

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

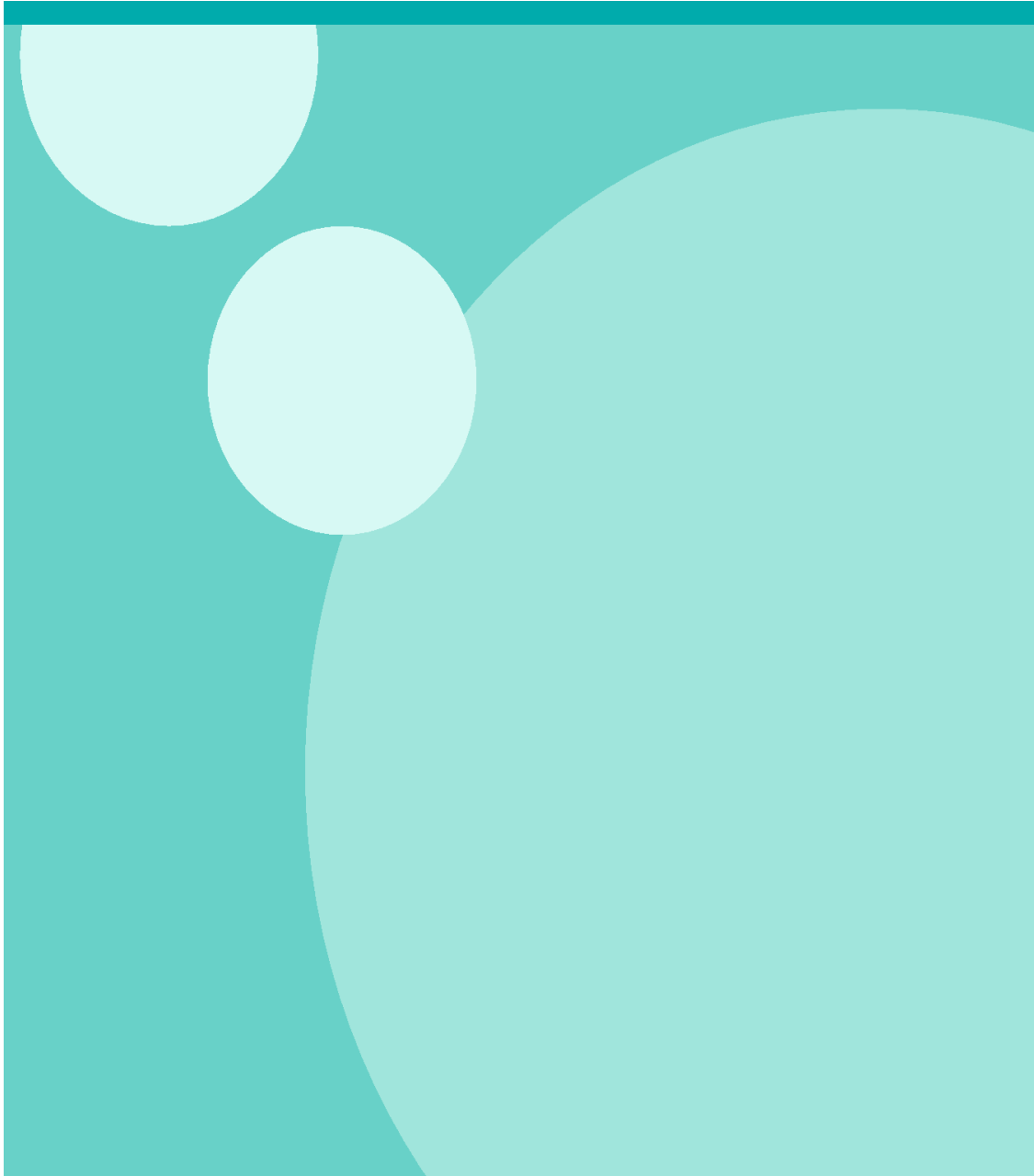


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This document is guidance on the subject of how to select suppliers of goods, works and services in projects part funded through ESIF. It does not constitute legal advice, nor does it imply any waiver of the legal obligations of recipients of ESIF 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. There are separate penalties for breaches of the National Rules.
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

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

a 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 National Rules?

11. These national rules are 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 to any Contracting Authorities which are not subject to the Commission Communicative Interpretation. 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.

