91/08, <i>Wal AG</i>, EU:C:2010:182</p>	<p>1) There are modifications to contract (including reduction in the scope of the contract) not in compliance with Article 72(1) of said Directive;</p> <p>However, modifications to contract elements will not be considered as an irregularity subject to a financial correction where conditions of Article 72(2) are respected, i.e.:</p> <p>a) the value of the modifications is below both of the following values:</p> <p>(i) the thresholds set out in Article 4 of Directive 2014/24/EU46; and</p> <p>(ii) 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts, and</p> <p>b) the modification does not alter the overall nature of the contract or framework agreement (47).</p> <p>(2) There is a substantial modification of the contract elements</p>	25% of the initial contract and the new works/supplies/services (if any) resulting from the modifications
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		<p>Article 72(1)(b), last subparagraph and Article 72(c)(iii) of Directive 2014/24/EU</p>	<p>(such as the price, nature of the works, the completion period, the terms of payment, the materials used) if the modification renders the implemented contract materially different in character from the one initially concluded. In any event, a modification will be considered substantial where one or more of the conditions set out in Article 72(4) of the Directive 2014/24/EU is met.</p> <p>Any increase in price exceeding 50 % of the value of the original contract.</p>	<p>25% of the initial contract and 100% of related contract modifications (price increase)</p>
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46 The thresholds are revised every two years, cf. Article 6 of the Directive.

47 The concept of "overall nature of the contract or framework agreement" is not defined by the Directives and has not yet been the subject of case-law. See also recital 109 of the Directive 2014/24/EU. In this respect, further guidance is provided by SIGMA's brief 38 on public procurement – contract modifications (available at <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-38-200117.pdf>): *"Modification is permitted where it is expressly provided for in review clauses set out in the initial procurement documents. Review clauses can provide a certain degree of flexibility in the terms of the contract. Modifications to the contract cannot be permitted simply because they were mentioned in the procurement documents in advance. Review clauses in procurement documents must be clear, precise and unequivocal. Review clauses must not be drafted in broad terms with a view to covering all possible changes. A review clause that is too general is likely to breach the principle of transparency and entails the risk of unequal treatment. (...) Review clauses must specify the scope and nature of possible modifications or options as well as the conditions under which they may be used. (...) Review clauses must not alter the overall nature of the contract. (...) For example, a new contract is likely to be drawn up if the nature of the contract is modified in such a way that the delivery of different products or the provision of services of a different kind is required in comparison to those set out in the original contract. In these circumstances, a modification will not be permitted, even if the scope, nature and conditions for different products or new services have been established in advance in a clear, precise and unequivocal manner."*

CHAPTER FOUR: COMMON ERRORS AND HOW TO AVOID THEM

Below is a list of common errors encountered in checks on ESIF projects

Problem	Examples
Inadequate Preparation	<p>Direct awards without sufficient justification.</p> <p>Changing the scope of the contract during the tender process.</p> <p>Underestimating the value of the contract.</p> <p>Failure to clearly set out how bids will be scored and assessed.</p>
Sub-standard advertising	<p>No advertising.</p> <p>Choosing to advertise on a medium with inadequate scope (Contracting authorities not advertising on contracts finder).</p> <p>Inaccurate and discriminatory advertising.</p>
Express breaches of public procurement law	<p>Not meeting the prescribed time limits.</p> <p>Not communicating extension of deadlines through additional OJEU notices</p> <p>Incorrect use of the provisions for negotiated procedure without prior publication due to extreme urgency due to unforeseeable events ,</p> <p>Using the extreme urgency exemption in order to save money. Auditors consider that this procedure should only be used for events such as imminent threat to life, the ESIF grant recipient should complete the form at Annex 2." ERDF does not accept risk of loss of grant as constituting extreme urgency.</p> <p>Requiring in a tender, attempting to justify negotiated procedure without prior advertisement or making direct awards on the basis of a requirement for local knowledge or having worked with an organisation previously. These would be considered discriminatory criteria which cannot be justified by the "technical" exemptions.</p> <p>Using frameworks, which they are not entitled to use or which are non-compliant.</p> <p>Mixing up selection and award criteria.</p> <p>Discriminatory or dissuasive criteria.</p>

	<p>Accepting bids which have not met the criteria.</p> <p>Failure to score bids in a fair and transparent way.</p>
Not following Treaty Principles	<p>Giving additional information to certain bidders but not others.</p> <p>Extending deadlines for certain bidders.</p> <p>Not applying consistent criteria when assessing different bids.</p> <p>Failure to put in place procedures to address conflicts of interest.</p> <p>Lack of clarity in relation to interviews and inconsistency in how they are used as part of the overall assessment</p>
Documentation	<p>Not having documentation to show how the process was followed and the rationale for decisions taken.</p>

1. In respect of Public Procurement Law compliance, the Commission has published [guidance which explains how to avoid the most common errors](#) in European Structural Fund projects¹⁰.
2. The Commission guidance should be read by all ESIF grant recipients (whether subject to Public Procurement Law, the Treaty Principles or National Rules) as it articulates the key issues which need to be considered by contracting organisations at each stage of a procurement process.
3. The six stages of a procurement are:
 - i. Preparation and planning
 - ii. Invitation to bid
 - iii. Submission and selection of bids
 - iv. Evaluation of bids
 - v. Awarding the contract
 - vi. Contract implementation
4. The 'preparation and planning' stage should not be underestimated: many of the errors identified during the ESIF 2007-2013 programmes could have been avoided had appropriate time and resource been invested during the preparation and planning stage.
5. Best practice is to develop a procurement plan. This should set out timescales for each stage of the process. It should also identify the person who is responsible for the day to day delivery of the procurement as well as the person who will be

¹⁰ Although this document refers to the Procurement Directive 2004/18/EC, which was transposed into English law through the Public Contracts Regulations 2006, many of the recommendations are helpful for the new procurement regime, in particular those relating to the need for thorough preparation.

responsible for carrying out gateway checks at the end of each stage of the procurement.

6. These checks should examine that the process is compliant and also verify that a clear audit trail is in place. Many organisations instruct a lawyer with ESIF procurement experience or another appropriate expert to carry out these gateway checks and sign off that the process is compliant

Insufficient Audit Trails / Transparency Requirements

There have been a number of recent cases where financial corrections have been applied for a lack of transparency in the evaluation process because there were **very few or no comments to demonstrate how scores were awarded**. **The level of correction for an insufficient audit trail is 25%**

Even if procurements are scored in line with the scoring evaluation criteria set out in the tender specification, if there is **no record** of any comments from evaluators to explain why those scores are awarded, i.e. the scoring sheets contain no or very few comments and there are no records retained of minutes of the moderation, notes on the evaluation and individual explanations for the decision for each tenderer, **this is generally unlikely to constitute “sufficient” documentation to demonstrate a complete audit trail and satisfy the requirement of transparency.**

To ensure compliance with PCR regulation 84, Grant Recipients when conducting an OJEU process for ESIF projects should ensure they comply with the following points:

Moderation notes must be kept and these must contain a full, transparent and fair summary of the discussion that led to the consensus scores. It is not necessary to record a verbatim record of every point made in moderation, but the notes must record the ultimate reason for awarding the consensus score to each bidder.

Individual evaluators' score sheets alone will not be adequate evidence, particularly where an evaluator's view shifts based on the discussions held in the moderation meeting. The reasons for the award of a score must reflect the discussions at the moderation meeting.

Where a tenderer is considered to have provided irrelevant information this must be noted in the reasons given for the score.

Careful and thorough notes should be kept by all evaluators and moderators, and should form part of the extended Regulation 84 report to demonstrate the decisions made and justify the scores given.

Full written justification for scoring should be provided for each question to assist with moderation. It is important that the rationale is explicit, factual, concise and consistent.

All documentation and notes relating to the procurement, including in relation to the evaluation process should be submitted.

All documentation must be kept for a period of at least three years from the date of the award of the contract.

CHAPTER FIVE: PUBLIC PROCUREMENT LAW

Introduction

New regulations covering Public Procurement Law came into effect in February 2015. The date that the contract is commenced determines which regulations apply. This chapter deals with contracts let by Contracting Authorities, over the relevant thresholds that commenced on or after 26th February 2015. For contracts that commenced prior to 26th February 2015 please see annex 5.

CONTRACTS WHERE PROCUREMENT PROCEDURE COMMENCED ON OR AFTER 26 FEBRUARY 2015

Phase 1: Preparation and Planning

1. All ESIF grant recipients are required to assess whether:
 - 1.1.1. there is a “procurement” for the purposes of the Public Contracts Regulations 2015;
 - 1.1.2. their organisation is a “contracting authority” within the meaning set out in the Public Contracts Regulations 2015; and
 - 1.1.3. the value of the contract meets or exceeds the relevant thresholds.

Is there a ‘Procurement’ for the purposes of the Public Contracts Regulations 2015?

2. To be within the scope of the Public Contracts Regulations 2015 there must be a “procurement” which is defined at [Regulation 2\(1\) of the Public Contracts Regulations 2015](#) as “*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*”.

Establishing whether your organisation is a contracting authority or whether your procurement may engage the rules on ‘Subsidised Contracts’

- 2.1.1. “Contracting authorities” are defined at [Regulation 2\(1\) of the Public Contracts Regulations 2015](#) which reads: “*the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity*”.
- 2.1.2. This definition catches public sector organisations and organisations which are governed or formed by public sector bodies (cf Regulation 3(1)(w) of the Public Contracts Regulations 2006) and includes central government, local authorities, and in most circumstances, universities and housing associations). By contrast, private

sector organisations will usually be outside the scope of this definition, subject to paragraph 2.1.3 below.

