



Selection of bodies implementing financial instruments under ESIF

Selection of bodies implementing financial instruments on the basis of the tendering procedures foreseen by the Directive 2014/24/EU; common mistakes and good practice

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Selection of financial intermediaries under public procurement rules: Procedural choices and implications

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Thresholds 2016-2017

- EUR 5 225 000 for public works contracts;
- EUR 135 000 for public supply and service contracts/design contests (central government authorities);
- EUR 209 000 for public supply and service contracts/design contests (sub-central contracting authorities)
- EUR 750 000 for public service contracts for social and other specific services.

Procedures available under the Directive

Always possible:

- *Open procedure*
- *Restricted*

Conditional access:

- *Competitive procedure with negotiations*
- *Competitive dialogue*
- *Innovation Partnership*

Very limited access:

- *Negotiated procedure without prior publication*

Procedures most relevant to FIs: 1. Open procedure

- 'Default' public procurement procedure
- Contracting authority (CA) publishes **call for tenders**
- **Any economic operator** may apply within deadline
- CA examines fulfilment of **exclusion** and **selection** criteria to select **tenderers**
- CA awards the contract to the **best** tender on the basis of the **award criteria**

Procedures most relevant to FIs: 1. Open procedure

- **Exclusion** grounds (negatives): some are **mandatory** (criminal organisation, corruption, fraud, terrorism, money laundering), some are **optional** (violation of social, environmental, and labour law; bankruptcy, grave professional misconduct etc.)
- **Selection** criteria (positives):
 - (a) suitability to pursue the **professional** activity – in the context of FIs, it should be a bank or a financial institution;

Procedures most relevant to FIs: 1. Open procedure

(b) **economic** and **financial** standing – that the bank has a high enough turnover (max x2 the value of the contract), a good ratio of assets and liabilities etc;

(c) **technical** and **professional** ability - human and technical resources and experience to perform the contract to an appropriate quality standard

In other words, you want to select a bank/financial institution which is really capable of performing

Procedures most relevant to FIs: 1. Open procedure

- **Award** criteria – nothing to do with the economic operator, focus solely on the proposed tender
- New Directive provides only one criterion (most economically advantageous tender), but it can be identified on the basis of the price or cost, cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio.
- linked to the subject-matter and can include quality, organisation, qualification and experience of staff etc.

IMPORTANT! Article 7 of the Commission Delegated Regulation

In **all** of the procedures, as well as for **direct award**, an **additional** set of requirements is set out in **Commission Delegated Regulation (EU) No 480/2014 – CDR in Article 7**

It covers **selection** and **award** criteria (misnamed) which must feature in the Terms of Reference, in addition to any other criteria

Article 7 of the Commission Delegated Regulation

Selection:

- (a) **entitlement to carry out** relevant implementation tasks under Union and national law;
- (b) adequate **economic** and **financial** viability;
- (c) adequate **capacity** to implement the financial instrument, (incl. organisational structure and governance framework);
(a, b and c correspond to selection criteria of the Directive)
- (d) effective and efficient **internal control** system;
- (e) use of an **accounting system** providing accurate, complete and reliable information in a timely manner;



Article 7 of the Commission Delegated Regulation

Selection:

(f) **agreement to be audited** by Member State audit bodies, the Commission and the European Court of Auditors.

Award:

(a) robustness and credibility of the **methodology** for **identifying and appraising financial intermediaries** or final **recipients** as applicable;

(b) the level of **management costs** and **fees** and the **methodology** proposed for their calculation;

(c) **terms and conditions** applied in relation to **support** provided to final recipients, including **pricing**;

Article 7 of the Commission Delegated Regulation

(d) the ability to **raise resources for investments** in **final recipients additional** to programme contributions*;

(e) the ability to **demonstrate additional activity** in comparison to present activity*;

(f) in cases **where** the body implementing the financial instrument **allocates its own financial resources** to the financial instrument or **shares the risk**, proposed measures to **align interests** and to mitigate possible conflicts of interest.

- Lowest price therefore not to be used.

