



Public Procurement and the Structural Funds

Audit experience

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Outline

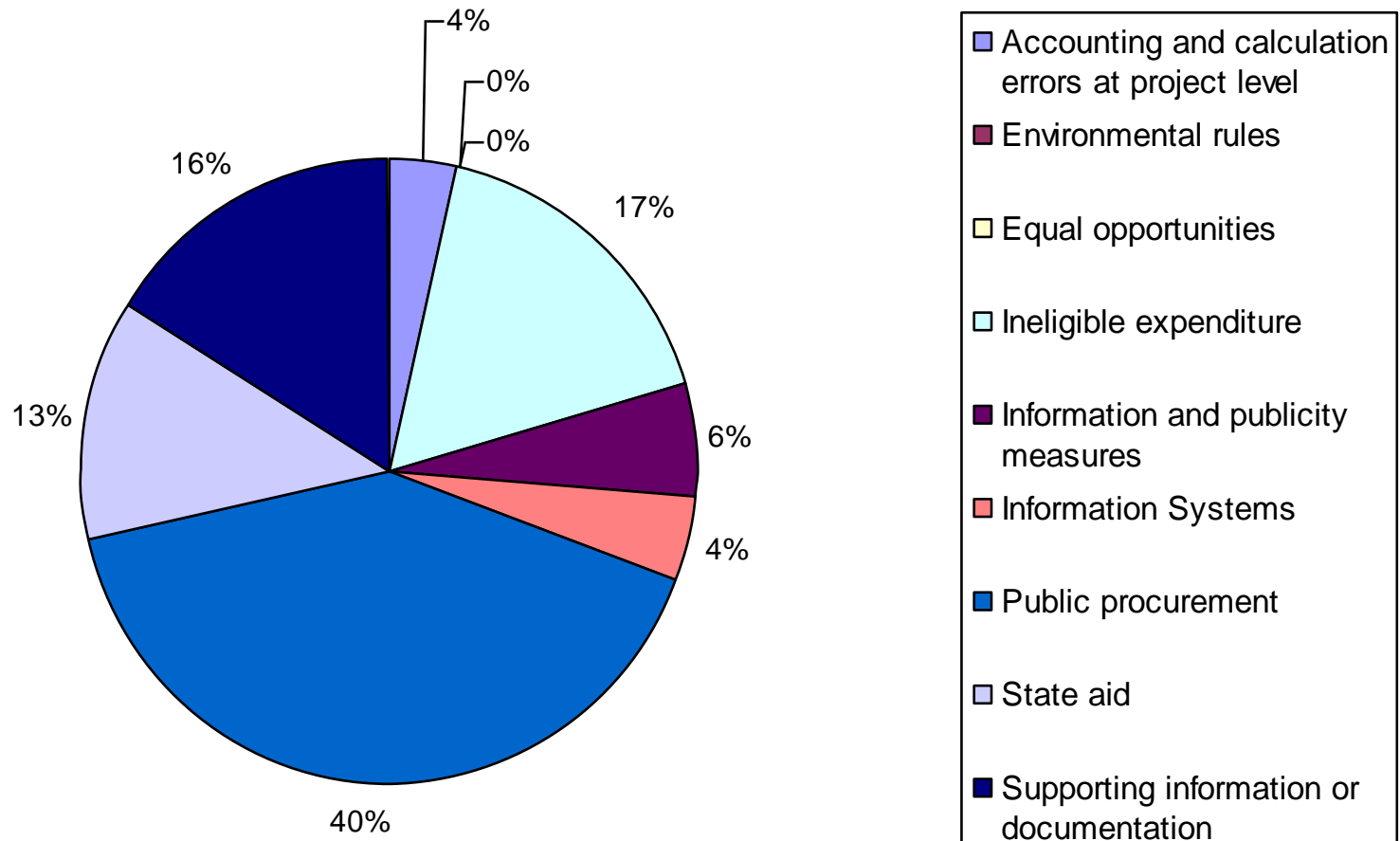
1. Public procurement – Why focus?
2. Legal basis / Scope / Principles
3. Contract stages and problems identified
4. Preventive actions and corrective measures

1. Public procurement – Why focus?

1. Why focus on public procurement?

- Most operational programmes involve public procurement, in particular those containing large infrastructure projects.
- High risk area which accounts for:
 - 40% of all errors identified in ERDF & CF operations
 - 75% of ECA's error rate
- Errors lead to financial corrections / loss of funds / risks to completion of operations

Findings per categories in the period 2007 - 2013 (%)



1. Why is public procurement still high risk area?

- High value contracts – infrastructure projects
- Often difficult to implement – contract changes
- Complexity of the procurement rules (both EU and national);
- Inexperienced beneficiaries acting as contracting authorities
- Pressure to implement operations quickly / absorb funding leading to shortcuts and procedures not being followed

2. Legal Basis / Scope / Principles

2. Legal Basis / Scope / Principles

Legislative framework

- Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
- Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities in the water, energy, transport and postal services sectors
- Commission Interpretative Communication 2006/C 179/02 on the community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives
- Case-law of the European Court of Justice
- National rules

2. Legal Basis / Scope / Principles

Scope / Who and what is covered by the Directives?