2.1.3. Even if your organisation is not within the definition of a contracting authority you will be required to follow the processes outlined in this Chapter 5 as if your organisation were a contracting authority where Regulation 13 of the Public Contracts Regulations ('Contracts Subsidised by Contracting Authorities') applies. Regulation 13 applies in respect of public works and public services contracts which receive more than 50% funding from contracting authorities, including any ESIF, in the context of the following:

2.1.4.

- Civil engineering activities listed in [Schedule 2](#) to the Regulations;
- Building works for hospitals, facilities intended for sports recreation and leisure, school and university buildings and buildings used for administrative purposes.

2.1.4. Non Contracting bodies are required under the Grant Funding Agreement to follow the requirements of Chapter 6.

Establishing whether the value of the contract meets the thresholds

3. Contracting authorities must calculate the value of the contract (in line with the requirements at [Regulation 6 of the Public Contracts Regulations 2015](#)) and establish whether this value meets or exceeds the relevant thresholds.

4. The Commission is concerned that some contracts have been artificially split in order to be below the thresholds. Therefore best practice is to explain the basis for the valuation in a file note which can be provided at audit.

5. The calculation of the value involves the contracting authority:

5.1.1. Identifying all the sums that the contracting organisation may reasonably anticipate will become payable during the delivery of the contract. This means factoring in all anticipated renewals, options, prizes, bonuses, premiums, fees, interest, commission and other forms of remuneration;

5.1.2. Establishing the appropriate term of the contract by reference to the relevant needs of the contracting authority. Where there is a supply contract with no fixed term or the contract term cannot be identified, calculating the monthly value and multiplying this by 48.

5.1.3. Where contracting authorities procure together, the value comprises all their needs together;

5.1.4. Basing the valuation on the full sum expected to be payable for the goods, works and services, not just limiting the value to the ESIF or other public funds being provided to the ESIF grant recipient;

5.1.5. Establishing the value exc VAT but, where relevant, incorporating expected inflation; and

5.1.6. In situations where there are many different options for the delivery of a contract, using appropriate judgement to identify the likely outcome. In this situation, if

the estimated amount is below but close to the threshold, it will normally be safer to assume that the procurement meets the threshold.

6. Where a valuation process is complex or produces a value close to the thresholds, it is recommended that a file note setting out the valuation rationale is produced which can be provided in the event of an audit.

Applying the Thresholds

7. Applying the thresholds requires identifying:
 - whether the contracting authority is a Central Government Authority or a Sub-Central Contracting Authority; and
 - what is being purchased?
8. There are two types of contracting authority:
 - Central Government Authorities are the Crown and the organisations listed at [Schedule 1 of the Public Contracts Regulations 2015](#) and their successor entities (where those successor entities are contracting authorities), but does not include Her Majesty in her private capacity,;
 - Sub-Central Contracting Authorities (which covers all contracting authorities except those which are Central Government Authorities).
9. The distinction between Central Government Authorities and Sub-Central Contracting Authorities is relevant to determining the scope of the “Below-Threshold Procurements” regime.

Type of Contract

10. Different thresholds apply depending on the category of contract. The categories are:
 - 10.1.1. Works¹¹;
 - 10.1.2. Supplies¹² and
 - 10.1.3. Services.
11. Where there is a mix of activities, the dominant activity determines the category.
12. The current thresholds are:

¹¹ The definition of “works” can be found at [Regulation 2\(1\) of the Public Contracts Regulations 2015](#) and includes building and civil engineering works.

¹² The definition of “public supply contracts” at [Regulation 2\(1\) of the Public Contracts Regulations 2015](#) reads “public contracts which have as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations”.

Thresholds from 1 January 2020 – 31 December 2022¹³ (exc VAT)

	SUPPLIES	SERVICES	WORKS	Light Touch Regime
Central Government Authorities	£ 122,976	£ 122,976	£ 4,733,252	£663,540
Sub-Central Government Authorities	£ 189,330	£ 189,330	£ 4,551,413	£663,540
Small Lots	£70,778	£70,778	£884,729	N/A

Choosing the procurement process

13. Where an organisation is a contracting authority and the value of the contract meets the thresholds, it is necessary to apply the Public Contracts Regulations and apply one of the procurement processes unless Regulation 12 (in-house awards/joint control) is engaged. Procurement is a complex process with many administrative requirements. Therefore before designing the selection process, it is necessary to read the Public Contract Regulations 2015 (<http://www.legislation.gov.uk/ukxi/2015/102/regulation/2/made>).
14. The procurement processes are:
- 14.1.1. **Open Procedure:** a process in which all interested parties are able to submit bids and be considered for the advertised contract. Selection and evaluation is carried out after the receipt of tenders. This procedure provides the broadest scope for competition as anyone can bid, but risks a large number of tenders and can therefore incur high administration costs. This is the preferred approach in the UK.
- 14.1.2. **Restricted Procedure:** this is a two stage process where the selection and short-listing is carried out on the basis of a pre-qualification questionnaire (“PQQ”). Responses to the PQQ are assessed. From this exercise, candidates are invited to submit a full tender from which a winning bidder is selected.
- 14.1.3. **Competitive Procedure with negotiation:** this process allows negotiations to be carried out with all bidders still in the procurement. Following negotiation on submitted tenders, there is a formal end to negotiations and bidders are invited to submit a revised tender.

¹³ Previous thresholds can be found in Annex 4
National ESIF Procurement Requirements
 ESIF-GN-1-001, Version 7
 Date published 15 September 2020

- 14.1.4. **Competitive Dialogue:** this is a process for situations where the solution cannot be defined at the outset. Following the OJEU notice and pre-qualification questionnaire, dialogue is permitted with potential bidders to develop options before competitive tenders are invited.
- 14.1.5. **Innovation Partnership:** this process allows a supplier to enter into a partnership with a contracting authority to develop an innovative new product or service.
- 14.1.6. **Negotiated Procedure without prior publication:** this process allows, in very limited circumstances, the contracting authority to approach suppliers to negotiate the terms of the contract without the publication of an OJEU notice or a call for competition.
- 14.2. The Commission expects that arguments around failed advertisements and urgency will be substantiated. To assist with this:
- 14.2.1 the form at Annex 2 should be completed and submitted to the relevant Department, in situations where the process of advertising has produced no acceptable tenders and a direct award is being considered¹⁴.
- 14.2.2 The same form at Annex 2 should be completed and submitted to the relevant department where a direct award is being considered because:
- Extreme urgency exists for reasons which are unforeseeable and beyond the control of the contracting organisation, for example replacing the sole power generator which has been damaged in a fire.
 - There is only one supplier capable of providing the relevant goods, works or services due to technical, artistic or copyright reasons.
- 14.3. The department strongly recommends against the use of direct awards except where there are strong arguments for this course of action which can be substantiated through evidence.

Framework Agreements and Dynamic Purchasing Systems

15. **Framework Agreements:** Frameworks are suitable for repeat purchases, especially in situations where demand is irregular or where the contracting authority needs flexibility

¹⁴ Please note that this is required for record keeping purposes, the Department cannot “sign off” such procurements as compliant.

to meet differing requirements, for example a framework may be suitable for a contracting authority to order stationery supplies, legal services or building repairs.

16. There are two stages to a Framework Agreement. The first involves appointing the members of the framework. The second involves awarding a contract to one or more members of the framework.
17. It is possible, although unusual, to appoint a single supplier to a framework¹⁵. There is no longer a requirement for there to be a minimum of 3 suppliers and there is no maximum number of suppliers, but frameworks with a very large number of suppliers are often difficult to manage, as contracting authorities may have to approach each supplier appointed to the framework before awarding a contract. Only in exceptional circumstances can a framework last longer than four years, however contracts awarded under frameworks may exceed the length of the framework itself.
18. The basis for selecting a member of a framework to deliver a contract is set out at [Regulation 33\(8\) of the Public Contracts Regulations 2015](#). Where the original framework is sufficiently precise in its requirements it is possible to award a contract without competition between the members in line with [Regulation 33\(8\)\(1\) of the Public Contracts Regulations 2015](#). Alternatively, [Regulations 33\(8\)\(2\) and 33\(8\)\(3\) of the Public Contracts Regulations 2015](#) set out the process for a mini-competition between the members of the framework.
19. Under the new Regulations, contracts from a framework may be allocated either by:
 - The Application of terms laid down in the framework agreement without reopening competition (direct award).
 - A mini-competition
 - A combination of direct award and mini-competition (new 2015 PCR).
20. Where a framework allows the authority a choice between applying the terms of the framework or re-opening competition within the framework the choice must be made by applying objective criteria set out in the procurement documents for the framework agreement (e.g. quantity, value or characteristics of the works/supplies/services involved).
21. Mini-competitions should be carried out in accordance with [Regulation 33\(11\) of the Public Contracts Regulations 2015](#), This allows all members of the framework capable of performing the contract sufficient time to submit a written proposal to carry out the contract. These bids shall not be opened until after the deadline and the best tender, evaluated against set criteria, shall be offered the contract.
22. The new directive makes it explicit that only authorities clearly identified in the OJEU notice may use a framework to award contracts and that contracts awarded under frameworks may exceed the length of the framework itself. It also sets out that call off awards over the relevant threshold should be published on Contracts Finder.
23. Frameworks have been a significant cause of corrections during the 2007-2013 ERDF programme. Special care should be taken to ensure the ESIF grant recipient is permitted

¹⁵ In this situation contracts would need to be awarded in accordance with [Regulation 33\(7\) of the Public Contracts Regulations 2015](#).

to use the framework and that the framework has not expired, particularly when using a framework that has been set up by someone else.