* could be selection criteria instead

Procedures most relevant to FIs: 2. Restricted procedure

- difference (\neq open): CA issues a call for competition and the economic operators request to participate (30 days); the number may be limited (not less than 5); then the selected ones send tenders (another 30 days).
- Useful when a large number of participants is expected

Other available procedures

3 and 4 - Competitive procedure with negotiation, or Competitive dialogue

- May be used in a number of cases, but the likely one applicable here is when the CA received, in response to an open or a restricted procedure, only **irregular** (not comply with proc. doc., late, collusion or corruption, or abnormally low) or **unacceptable** (not have the required qualifications, or price exceeds the budget) are submitted

Other available procedures

5 – Innovation partnership (New)

- Aims at development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works
- Combines a service and supply contract
- Not likely applicable because management of financial instruments typically does not involve development of innovative solutions

Other available procedures

6 - negotiated procedure without prior publication- used exceptionally in certain cases, the only applicable here is when the CA received, in response to an open or a restricted procedure, **no** (or **no suitable**) tenders or requests to participate

Not suitable tender: irrelevant, manifestly incapable meeting the CA's needs and requirements

Not suitable request: economic operator under exclusion or does not fulfil selection criteria

Time limits

- Open – normal: 35 days / 30 (if electronic submission) or 40 if no e-documents
- Open with PIN*: 15 or 20 if no e-documents
- Restricted with PIN* – requests 15 or 20 if no e-documents; tenders 10 or 15 if no e-documents
- * if PIN included all info required and published between 35 days and 12 months before contract notice

Time limits

- Possibility to use accelerated procedure in open and restricted in case of a "state of urgency duly substantiated" – not likely applicable
- Open: 15 days
- Restricted: 15 days for requests, 10 for tenders.

Framework agreements (FWA)

- agreement between one or more CAs and one or more economic operators, with terms governing contracts to be awarded during a period (FWA 4 years, contracts longer/shorter)
- General rule: specific contracts may not entail substantial modifications to the terms laid down in that framework agreement
- Single or multiple FWAs exist.

Framework agreements (FWA)

- Single FWA: concluded with a single economic operator, the specific contracts are awarded in the limits of the terms laid down in the FWA, with supplementing the tender when needed.
- Multiple FWA. concluded with more than one economic operator, there are following ways:
 - a) "call-offs": without reopening competition, if FWA sets out all the terms;
 - b) "mini-competition" where not all the terms and
 - c) combination of a and b if this possibility, objective criteria to choose to (not) reopen, and which terms may be subject to competition, are stipulated.

Modification of contracts

- has been made clearer and simpler in order to remove any doubt and shed light on this corruption-prone phase.
- General rule is still: modification needs a new PP procedure. But exceptions:
 - 1)** "De minimis" or "safe harbour": If the value does not exceed the Directive thresholds **and** less than 10 % of the value of the original contract (15 % for works) – for successive, net cumulative value); but not alter overall nature

Modification of contracts

- 2) If specified in the original documents, by clear and unequivocal review clauses, regardless of value, but not alter overall nature;
- 3) **unforeseen** (with diligence) **events**, not changing nature (up to 50% of original – for each modification).
- 4) for additional works, products or services which have become necessary; change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience and costs (up to 50% of original – for each modification).

Modification of contracts

5) new contractor replaces the old in the cases of foreseen change, legal succession or the CA assumes the obligations of the operator to the subcontractors

6) where the modifications, irrespective of their value, are not substantial

- Modification is substantial? – case by case, but always if:
 - would allow other/additional participants/other tenders
 - changes economic balance in favour of contractor
 - extends the scope of contract/FA considerably
 - if new contractor outside of case under 5).



Thank you !

Contact

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financial instruments revolving capacity building
 added value **ERDF** funding agreement **ESF** EU guidance
 technical support seminars leverage financial intermediaries microfinance
 co-financing **ESIF** case studies
 investments **fi-compass** final recipients
 business plan **Thank you** thematic objectives
 advisory services guarantees banks loans **EaSI** equity
 private investors life cycle combination of support
EAFRD conferences factsheets
 fund of funds **EMFF** investment strategy **CF**
 managing authorities manuals