- 'Contracting authorities': State, regional or local authorities, bodies governed by public law
- Contracts subsidised by more than 50 % by contracting authorities
- Public (works, supply, service) contracts
- Thresholds for application of Directives (as from 01/01/2012)
 - Works EUR 5,000,000
 - Services, supplies
 - (Dir. 17/2004) EUR 400,000
 - (Dir. 18/2004, other contracting authorities) EUR 200,000
 - (Dir. 18/2004, central government authorities) EUR 130,000

2. Legal Basis / Scope / Principles

- *Contracts below the threshold:*
 - DG REGIO audit approach was adapted to the ECJ case-law (C-147/06 and C-148/06, SECAP and Santorso, of 15 May 2008, Rec. 2008, p. I-3.565, paragraph n.20)
 - Apply financial corrections to contracts below thresholds only if there is:
 - breach of EU Treaty principles and
 - the contract in question is of a cross-border interestor
 - breach of the applicable national law

2. Legal Basis / Scope / Principles

- *Assessment of cross-border interest:*

A works contract could be of cross-border interest due to

- its value or
- its technical complexity or
- the location of the works (e.g. border area)

The Commission bears the burden of proof.

2. Legal Basis / Scope / Principles

Objectives and principles

- Main objective of Public Procurement Directives:
 - To open up contracts to competition across Member States (value for money)
 - Treaty principles:
 - freedom of movement of goods
 - freedom of establishment
 - freedom to provide services
- and the principles deriving therefrom, such as the principles of:
- equal treatment
 - non-discrimination
 - mutual recognition
 - proportionality
 - transparency

3. Contract stages and problems identified

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But first, the worst case is:

- No publication = direct award = no competition
 - Principles of equal treatment, non-discrimination and transparency not respected
 - Consequences – most serious breach
 - => 100% financial correction

3. Contract stages and problems identified

Main contract stages (with problems identified)

3 main stages

- 3.1 Tender preparation and publication
- 3.2 Submission of tenders, selection, evaluation and award of contract
- 3.3 Contract implementation

3.1 Tender preparation and publication

(a) PIN (Prior information notice) – shortened deadlines

Article 38 (18/2004)

The shortened time limits (...) shall be permitted, provided that the prior information notice has included all the information required for the contract notice in Annex VII A, insofar as that information is available at the time the notice is published and that the prior information notice was sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

If there are differences between the PIN and the notice and the shortened deadlines have been used then the contracting authority should be able to prove that it did not have the information.

3.1 Tender preparation and publication

(b) Contract notice

- Disproportionate selection criteria (Art 44.2 - minimum capacity levels of ability required for a specific contract must be proportionate and related to the subject matter of the contract)
- Discriminatory criteria (lack of mutual recognition of qualifications - no 'or equivalent' statement, local office required)
- Mixing of selection and award criteria (award criteria should relate to the specific objectives of the contract and not to the contractor) (Example: experience of contractor should generally be assessed at selection stage and not at award stage)

3.1 Tender preparation and publication

(b) Contract notice

- Different criteria in national and EC publications (Lowest price / MEAT)
- Award criteria such as 'previous work done for the contracting authority' not related to the subject matter of the contract
- Incorrect deadlines (too short) set for submission of tenders,
- Specification of particular 'brands' of equipment and not allowing equivalent equipment from other manufacturers
- Excessive fees charged for purchase of tender documents

3.1 Tender preparation and publication

(b) Contract notice

Splitting of contracts

- Artificial splitting of contracts with the aim of avoiding publishing the contract in the OJEC - Contract notice only published at national level - Deliberate limitation of competition
(Example: €8m works contract divided into two parts of €4m each, i.e. below €5m threshold)

3.2 Submission of tenders, selection, evaluation and award of contract

Examples of selection and award criteria

- Selection criteria:
 - personal situation, economic and financial standing, professional and technical ability (related to the tenderer, i.e. is the tenderer capable of performing the contract?)