24. **Dynamic Purchasing Systems:** Like frameworks, dynamic purchasing systems are suitable for repeat purchases, especially in situations where demand is irregular or where the contracting authority needs flexibility to meet differing requirements.
25. Dynamic Purchasing Systems differ from framework agreements because they do not establish a fixed panel of suppliers, instead they are open so that any organisation which can demonstrate it meets the relevant criteria can be added to the dynamic purchasing system during its term.
26. Grant recipients who intend on using a framework or dynamic purchasing system that has been set up by another contracting authority must ensure they have the documents required to demonstrate compliance of the framework or dynamic purchasing system with public procurement law. ESIF grant recipients should check that:
 - 26.1.1. the documents can be produced at audit;
 - 26.1.2. they are permitted to use the framework or dynamic purchasing system;
 - 26.1.3. the description of the goods, services or works in the OJEU notice and eventual contract covers the partner authorities' requirements; and
 - 26.1.4. the framework or dynamic purchasing system and their call-off from it fulfils all relevant legal requirements.

Scoping the specification, managing conflicts of interest and agreeing the criteria

Scoping the specification

27. Many errors can be traced back to inadequately drafted specifications. It is therefore recommended that the specification is developed by a team of 4 to 8 persons including those who will be involved in the day to day delivery, the person who will have overall

responsibility for the compliance of the procurement, the finance director and relevant specialists.

28. Prior to drafting the specification the panel should consider:

28.1.1. What is the contracting authority asking the market to provide and why?

28.1.2. What are the main considerations for the contracting organisation?;

28.1.3. What are the critical success factors?

28.1.4. Are ~~their~~ there alternative ways to achieve this outcome?

28.1.5. What scope is there to purchase ready-made solutions or does a solution need to be developed?

28.1.6. What is the anticipated budget? What steps can be taken to achieve value for money?

28.1.7. What are the minimum requirements to obtain the necessary goods, works or services?

28.1.8. Does the specification contain all the information needed for the market to be able to respond to the notice?

Conflicts of interest

29. A conflict of interest occurs when an individual or organisation has more than one interest in a contract, leading to a risk of biased or corrupt decision making or the perception of such.

30. The audit of ESIF takes a very strict approach to situations where a conflict of interest could occur. It is therefore necessary to:

- identify all potential conflicts of interests (for example, a director of the ESIF grant recipient who is a shareholder or director of a company which plans to bid for the contract) at the earliest opportunity;
- make staff aware of the process to declare a conflict of interest during the procurement process; and
- Keep records of how conflicts are managed.

31. [Regulation 24 of the Public Contracts Regulations 2015](#) sets out the responsibilities of contracting authorities to manage conflicts of interest. Failure to identify, prevent and remedy potential conflicts may lead to 100% correction – see Chapter 3.

32. For more detail on managing conflicts of interest, please see The Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF (ESIF-GN-1-027)

Selection and Award Criteria

33. There are two distinct types of evaluation criteria - selection and award criteria.
34. In designing a procurement, it is important to keep the two criteria separate. [Regulation 58 of the Public Contracts Regulations 2015](#) covers selection criteria. [Regulation 67 of the Public Contracts Regulations 2015](#) covers award criteria. Failure of ERDF grant recipients to segregate the two criteria was a major source of irregularities in the 2007-2013 ERDF programme.
35. In simple terms:
- selection criteria aim to establish "does the bidder have the capability to deliver the contract?¹⁶"; and
 - award criteria aim to establish "based on the proposal to deliver the contract which bid is the best?¹⁷"
36. **Selection Criteria** assess the ability of the tenderer to perform a contract based on qualitative information relating to suitability to pursue a professional activity, economic and financial standing, and technical and professional ability (for example, their previous experience and qualifications).
37. The selection criteria, sub-criteria and any weighting applied to each must be proportionate to the requirement in question. The requirements must be publicised in an OJEU notice or in the procurement documents.
38. **Award Criteria** are specific to how the bidder intends to deliver the contract (for example cost, quality, timescale).
39. The criteria, sub-criteria and weightings to be applied must be disclosed in the OJEU notice or in the procurement documents.
40. The award criteria must be objective, relate to the subject matter of the contract, and be proportionate and transparent.

Timescales

41. The time limits for the open, restricted and competitive dialogue procedures are:

Procedure	Minimum time limits (days)
Open	35 days (less 5 for e-tendering) ¹⁸

¹⁶ The selection criteria relate to the tenderer. They are used to assess the tenderer's ability to be able to perform the contract (including financial standing and eligibility).

¹⁷ Used to identify which tenderer is the most economically advantageous so as to determine to whom to award the contract

¹⁸ May be reduced to 15 where urgency or Prior Information Notice is published, see [Regulation 27\(4\) of the Public Contracts Regulations 2015](#).

Restricted	<p>Requests to participate - 30 days</p> <p>Can be reduced to 10 where urgency or Prior Information Notice is published.</p> <p>Tenders – 30 days from date on which ITT is sent (less 5 for e-tendering; or 10 days where a previous prior information notice which was not used as a call for competition has been published)</p>
Competitive Dialogue	<p>30 days for requests to participate</p> <p>30 days for initial tenders¹⁹</p>

42. Any divergence from the minimum timescales is likely to lead to a financial correction²⁰.
43. Reduction of timescales on the grounds of urgency will only be compliant where there are the relevant legal requirements are met (for example, urgency).

Phase 2: Invitation to Bid

Advertising

44. Contracts above the OJEU thresholds set out in the Public Contracts Regulations 2015 shall be advertised in the Official Journal of the European Union. Contracts above £10,000 for Central Government Authorities and £25,000 for Sub-Central Contracting Authorities should also be advertised on Contracts Finder.
45. Contracts below the OJEU thresholds shall be advertised in accordance with [Part 4 of the Public Contract Regulations 2015](#) and should follow the Treaty Principles section of Chapter 6.
46. In the interests of equal treatment, where clarification is sought on any point in the tender documents, the contracting authority must promptly make the same information available to all potential bidders. Records should be kept of communications with economic operators under [Regulation 84\(8\) of the Public Contracts Regulations 2015](#).

Phase 3: Submission and selection of bids

47. The contracting authority must only consider information set out in bid documents.
48. Bids which are late or do not meet the minimum requirements should, by default, be rejected.
49. The contracting authority must put in place appropriate processes to keep tender submissions confidential and in safe custody. Where electronic communication is used,

¹⁹ Capable of being shortened, subject to rules relating to the procedure applied.

²⁰ 2.2.2. of the European Commission's guidance for practitioners on the avoidance of common errors in ESI funded projects.

the relevant requirements in [Regulation 22 of the Public Contracts Regulations 2015](#) must be satisfied.

50. Criteria and / or the weighting should not be amended after they have been published in the procurement documents.

Phase 4: Evaluation of bids

51. The evaluation process must be transparent and applied in a manner which ensures equal treatment, non-discrimination and mutual recognition.
52. Bids shall be reviewed and given scores against the set criteria. To meet ESIF audit requirements, the scores shall be dated and signed by at least two members of staff. Once the scores are set any amendment must be dated and signed by two members of staff and accompanied by a file note justifying the change. Any weighting set out in the procurement documents may be applied after the scores are set.
53. The contracting authority must not engage in negotiation with bidders during the evaluation stage²¹. Clarification about aspects of bids should be kept to an absolute minimum and may pose some level of legal risk. It should only be attempted where:
 - 53.1. the contracting authority raises questions about information already submitted by a bidder;
 - 53.2. all correspondence about the clarification is recorded in writing; and
 - 53.3. the clarification is minor, i.e. the communication has no bearing on significant information within the bid such as selection documents, pricing, quality or service elements.
54. Where an abnormally low tender is received, the contracting authority may only reject it after considering an explanation from the bidder, in line with [Regulation 69 of the Public Contracts Regulations 2015](#). A file note explaining the decision should be produced and kept for audit.

Phase 5: Award

55. Within 30 days of the award of a contract or framework agreement, the contracting authority must send a Contract Award Notice to the Official Journal of the European Union for publication. The requirements of the contract award notice are set out in [Regulation 50 of the Public Contracts Regulations 2015](#)²².
56. As soon as possible after a decision has been made the contracting authority must contact all bidders providing the information listed at [Regulations 86 of the Public Contracts Regulations 2015](#). This information includes the name of the winning bidder and the basis for the award.

²¹ Unless permitted as part of the process, for example in the Innovation Partnership process.

²² [Part 4 of the Public Contracts Regulations 2015](#) contains further requirements.

57. These communications are called Standstill Letters as they initiate a period of not less than ten full days²³ during which time work cannot start on the contract. This process is designed to allow time for any bidder who is dissatisfied with the bidding process to take action. Standstill letters are normally sent by email using the receipt function to demonstrate compliance with the relevant timescales. Full details about this process are set out in regulations 86 and 87 of the Public Contracts Regulations 2015. If this procedure is not followed correctly, there can be serious legal consequences.
58. Documents must be retained to demonstrate compliance at audit and in accordance with Chapter 7 of this guidance.

Phase 6: Contract Implementation

59. Modification of contracts during delivery should be kept to a minimum through effective contract management. Regular reviews should be conducted with the supplier in which progress is assessed against the statements in the specification and bid.
60. The ESIF grant recipient should keep records of where the cost of the contract has increased beyond the bid, especially where increases impact on the level of ESIF investment provided.
61. Modifications of contracts let under the Public Contracts Regulations 2015 are only permitted where they meet the requirements of [Regulation 72](#).

²³ From the date of the dispatch of the notice.
National ESIF Procurement Requirements
ESIF-GN-1-001, Version 7
Date published 15 September 2020

CHAPTER SIX: TREATY PRINCIPLES AND NATIONAL RULES

Introduction

- 1 The following chapter sets out when compliance with the Treaty Principles and National Rules apply.
- 2 ESIF grant recipients which are outside the scope of the Public Contracts Regulations because, for example they are (i) not a contracting authority (ii) the value of the contract does not meet the thresholds²⁴ or who are procuring contracts through the light touch regime for Health, Social, Education and certain other services contracts under the Public Contracts Regulations 2015, must demonstrate that the selection process used to determine the suppliers of goods, services and works part funded through ESIF, is consistent with the Treaty Principles or the National Rules.

Treaty Principles

- 3 The Treaty Principles generally apply to Contracting Authorities where the value of the contract does not meet the OJEU thresholds, or those contracts procured under the light touch regime under the 2015 Regulations.
- 4 The relevant Treaty Principles are:
 - 4.1 Equal treatment;
 - 4.2 Transparency;
 - 4.3 Non-discrimination;
 - 4.4 Mutual recognition²⁵; and
 - 4.5 Proportionality
- 5 Neither the Commission nor the department prescribes a set process to be used by ESIF grant recipients to demonstrate compliance with the Treaty Principles.
- 6 The department has produced this guidance with the aim of setting out characteristics which ESIF grant recipients can demonstrate to show compliance with the Treaty Principles.
- 7 As with the Public Procurement Law requirements, the ESIF grant recipient should record each stage of the process in order to meet the demands of audit.
- 8 The [Interpretative Communication](#) sets out how the Commission expects certain organisations (which are outside the scope of Public Contracts Regulations) to demonstrate compliance with the Treaty Principles.
- 9 To determine whether an ESIF grant recipient is subject to the Interpretative Communication and therefore the Treaty Principles, it is necessary to answer two questions.

²⁴ Contracts within scope of Regulations 109-112 of the Public Contracts Regulations 2015 (“Below-threshold procurements”) may wish to take account of the information on the Treaty Principles set out in Chapter Six, but are only obliged to meet the requirements set out within the Public Contracts Regulations 2015. Contracts subject to the Public Contracts Regulations 2015 but below the £10,000 and £25,000 values must take account of this Chapter.

²⁵ In this context this relates to recognising qualifications and certifications used in other Member States

- 10 Firstly, “is the contract (i) let by a contracting authority but below the thresholds (ii) a supply contract for light touch regime (under the 2015 PCR) or (iii) a concession?” If the answer to any of these questions is yes the second question is “is the contract going to be of cross-border interest?” If the answer to this question is also yes then the Treaty Principles need to be applied.
- 11 If the answer to either of these questions is no there is no obligation to apply the statements within the Interpretative Communication and this guidance can be followed.

How to determine whether the contract is of cross-border interest?

- 12 The Commission’s regulation of the purchase of goods, works and services is primarily focussed upon ensuring that contract opportunities are opened up to businesses in other Member States of the European Union with a view to ensuring the proper functioning of the common market. Therefore ESIF grant recipients who can show that their contracts are not of cross-border interest are subject to lighter regulation.
- 13 ESIF grant recipients are strongly encouraged to investigate whether their contract will be of cross border interest at the start of any procurement process. Those wishing to make the argument should complete the form at Annex 3, prior to letting the contract, and submit this to the relevant Department²⁶.
- 14 The evaluation as to whether a contract may generate cross border interest must be made by the ESIF grant recipient²⁷, taking into account the individual circumstances of the case, such as the subject matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices), the geographic location of the place of performance and relevant market information²⁸.
- 15 The assessment of the existence of cross border interest must be taken prior to letting the contract²⁹ and therefore to be valid, the form must be signed and dated. The reasons why the ESIF grant recipient believes there is no cross border interest should be set out alongside relevant supporting evidence³⁰.

How to apply the Treaty Principles

- 16 Contracts within the scope of the interpretative communication are required to apply “a *degree of advertising sufficient to enable the... market to be opened up to competition and the impartiality of procedures to be reviewed*”³¹. In practical terms this means that the offer

²⁶ The Department requires such documentation for the purposes of monitoring but is not in a position to verify whether cross border interest is present.

²⁷ Or a specialist engaged for this task

²⁸ Evidence to the contrary must also be disclosed, that similar tenders have attracted interest from other Member States or where there are expressions of interest from any organisation outside the Member State. Such information will be fatal to any argument that the contract is not of cross border interest.

²⁹ Paragraph 43, [Mansfield District Council v Secretary of State for Communities and Local Government](#) [2014] EWHC 2167 (Admin)

³⁰ In Commission audits, the burden of proof lies on the Commission to demonstrate that there would have been cross border interest.

³¹ 1.2 of the Interpretative Communication, from paragraph 62 of the Teleaustria case

must be advertised on a forum allowing interested operators from other Member States to consider bidding³² and that the information in the advertisement must be sufficient to be reviewed, i.e. the advertisement sets out the specifications and the process that will be used to evaluate the bids³³. It is recognised that in rare cases an advertisement is not possible due to extreme urgency due to unforeseeable events or technical, artistic or exclusive rights issues. In such circumstances, the ESIF grant recipient should complete the form at Annex 2.

- 17 The Interpretative Communication does not set out how the opportunity is to be advertised, except that the scope of the advertising needs to be appropriate. As a guide, the department expects the following requirements to be followed for all contracts subject to the Treaty Principles³⁴:

Value of contract ³⁵	Minimum Procedure ³⁶	Advertising Required ³⁷
£0 - £2,499 ³⁸	Direct award ³⁹	None
£2,500 - £24,999 ⁴⁰	3 written quotes or prices sought from relevant suppliers of goods, works and services	None
£25,000 ⁴¹ – Relevant Public Contracts Regulations threshold	Formal tender process in line with the Interpretative Communication and the relevant guidance set out below	1) Advertised on Contracts Finder , and 2) the opportunity is advertised on the ESIF grant recipient’s website for a reasonable time period ⁴² .

³² Paragraph 21, C-231/2003 Coname

³³ 2.1.3 of the Interpretative Communication makes it clear that the minimum for the advertisement is a short description of the contract and the award method with details of where the interested party may obtain further information.

³⁴ Deviation from the guide is permitted, but will need to be justified at audit.

³⁵ The same principles apply to the valuation of the tender as set out in Chapter 3.

³⁶ A particular organisation’s standing orders may require a more rigorous procedure.

³⁷ Even at the lowest levels, the Interpretative Communication still requires an assessment of potential cross border interest. Contracting Authorities should take their own legal advice. If cross border interest is identified advertising will still be required

³⁸ Revised threshold applies from 7th October 2015

³⁹ It is necessary to retain documentation on such awards as manifestly excessive payments will be subject to correction.

⁴⁰ Where a number of individual recurring procurements for the same requirement occur consideration should be given to whether or not they need to be aggregated. The audit services will take action where the aggregation rules are not applied or where contracts have been artificially divided to avoid the thresholds.

⁴¹ Where existing standing orders in local government are in place that have a higher value for advertising opportunities, the higher value applies rather than £25,000, although the usual Treaty Principles apply where a contract might be of cross-border interest. For all contracts over £25k, the contract award still needs to be added to contracts finder

⁴² This would usually be between 10 and 14 days for services and supplies, with a longer period for works subject to the characteristics of the contract. Evidence must be collected of the advertisement and the length of time.

- 18 The ESIF grant recipient is required to put in place a process which assesses the merits of the bids on an impartial basis. This involves:
- 18.1 A contract description which is non-discriminatory: it is not permitted to refer to a particular brand, qualification, certification, a specific origin or trademarks, for the purposes of demonstrating mutual recognition is to necessary to make it clear that equivalents will be equally valid;
 - 18.2 Designing the process so there is no direct or indirect discrimination of bidders from other Member States;
 - 18.3 Making available the same information about the contract opportunity to all interested parties⁴³;
 - 18.4 Putting in place appropriate time limits to allow bidders to consider the contract and submit a meaningful bid⁴⁴;
 - 18.5 Managing potential conflicts of interest⁴⁵;
 - 18.6 Ensuring the applicable rules of the bidding process are communicated to potential bidders at the outset;
 - 18.7 Applying the communicated bidding process rules will in the same way to all applicants throughout the process; and

Awarding the contract to a bidder on the merit of their bid and in line with the procedural rules set out at the start of the process.

- 19 This is in line with the UK objective of achieving value for money in all public procurements, not just those covered by the Public Contracts Regulations.
- 20 Part 4 of the Public Contracts Regulations 2015 introduced some key reforms relating to below threshold tenders which grant recipients must be aware of. These are:
- Abolition of a pre-qualification stage for procurements below the EU thresholds, and a requirement to have regard to guidance on qualitative selection issued by Cabinet Office for above EU threshold procurements
 - Requirement for contracting authorities to insert provisions in all public contracts to ensure prompt payment through the supply chain

⁴³ Including responses to questions from interested bidders

⁴⁴ In most cases, ESIF grant recipients apply a time period between 10 days and the timescales set out in Public Procurement Law.