- Award criteria:
 - the lowest price or
 - MEAT (most economically advantageous tender) - award criteria related to the subject-matter of the contract include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion

3.2 Submission of tenders, selection, evaluation and award of contract

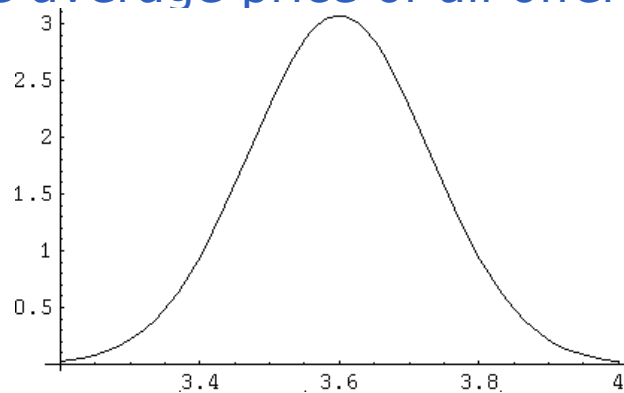
(a) Submission of tenders and selection stage

- Tenders accepted after the deadline
- Rejection of tenders for minor formal reasons (Copies of documents, format of the information presented)
- Clarifications not sent to all participants, only to those requesting them
- Unclear replies to requests for clarification by the contracting authority leading to rejection of tenderers
- Accepting tenders that do not meet one or more of the selection criteria

3.2 Submission of tenders, selection, evaluation and award of contract

(b) Evaluation stage

- Exclusion of 'abnormally low' offers without asking tenderer to justify its offer
- Using mathematical formulae that favour tenderers with offer prices near to the average price of all offers



3.2 Submission of tenders, selection, evaluation and award of contract

(b) Evaluation stage

- Lack of transparency as to how the evaluation committee reached its decision to award the contract (no evaluation grids – not compulsory but best practice)
- Use of criteria at award stage that are not linked to the subject-matter of the contract but rather to the company itself (such as experience, profitability of company, etc. used at selection stage - i.e. mixing selection and award criteria)

3.2 Submission of tenders, selection, evaluation and award of contract

(c) Award stage

- Contract award notice not published or not published within deadline.
- It should be published in OJEC no later than 48 days after the award of the contract (where 'award' is the signature of contract, not the decision to award the contract)

3.3 Contract implementation

General principle:

- The contracting authority may not amend an essential condition of the contract during the contract implementation stage...
- ...unless it expressly provides for that possibility in the tender documents (e.g. price increase / inflation clause)
(Case C-496/99, CAS Succhi di Frutta SpA)
- Any amendment of an essential condition of the contract must be considered equivalent to the conclusion of a new contract, requiring, in principle, a new competition
(Case C-454/06, Presstext Nachrichtenagentur)

3.3 Contract implementation

Audit findings:

- Duration for implementation of the contract extended, even though the duration was used as an award criterion
- The direct award of new works due to 'savings'
- Additional works / services awarded directly (no competition)

3.3 Contract implementation

Additional works / services awarded directly (no competition)

However, Article 31(4) of Directive 2004/18/EC allows for exceptions to this rule and allows for the award of a contract for additional works/services through a negotiated procedure without a contract notice to the existing contractor:

- For **additional works** not included in the original contract but which have become necessary due to **unforeseen** circumstances provided that:
 - The additional works cannot be separated (technically or economically) from the original contract without major inconvenience to the contracting authority, or
 - Although separable from the original contract are strictly necessary for its completion
 - Value of additional works **cannot be > 50%** of the value of the original contract (50% limit does not apply for the Utilities Directive)
- Contracting authorities have the burden of proof

3.3 Contract implementation

- 'Additional works' (not new works)
- Unforeseen circumstances:
 - Question: What should a diligent contracting authority have foreseen ?
 - Interpret this in an objective way
 - Unforeseen circumstances should not be imputable to the contracting authority
 - Assess 'unforeseen' on a case by case basis

4. Preventive actions and corrective measures

4.1 Preventive actions

- Only use exceptional procedures in exceptional cases (e.g. additional works awarded directly under Art 31(4))
- Always keep Treaty principles in mind
- Lay down transparent and objective selection and award criteria
- Where possible use standardised tender documents
- Make available a help-desk service for inexperienced contracting authorities
- Ex-ante checks / approval of tender file

4.1 Preventive actions

- Monitor costs – be aware of variations / delays and contract modifications
- Carry out regular on-site inspections and quality checks during implementation
- Make use of supervising engineer's reports
- Ensure that all Public Procurement aspects are checked before expenditure is certified to the Commission (MA and CA)

4.2 Corrective measures

Financial corrections:

- Irregularities without specific financial impact may also be seriously prejudicial to the financial interests of the European Union and to compliance with Community law...
...and justify the application of financial corrections (C-199/03, Ireland vs. Commission)
- COCOF Guidelines for financial corrections for non-compliance with the rules on public procurement of 29/11/2007 (COCOF 07/0037/03-EN)

4.2 Corrective measures

- COCOF Guidelines being updated - Why?
- Financial corrections:
 - 'New' types of irregularities
 - Artificial splitting of contracts
 - Non-respect of time limits for receipt of tenders
 - Insufficient time to obtain tender documentation
 - Disproportionate selection criteria
 - Abnormally low offers
 - Insufficient definition of the subject-matter of the contract
 - Clarification regarding other types of irregularities



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Questions?

Thank you for your attention!

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