⁴⁵ It would be expected that these would be managed to the same extent required by Public Procurement Law with relevant audit information retained and in line with Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF (ESIF-GN-1-027)

- Requirement to advertise public sector opportunities over a certain threshold in one place, Contracts Finder, and to publish award notices for contracts and call-offs from framework agreements

21 Contracts following the Treaty Principles are subject to the same levels of audit as those awarded in accordance with Public Procurement Law. Therefore documents demonstrating compliance should be collected throughout the process and provided in the event of audit.

National Guidance

22 Contracts which are outside the scope of the Interpretative Communication, for example where there is no cross border interest or where the contract is being let by a non-contracting authority are subject to this **national** guidance⁴⁶. This guidance is designed to achieve sound financial management of public funds⁴⁷ and to open opportunities up to competition.

23 To meet the national rules an ESIF grant recipient's process must be in line with the requirements below:

Value of contract ⁴⁸	Minimum Procedure	Advertising Required
£0 - £24,999	Direct award	None
£25,000 - £181,302 (services) and £4,551,413 (works)	<p>The advert needs to incorporate or direct any interested party to the following information:</p> <ul style="list-style-type: none"> • Details of the opportunity • What is required from all interested parties • How successful candidate will be chosen • Deadline and details of how to apply <p>Justification will also be required to demonstrate that the contract award is in line with the advert</p>	Advertise the opportunity on the grant recipients/or other appropriate website for a minimum of 10 days.

⁴⁶ Under Article 2(2) of the TFEU

⁴⁷ The national rules are also designed to ensure that the financial framework of ESIF is not prejudiced by the charging of excessive sums to its budget

⁴⁸ Grant recipients must ensure that contracts are valued accurately and are not artificially split in order to fall below certain thresholds. The route followed is based on the full value of the contract and not linked to the amount of ERDF involved, the value of the grant or the project intervention rate. The value is exc VAT

<p>£25,000 - £181,302 (supplies)</p>	<p>3 written quotes or prices sought from relevant suppliers against a clear specification</p> <p>Justification that a reasonable decision has been made on the basis of the quotes/prices</p>	<p>None</p>
<p>Over £181,302 (services and supplies) and £4,551,413 (works).</p>	<p>The advert needs to incorporate or direct any interested party to the following information:</p> <ul style="list-style-type: none"> • Details of the opportunity • What is required from all interested parties • How successful candidate will be chosen • Deadline and details of how to apply <p>Adhere to the Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF, and submit a declaration to MHCLG or DWP;</p> <p>Impartially assess each bid against the same criteria and demonstrate this through use of a score/evaluation sheet; and</p> <p>Provide evidence to demonstrate that the winning bidder has been selected on merit – as a minimum this should include a rationale behind the decision to award</p>	<p>Advertise the opportunity on the grant recipients/or other appropriate website for a minimum of 10 days.</p>

24 Although the national rules are more relaxed than both the requirements under the PCR and the Treaty Principles the following practices will **not be acceptable** under any circumstances;

- Direct awards to linked organisations – for further information on this please see the Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF (ESIF-GN-1-027)
- Discriminatory tender conditions which prevent competition.
- Non-compliance with the thresholds above – including artificial splitting of contracts.
- Modification of contracts. If the original contract value is below the threshold of £25,000 and an extension of the contract takes the overall above £25,000 the contract must then be advertised in accordance with the threshold for contracts over £25,000.
- Contracts cannot be extended above 50% of their original value.
- Non advertising extension of tender submission deadlines - any extension must be advertised through the same means as the original advertisement

25 The process followed by the grant recipient must be recorded and the relevant documentation retained and made available as part of the project audit trail. A lack of audit trail to demonstrate the process followed and decisions taken may also lead to a financial correction.

26 If the contract is above the threshold for services and supplies (£181,302) and works (£4,551,413) and more than 50% of the contract is funded by public means then the Non Contracting Authority must comply with Part 2 of the Public Contracts Regulations 2015 as required by Regulation 13 and any breaches would be subject to the Commission Guidelines which are explained in chapter 3 of this guidance

Corrections for Non-Contracting-Authorities

27 For breaches of this guidance and in order to protect the ESIF budget, the department shall apply the correction rates based on upon analogous breaches as set out in the Commission Guidelines, which is explained in Chapter 3 of this guidance.

Therefore if a Non Contracting Authority does not advertise a contract opportunity with a value over £25,000 in any form a 100% correction will be applied in accordance with the Commission's corrections note.

28 -Commission Guidelines on corrections were published on 14th May 2019⁴⁹. Breaches of the procurement rules set out in this guidance are an irregularity within the meaning of the Structural Funds Regulations and therefore a breach of contract. All breaches, including those relating to contracts let prior to 14th May 2019, will be subject to the correction rates set out in the 2019 Guidelines if correction procedures were launched after 14th May 2019.

Additional Public Procurement Guidance following the Co-vid 19 outbreak in March 2020

29 The Cabinet Office have published specific guidance notes on public procurement following the Co-vid outbreak.

⁴⁹ C(2019) 3452: Commission Decision of 14.05.2019 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

Links to the guidance notes on procurement and supplier relief payments are as follows

<https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>

<https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>

CHAPTER SEVEN: RECORD KEEPING

1. For the 07-13 Programme records must be retained for verification until advised by the Managing Authority.
2. For the 14-20 Programme, records must be maintained for verification in line with the Guidance on Document Retention, Including Electronic Data Exchange, for 14-20 projects (ESIF-GN-1-008). It is the ESIF grant recipient's responsibility to ensure that delivery partners and other sub-contractors who are subject to audit hold and retain the appropriate documentation.
3. By way of example, in an audit of a Public Procurement Law contract, an auditor (whether part of the ESIF Compliance team, the Audit Authority team, the European Commission audit team or the European Court of Auditors) would expect to see as a minimum all of the documents listed below:
 1. Explanation of procurement procedure selected with justification
 2. Copy of OJEU Contract notice or relevant advertisement and OJEU Prior Information Notice (PIN) if applicable (including for Framework Agreements)
 3. Contracts finder advertisement for Contracting Authority procurements over £25,000
 4. Lists of Expressions of Interest
 5. PQQ template including the associated selection criteria (where used) and log of responses received (where relevant)
 6. PQQ scoring matrix (if applicable)
 7. Completed PQQ individual score sheets with sufficient evaluation commentary for the selection stage (if applicable) (please refer to page 27 of this guidance)
 8. Signed record of the moderation to agree the consensus scores.
 9. Copy of tender specification with clear award criteria
 10. Log sheet for all tenders received (time and date)
 11. Tender evaluation matrix
 12. Copy of all tenders
 13. Copy of individual score sheets dated and signed with sufficient evaluation commentary (please refer to page 27 of this guidance)

14. Signed record of the moderation to agree the consensus scores for the award stages.
15. Copy of OJEU award notice
16. Copy of tender evaluation report which is compliant with regulation 84 in the public contract regulations 2015
17. Copy of correspondence, including interview questions and clarification questions where appropriate
18. Copy of letters to unsuccessful tenderers giving an appropriate standstill period (where appropriate)
19. Copy of award letter /signed contract
20. Copy of notes from inception meeting

Managing Authority Procurement Check

The following documents will be the minimum core documents required by the Managing Authority (GDTs) when they are undertaking a desk based review of the procurement rather than a full audit of the procurement, prior to the submission of the first claim.

Copy of OJEU Contract notice or relevant advertisement and OJEU Prior Information Notice (PIN) if applicable (including for Framework Agreements)

Contracts finder advertisement for Contracting Authority procurements over £25,000

PQQ template including the associated selection criteria (where used) and log of responses received (where relevant)

PQQ scoring matrix (if applicable)

Copy of tender specification with clear award criteria

Log sheet for all tenders received (time and date)

Tender evaluation matrix

Signed record of the moderation to agree the consensus scores for the award stages.

Copy of OJEU award notice (if applicable)

Copy of letters to unsuccessful tenderers giving an appropriate standstill period (where appropriate)

Copy of award letter

ANNEX 1 – USEFUL LINKS

European Commission Public Procurement Pages

http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm

Cabinet Office Procurement

<https://www.gov.uk/government/organisations/cabinet-office/about/procurement>

Crown Commercial Service

<https://www.gov.uk/government/organisations/crown-commercial-service>

The Public Contracts Regulations 2015

<http://www.legislation.gov.uk/uksi/2015/102/contents/made>

The Public Contracts Regulations 2006

<http://www.legislation.gov.uk/uksi/2006/5/contents/made>

Interpretative Communication 2006

[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006XC0801\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006XC0801(01))

Commission Decision on Financial Corrections 19.12.2013

[http://www.ampost.ro/fisiere/pagini_fisiere/Commission_Decision_C\(2013\)_9527_of_19_dec_2013_en.pdf](http://www.ampost.ro/fisiere/pagini_fisiere/Commission_Decision_C(2013)_9527_of_19_dec_2013_en.pdf)

European Court of Auditors webpage

<http://www.eca.europa.eu/en/Pages/ECAWork.aspx>

ANNEX 2 - SINGLE TENDER JUSTIFICATION FORM⁵⁰

Grant recipient name	
Address	
Contact name	
Email	
Telephone number	

Project title	
Details of proposed contract	
Proposed contract value (ex VAT)	
Proposed contractor (if known)	

Principle justification	
There is extreme urgency (which has occurred for reasons which were unforeseeable and are beyond the control of the grant recipient)	<input type="checkbox"/>
There is only one supplier capable of providing the relevant goods, works or services due to genuine technical, artistic or copyright reasons	<input type="checkbox"/>
No organisations have responded to the advertisement	<input type="checkbox"/>

<p>Please provide details as to why the approach is justified <i>(response should be limited to one page plus an Annex referring to supporting documents)</i></p>

<p>Please detail the selection methods applied to identify the proposed Contractor <i>(Please limit your response to one A4 page where possible)</i></p>

⁵⁰ Annexes 2 and 3 are available as separate Word documents on GOV.UK
National ESIF Procurement Requirements
 ESIF-GN-1-001, Version 7
 Date published 15 September 2020

DECLARATION

We confirm that we have carried out our own review in relation to the information contained within this Single Tender Action form and have not relied on any information or advice provided by the department in relation to the same.

We confirm that the information supplied to the department in this Single Tender Action form is true and accurate in all respects and we confirm and undertake that if any of such information becomes untrue or inaccurate that we will notify the department immediately and resubmit any updated information as required.

We confirm that we understand that this Single Tender Action form will be used by the department to monitor our compliance with the ESIF rules and the Funding Agreement obligations.

We understand that the department's acceptance or otherwise of this Single Tender Action form is not to be regarded as confirmation that we have complied with our obligations under the Regulations and in providing such acceptance or otherwise we understand that this shall not constitute a waiver of, or prevent or restrict future exercise of, the department's right to clawback grant funding in accordance with the Funding Agreement or any other right or remedy.

Signed by: (Signature)

Name

Position

For and on behalf of

Date

ANNEX 3 – CROSS BORDER INTEREST ASSESSMENT FORM⁵¹

Grant recipient name	
Address	
Contact name	
Email	
Telephone number	

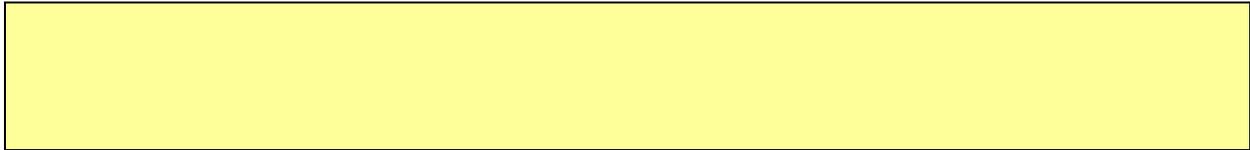
Project title	
Details of proposed contract	
Proposed contract value (ex VAT)	
Proposed contractor (if known)	

Justifications as to why there is no cross border interest	
No supplier from another Member State is interested due to the subject matter of the contract	<input type="checkbox"/>
No supplier from another Member State is interested due to the value of the contract	<input type="checkbox"/>
No supplier from another Member State is interested due to the nature of the market	<input type="checkbox"/>
No supplier from another Member State is interested due to the geographical location of the place of performance of the contract	<input type="checkbox"/>
Specific market information means that no supplier from another Member State would be interested in the contract	<input type="checkbox"/>
Other	<input type="checkbox"/>

<p>Please provide details as to why the approach is justified <i>(response should be limited to one page plus an Annex referring to supporting documents)</i></p>

<p>Please detail the steps taken to identify whether suppliers might be interested <i>(Please limit your response to one A4 page where possible)</i></p>

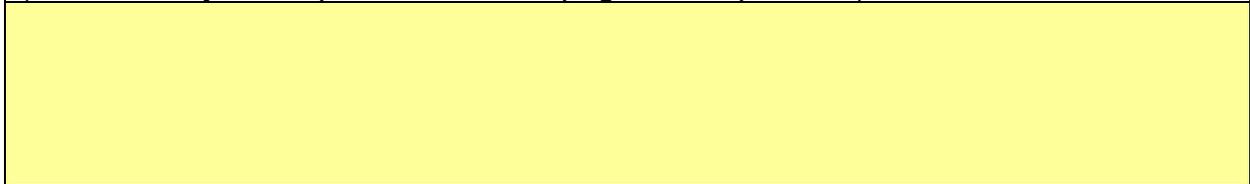
⁵¹ Annexes 2 and 3 are available as separate Word documents on GOV.UK



Has your organisation let a similar contract where a supplier from another Member State has submitted a bid?	<input type="checkbox"/>
--	--------------------------

Is your organisation aware of interest in the contract from a supplier in another Member State?	<input type="checkbox"/>
---	--------------------------

If you have ticked either box above, please provide extra information.
(Please limit your response to one A4 page where possible)



DECLARATION

We confirm that we have carried out our own review in relation to the information contained within this Cross Border Interest Assessment form and have not relied on any information or advice provided by the department in relation to the same.

We confirm that the information supplied to the department in this Cross Border Interest Assessment form is true and accurate in all respects and we confirm and undertake that if any of such information becomes untrue or inaccurate that we will notify the department immediately and resubmit any updated information as required.

We confirm that we understand that this Cross Border Interest Assessment form will be used by the department to monitor our compliance with the ESIF rules and the Funding Agreement obligations.

We understand that the department's acceptance or otherwise of this Cross Border Interest Assessment form is not to be regarded as confirmation that we have complied with our obligations under the Regulations and in providing such acceptance or otherwise we understand that this shall not constitute a waiver of, or prevent or restrict future exercise of, the department's right to clawback grant funding in accordance with the Funding Agreement or any other right or remedy.

Signed by: (Signature)

Name

Position

For and on behalf of

Date

N E C

ANNEX 4 – PREVIOUS OJEU THRESHOLDS

Thresholds from 1 January 2018 – 31 December 2019 ⁵² (exc VAT)

	SUPPLIES	SERVICES	WORKS	Light Touch Regime
Central Government Authorities	£ 118,133	£118,133	£ 4,551,413	£615,278
Sub-Central Government Authorities	£ 181,302	£181,302	£ 4,551,413	£615,278
Small Lots	£65,630	£65,630	£820,370	N/A

Thresholds from 1 January 2016 – 31 December 2017⁵³ (exc VAT)

	SUPPLIES	SERVICES	WORKS
Central Government Authorities	£ 106,047	£ 106,047	£ 4,104,394
Sub-Central Government Authorities	£ 164,176	£ 164,176	£ 4,104,394
Small Lots	£62,842	£62,842	£785,530

Thresholds from 1 January 2014 – 31 December 2015 (exc VAT)

	SUPPLIES	SERVICES	WORKS
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⁵² Previous thresholds can be found in Annex 4

⁵³ Previous thresholds can be found in Annex 4

Central Government Authorities	£111,676	£111,676	£4,322,012
Sub-Central Government Authorities	£172,514	£172,514	£4,322,012
Indicative Notices	£625,050	£625,050	£4,322,012
Small Lots	£66,672	£66,672	£833,400

ANNEX 5 CONTRACTS LET BEFORE 26 FEBRUARY 2015

Phase 1: Preparation and Planning

Is there a contract for the purposes of the Public Contracts Regulations 2006?

62. To be within the scope of the [Public Contracts Regulations 2006](#) a contract must be in writing and for consideration.

Establishing whether your organisation is a contracting authority or whether your procurement may engage the rules on ‘Subsidised Contracts’

63. All ESIF grant recipients are required to check whether they are subject to Public Procurement Law. This involves the grant recipient making an assessment of whether:

63.1.1. their organisation is a “contracting authority” under Regulation 3 of the Public Contracts Regulations 2006; and

63.1.2. the value of the contract meets the thresholds set out by the Commission.

64. Establishing whether an organisation is a “contracting authority” involves:

64.1.1. checking the list at [Regulation 3 of the Public Contracts Regulations 2006](#) to determine whether the type of organisation is listed (a more detailed list of specific organisations is also set out at Schedule 1); and

64.1.2. evaluating whether the organisation falls within the scope of Regulation 3(1)(w).

65. Regulation 3(1)(w) reads:

“a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and—

65.1.1. financed wholly or mainly by another contracting authority;

65.1.2. subject to management supervision by another contracting authority; or

65.1.3. more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority”.

66. Regulation 3(1)(w) catches most organisations closely linked with the public sector because they either receive more than half their funding from a contracting authority or the directors are appointed by a contracting authority.

67. By contrast private sector grant recipients will usually be outside the scope of a contracting authority for the purposes of the Public Contracts Regulations 2006.

68. Even if your organisation is not within the definition of a contracting authority you will be required to follow the processes outlined in this Chapter 5 as if your organisation were a

contracting authority where Regulation 34 of the Public Contracts Regulations ('Subsidised Public Works Contracts and Public Services Contracts) applies. Regulation 34 applies in respect of public works and public services contracts which receive more than 50% funding from a contracting authority, including any ESIF, in the context of the following:

- Civil engineering activities listed in Schedule 2 to the Regulations;
- Building works for hospitals, facilities intended for sports recreation and leisure, school and university buildings and buildings used for administrative purposes.

Establishing whether the value of the contract meets the thresholds

69. An ESIF grant recipient, that is a contracting authority, must calculate the value of the contract in line with the requirements at [Regulation 8](#) of the Public Contracts Regulations 2006 and establish whether this value meets or exceeds the relevant thresholds.
70. The Commission is concerned that some contracts have been artificially split in order to be below the thresholds. Therefore best practice is to set out the basis for the valuation in a file note which can be produced at audit.
71. The calculation of the value involves the contracting authority:
 - 71.1.1. Identifying all the sums that the contracting organisation may reasonably anticipate will become payable during the delivery of the contract. This means factoring in all anticipated renewals, options, prizes, bonuses, premiums, fees, interest, commission and other forms of remuneration which can be expected to arise as part of the purchase of the goods, works or services;
 - 71.1.2. Establishing the appropriate term of the contract by reference to the relevant needs of the contracting authority. Where items with similar characteristics are

going to be regularly purchased [Regulations 8\(11\) to 8\(19\) of the Public Contracts Regulations 2006](#)⁵⁴ covering aggregation are applicable;

- 71.1.3. Where there is a supply contract with no fixed term or the contract term cannot be identified, calculating the monthly value and multiplying this by 48.
 - 71.1.4. Where contracting authorities procure together, the value comprises all their needs together;
 - 71.1.5. Basing the valuation on the full sum expected to be payable for the goods, works and services, not just limiting the value to the ESIF or other public funds being provided to the ESIF grant recipient;
 - 71.1.6. Establishing the value exc VAT but, where relevant, incorporating expected inflation;
 - 71.1.7. In situations where there are many different options for the delivery of a contract, using appropriate judgement to identify the likely outcome.
72. Further information on the calculation of the value can be found at [Regulations 8\(6\) to 8\(20\) of the Public Contracts Regulations 2006](#).
73. Where a valuation process is complex or produces a value close to the thresholds, it is recommended that a file note setting out the valuation rationale is produced which can be provided in the event of an audit.

Applying the Thresholds

74. The thresholds are based on the category of contract. The categories are:
- 74.1.1. Works (which are listed in [Schedule 2](#) of the Public Contracts Regulations 2006);
 - 74.1.2. Supplies (which covers goods as listed in [Schedule 5](#) of the Public Contracts Regulations 2006); and
 - 74.1.3. Services (which are listed in [Schedule 3](#) of the Public Contracts Regulations 2006).
75. A contract which meets or exceeds the thresholds must be let in accordance with the Public Contracts Regulations. A contracting authority letting a contract below the threshold is required to apply the Treaty Principles.
76. Where there is a mix of activities, the dominant activity determines the category.

The procurement thresholds are updated every 2 calendar years. The relevant thresholds for procurements that have taken place prior to February 2015 are set out at Annex 4

Choosing the procurement process

77. Where an organisation is a contracting authority and the value of the contract meets the thresholds, it is necessary to apply the Public Contracts Regulations and apply one of the procurement processes unless the contract involves in-house award/joint control

between contracting authorities in line with established case law⁵⁵. This is a complex process with many administrative requirements. Therefore before designing the selection process, it is necessary to read the Public Contract Regulations 2006 (<http://www.legislation.gov.uk/uksi/2006/5/contents/made>).

78. Detailed guidance on the relevant requirements can be found at the [gov.uk website](#) and, with regard to the Procurement Directives, in the Commission's [guidance note](#).
79. The procurement processes are:
- 79.1.1. **Open Procedure**: a process in which all interested parties are able to submit bids and be considered for the advertised contract. Selection and evaluation is carried out after the receipt of tenders. This procedure provides the broadest scope for competition as anyone can bid, but risks a large number of tenders and can therefore incur high administration costs. This process will normally take a minimum of 52 days with an additional 10 day period for appeal once the standstill notice is issued.
- 79.1.2. **Restricted Procedure**: this is a two stage process where the selection and short-listing is carried out on the basis of a pre-qualification questionnaire ("PQQ"). Responses to the PQQ are assessed. From this exercise, between five and twenty candidates are invited to submit a full tender from whom a winning bidder is selected. The process will normally take 37 days for the first stage and 40 days for the second with a 10 day standstill period before the contract is awarded.
- 79.1.3. **Competitive Dialogue**: This is a three stage process for situation where the solution is not known at the outset. Following the OJEU notice and pre-qualification questionnaire, dialogue is permitted with potential bidders to develop options before competitive tenders are invited. Work can continue to refine the proposal with the preferred bidder to a point at which contract is awarded.
- 79.1.4. **Negotiated Procedure**: This is a two stage process, where in limited circumstances, following the OJEU notice and pre-qualification questionnaire an organisation may be permitted to negotiate the terms of a contract with one or more suppliers of its choice. Ordinarily negotiation should be with not less than 3 candidates⁵⁶.

⁵⁴ The audit services will take action where the aggregation rules are not applied or where contracts have been artificially divided to avoid the thresholds.

⁵⁵ For example *Teckal Srl v Commune di Viano* C107/98; *Commission v Germany* C480/06

⁵⁶ Providing there are three viable candidates available.

80. To assist with future audits, where the ESIF grant recipient is not applying the open or restricted procedure, they should produce a document setting out the reasons for their decision which can be provided in the event of an audit.
81. The form at Annex 2 should be completed and submitted to the relevant Department, if the process of advertising has produced no acceptable tenders and a direct award is being considered.
82. The same form at Annex 2 should be completed and submitted to the relevant Department where a direct award is being considered because:
 - Extreme urgency exists for reasons which are unforeseeable and beyond the control of the contracting organisation, for example replacing the sole power generator which has been damaged in a fire.
 - There is only one supplier capable of providing the relevant goods, works or services due to technical, artistic or copyright reasons.

The Department strongly recommends against the use of direct awards except where there are strong arguments for this course of action which can be substantiated through evidence.

Framework Agreements and Dynamic Purchasing Systems

83. [Framework Agreements](#): Frameworks are suitable for repeat purchases, especially in situations where demand is irregular or where the contracting authority needs flexibility to meet differing requirements, for example a framework may be suitable for a contracting authority to order stationery supplies, legal services or building repairs.
84. There are two stages to a Framework Agreement. The first involves appointing the members of the framework. The second involves awarding a contract to one or more members of the framework.
85. It is possible, although unusual, to appoint a single supplier to a framework. Where a contracting authority enters into a framework with more than one supplier, there must be a minimum of three suppliers. There is no maximum number of suppliers, but frameworks with a very large number of suppliers are often difficult to manage, as contracting authorities may have to approach each supplier appointed to the framework before awarding a contract. Only in exceptional circumstances can a framework last longer than four years.
86. The basis for selecting a member of a framework to deliver a contract is set out at [Regulation 19\(7\) of the Public Contracts Regulations 2006](#). Where a mini-competition is appropriate, this shall be carried out in accordance with [Regulation 19\(9\) of the Public Contracts Regulations 2015](#), allowing all members of the framework capable of performing the contract sufficient time to submit a written proposal to carry out the

contract. These bids shall not be opened until after the deadline and the best tender, evaluated against set criteria, shall be offered the contract.

87. Frameworks have been a significant cause of corrections during the 2007-2013 ERDF programme. Special care should be taken to ensure the ESIF grant recipient is permitted to use the framework and that the framework has not expired.
88. **Dynamic Purchasing Systems**: Like frameworks, dynamic purchasing systems are suitable for repeat purchases, especially in situations where demand is irregular or where the contracting authority needs flexibility to meet differing requirements.
89. Dynamic Purchasing Systems differ from framework agreements because they do not establish a fixed panel of suppliers, instead they are open so that any organisation which can demonstrate it meets the relevant criteria can be added to the dynamic purchasing system during its term.
90. Grant recipients who intend on using a framework or dynamic purchasing system that has been set up by another contracting authority must ensure they have the documents required to demonstrate compliance of the framework or dynamic purchasing system with public procurement law. ESIF grant recipients should check that:
 - 90.1.1. the documents can be produced for audit;
 - 90.1.2. they are permitted to use the framework; and
 - 90.1.3. the description of the goods, services or works in the OJEU notice and eventual contract covers the partner authorities' requirements.

Scoping the specification, managing conflicts of interest and agreeing the criteria

Scoping the specification

91. Many errors can be traced back to inadequately drafted specifications. It is therefore recommended that the specification is developed by a team of 4 to 8 persons including those who will be involved in the day to day delivery, the person who will have overall

responsibility for the compliance of the procurement, the finance director and relevant specialists.

92. Prior to drafting the specification the panel should consider:

92.1.1. What is the contracting authority asking the market to provide and why?

92.1.2. What are the main considerations for the contracting organisation?;

92.1.3. What are the critical success factors?

92.1.4. Are there alternative ways to achieve this outcome?

92.1.5. What scope is there to purchase ready-made solutions or does a solution need to be developed?

92.1.6. What is the anticipated budget? What steps can be taken to achieve value for money?

92.1.7. What are the minimum requirements to obtain the necessary goods, works or services?

92.1.8. Does the specification contain all the information needed for the market to be able to respond to the notice?

Conflicts of interest

93. A conflict of interest occurs when an individual or organisation has more than one interest in a contract, leading to a risk of biased or corrupt decision making or the perception of such.

94. The audit of ESIF takes a very strict approach to situations where a conflict of interest could occur. It is therefore necessary to:

- identify all potential conflicts of interests (for example, a director of the ESIF grant recipient who is a shareholder or director of a company which plans to bid for the contract) at the earliest opportunity;
- make staff aware of the process to declare a conflict of interest during the procurement process; and
- keep records of how conflicts are managed⁵⁷.

95. Failure to identify, prevent and remedy potential conflicts may lead to 100% correction – see Chapter 3.

Selection and Award Criteria

96. There are two distinct types of evaluation criteria: selection and award criteria. It is important that ESIF grant recipient's procurement processes keep the two types of

⁵⁷ Given the strict approach applied during the audit of ESIF projects, in most cases involving conflicts of interest involving individuals, the appropriate approach is to remove them from the process.

criteria separate⁵⁸. Failure to do so, for example including assessments of qualitative criteria such as experience as part of the award criteria⁵⁹ is likely to result in a correction when audited.

97. In simple terms:
- 32.1 selection criteria aim to establish "does the bidder have the capability to deliver the contract?⁶⁰"; and
 - 32.2 award criteria aim to establish "based on the proposal to deliver the contract which bidder is the best?⁶¹"
98. **Selection Criteria** assess the ability of the tenderer to perform a contract based on information relating to economic, financial, technical and/or professional capability (for example, their previous experience and qualifications).
99. The selection criteria, sub-criteria and any weighting applied to each must be proportionate to the requirement in question. The requirements must be publicised in an OJEU notice or in the Pre-Qualification Questionnaire (PQQ)/tender documents.
100. The aspects which can be evaluated as selection criteria are set out in Regulations [23](#) to [26](#) of the Public Contracts Regulations 2006.
101. **Award Criteria** are specific to how the bidder intends to deliver the contract (for example cost, quality, timescale).
102. The assessment of the Award Criteria may be made on the basis of either:
- the lowest price; or
 - the 'Most Economically Advantageous Tender' ("MEAT") which balances cost against other considerations.
103. When applying MEAT criteria a contracting authority must apply criteria directly linked to the subject matter of the contract including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period

⁵⁸ Case 31/87, Gebroeders Beentjes v the Netherlands [1988] ECR 4635

⁵⁹ Lianakis & Ors [2008] EUECJ C-532/06 (24 January 2008)

⁶⁰ The selection criteria relate to the tenderer. They are used to assess the tenderer's ability to be able to perform the contract (including financial standing and eligibility).

⁶¹ Used to identify which tenderer is the most economically advantageous so as to determine to whom to award the contract

and period of completion. Further information can be found at [Regulation 30](#) of the Public Contracts Regulations 2006.

- 104. The criteria, sub-criteria and weightings to be applied must be disclosed in the OJEU notice or in the invitation to tender documents.
- 105. The award criteria must be objective, relate to the subject matter of the contract, be proportionate and transparent.
- 106. Award criteria are governed by Regulations [30](#) to [32](#) of the Public Contracts Regulations 2006.

Timescales

107. The time limits for open, restricted, competitive dialogue and negotiated procedures are:

Procedure	Minimum time limits	Days
Open	Minimum time for receipt of tenders from date Contract Notice sent	52
Restricted	Minimum time for receipt of requests to tender (PQQ response) from the date Contract Notice sent	37
	Minimum time for receipt of tenders from the date invitation to tender sent	40
Accelerated restricted (if urgent)	Minimum time for receipt of requests to tender from the date Contract Notice sent	15
	Minimum time for receipt of tenders from the date invitation to tender sent	10
Competitive dialogue and negotiated	Minimum time for receipt of requests to participate in dialogue or negotiate from the date Contract Notice sent	37
Accelerated negotiated (if urgent)	Minimum time for receipt of requests to negotiate from the date contract notice sent	15

108. Any divergence from the minimum timescales is likely to lead to a financial correction⁶².
109. Reduction of timescales will only be compliant where there are compelling reasons for urgency.
110. The minimum time limits set out in the table above may be reduced by seven days (five days for accelerated restricted procedure) where the notices are transmitted electronically (in accordance with the requirements in the Regulations) by five days where the Contracting Authority offers full access by electronic means to the contract documents from the date of the Contract Notice and provided the Contract Notice specifies the internet address at which the documents are available.

Phase 2: Invitation to Bid

Advertising

111. Under the Public Contracts Regulations 2006, contracts for works, services and supplies must be advertised by way of a standard form notice placed in the Official Journal of the European Union.
112. For services, the level of advertising depends on whether the contract is categorised as a Part A or Part B service:

⁶² 2.2.2. of the European Commission's guidance for practitioners on the avoidance of common errors in ESI funded projects.

Part A Services	Part B Services
Maintenance and repair of vehicles and equipment.	Hotel and restaurant services.
Transport by land, including armoured car services and courier services, but not including transport of mail and transport by rail.	Transport by rail.
Transport by air but not transport of mail.	Transport by water.
Transport of mail by land, other than by rail, and by air.	Supporting and auxiliary transport services.
Telecommunications services.	Legal services.
Financial services: Insurance services. Banking and investment services other than financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments and central bank services.	Personnel placement and supply services.
Computer and related services.	Investigation and security services, other than armoured car services.
Research and development services where benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs and the services are to be wholly paid for by the contracting authority.	Education and vocational health services.
Accounting, auditing and book-keeping services.	Health and social services.
Market research and public opinion polling services.	Recreational, cultural and sporting services.
Management consultancy services and related services, but not arbitration and conciliation services.	Other services.

Architectural services: engineering services and integrated engineering services: urban planning and landscape architectural services: related scientific and technical consulting services; technical testing and analysis services.	
Advertising services.	
Building cleaning services and property management services.	
Publishing and printing services on a fee or contract basis.	

113. Part A services must follow the formal requirements set out in the Public Contracts Regulations 2006, including publication of a notice in the Official Journal of the European Union.

114. Part B services are only required to demonstrate compliance with the Treaty Principles⁶³.

115. In the interests of equal treatment, where clarification is sought on any point in the tender documents, the contracting authority must promptly make the information available to all potential bidders.

116. The contracting authority must inform potential bidders of the process by which they may apply, making provision for tenders to be submitted directly or by post⁶⁴.

Phase 3: Submission and selection of bids

117. The contracting authority must only consider information set out in bid documents.

118. Bids which are late or do not meet the delivery requirements should, by default, be rejected⁶⁵.

119. The contracting authority must put in place appropriate processes to keep tender submissions confidential and in safe custody.

120. Once bids are opened, any non-compliant bids must be automatically rejected.

121. Criteria and / or the weighting must not be amended after bids have been opened

Phase 4: Evaluation of bids

⁶³ In accordance with the Commission Interpretative Communication on Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02)

⁶⁴ A price may be charged to obtain tender documents but this must not be disproportionate. The Department's policy is to discourage such charges in ESIF part funded projects.

⁶⁵ The Commission guidance at 3.1 does set out how timescales can be extended in rare circumstances

122. The evaluation process must be transparent and applied in a manner which ensures equal treatment, non-discrimination and mutual recognition.
123. Bids shall be reviewed and given scores against the set criteria. The scores shall be dated and signed by at least two members of staff. Once the scores are set any amendment must be dated and signed by two members of staff and accompanied by a file note justifying the change. Weighting is applied after the scores are set.
124. The contracting authority must not engage in negotiation with bidders during the evaluation stage. Clarification about aspects of bids is only allowed where:
 - 124.1. the contracting authority raises questions about information already submitted by a bidder;
 - 124.2. all correspondence about the clarification is recorded in writing; and
 - 124.3. the clarification is minor, i.e. the communication has no bearing on significant information within the bid such as selection documents, pricing, quality or service elements.
125. Where an abnormally low tender is received, the contracting authority may only reject it after considering an explanation from the bidder. A file note explaining the decision should be produced and kept for audit.

Phase 5: Award

126. Within 48 days of selecting the winning bid, the contracting authority must send a Contract Award Notice to the Official Journal of the European Union for publication. The requirements of the contract award notice are set out in [Regulation 31](#) of the Public Contracts Regulations 2006.
127. As soon as possible after a decision has been made the contracting authority must contact all bidders providing the information listed at [Regulation 32](#) of the Public Contracts Regulations 2006. This information includes the name of the winning bidder and the basis for the award.
128. These communications are called Standstill Letters as they initiate a period of not less than ten full days⁶⁶ during which time work cannot start on the contract. This process is designed to allow time for any bidder who is dissatisfied with the bidding process to take action. Standstill letters are normally sent by email using the receipt function to demonstrate compliance with the relevant timescales.
129. Documents must be retained to demonstrate compliance at audit.

Phase 6: Contract Implementation

130. Modification of contracts during delivery should be kept to a minimum through effective contract management. Regular reviews should be conducted with the supplier in which progress is assessed against the statements in the specification and bid.

⁶⁶ From the date of the dispatch of the notice
National ESIF Procurement Requirements
ESIF-GN-1-001, Version 7
Date published 15 September 2020

131. The ESIF grant recipient should keep records of where the cost of the contract has increased beyond the bid, especially where increases impact on the level of ESIF investment provided.
132. A material extension or variation to an existing contract is a breach of the regulations. A material amendment is a change which⁶⁷:
- Introduces conditions which, if they had been part of the initial award procedure, would have allowed for the admission of bidders other than those initially admitted or allowed for the acceptance of another bid;
 - Extends the scope of the contract as originally tendered by encompassing services not initially covered; or
 - Changes the economic balance of the contract in favour of the contractor in a manner not provided for in the terms of the initial contract.

⁶⁷ Case C-454/06 - Presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext – Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, judgment of 19 June 2008.