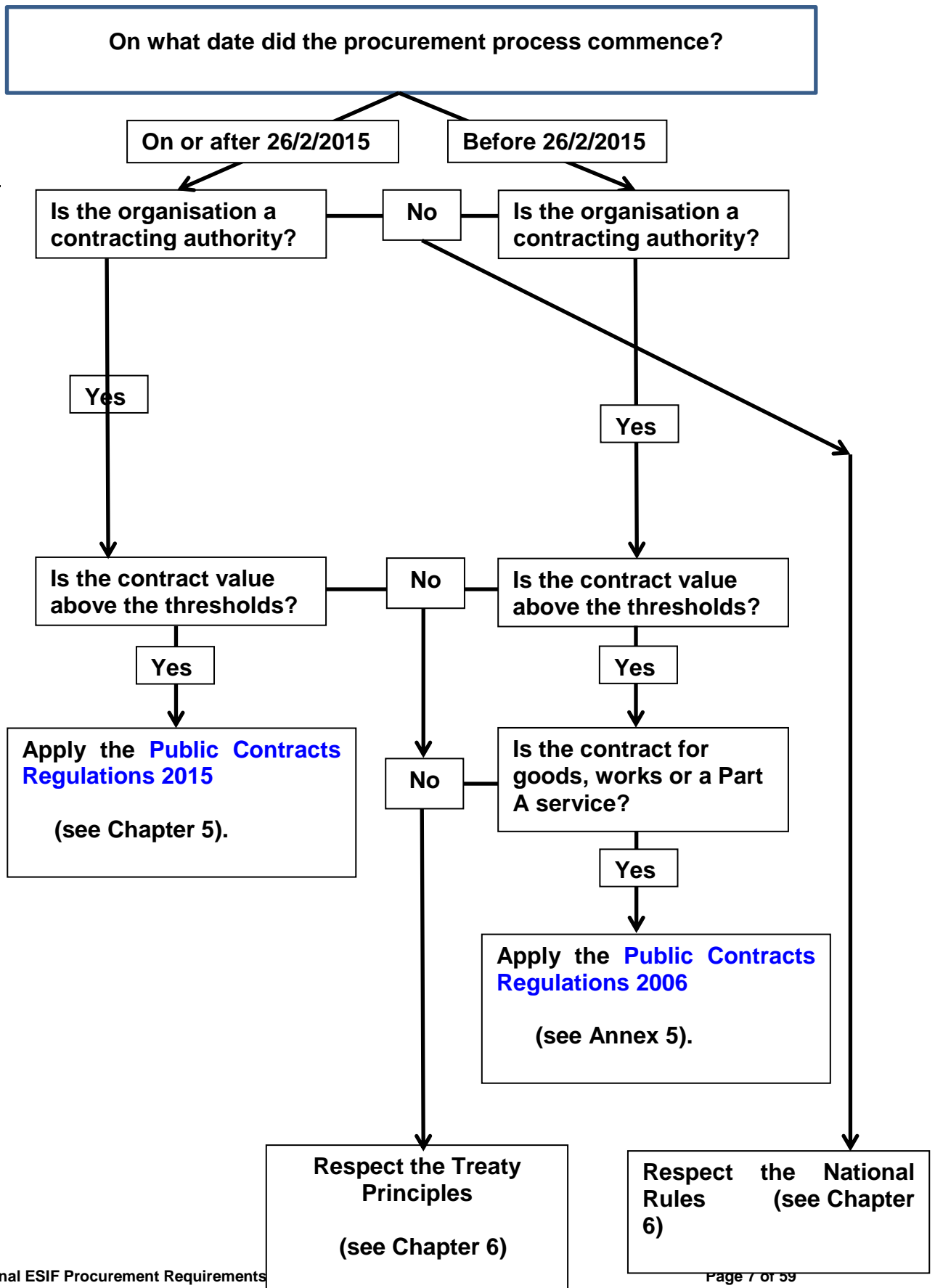
⁴ The national rules are also designed to ensure that the financial framework of ESIF is not prejudiced by the charging of excessive sums to its budget

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 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 [guidance](#)⁵.
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.

	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
1.	Lack of publication of contract notice	Articles 35 and 58 of Directive 2004/18/EC Article 42 of Directive 2004/17/EC Section 2.1 of the Commission interpretative communication n° 2006/C 179/02	The contract notice was not published in accordance with the relevant rules (e.g. publication in the Official Journal of the European Union (OJEU) where this is required by the Directives).	100% 25% if publication of a contract notice(s) is required by the Directives and the contract notice(s) was not published in the OJEU but it 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 means that either the contract notice was published at national level (following the national legislation or rules in that regard) or the basic standards for the publication of contract notice was respected. For more details on these standards, see section 2.1 of the Commission interpretative communication n° 2006/C

⁵ The latest corrections guidance can be found at [“Commission Decision of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement”](#). This guidance is used in ESIF audits carried out by the ESIF Managing Authority's Internal Audit Service, the Audit Authority, DG Regio and Emploi Audit Service and the European Court of Auditors.

	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
				179/02.
2.	Artificial splitting of works/ services/ supplies contracts.	Article 9(3) of Directive 2004/18/EC Article 17(2) of Directive 2004/17/EC	A works project or proposed purchase of a certain quantity of supplies and/or services is subdivided resulting in its coming outside the scope of the Directives, i.e., preventing its publication in OJEU for the whole set of works, services or supplies at stake.	100% 25% if publication of a contract notice is required by the Directives and the contract notice was not published in the OJEU but it 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 means that either the contract notice was published at national level (following the national legislation or rules in that regard) or the basic standards for the publication of contract notice was respected. For more details on these standards, see section 2.1 of the Commission interpretative communication n° 2006/C 179/02.
3.	Non-compliance with - time limits for receipt of tenders; or - time limits for receipt of requests to	Article 38 of Directive 2004/18/EC Article 45 of Directive 2004/17/EC	The time limits for receipt of tenders (or receipt of requests to participate) were lower than the time limits in the Directives.	25% if reduction in time limits >= 50% 10% if reduction in time limits >= 30% 5% if any other reduction in time limits (this correction rate may be reduced to between 2% and 5%,

	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
	participate			where the nature and gravity of the deficiency is not considered to justify a 5% correction rate).
4.	Insufficient time for potential tenderers/candidates to obtain tender documentation	Article 39(1) of Directive 2004/18/EC Article 46(1) of Directive 2004/17/EC	Time for potential tenderers/candidates to obtain tender documentation is too short, thus creating an unjustified obstacle to the opening up of public procurement to competition. Corrections are applied on a case by case basis. In determining the level of the correction, account will be taken of possible mitigating factors related to the specificity and complexity of the contract, in particular a possible administrative burden or difficulties in providing the tender documentation.	25% if the time that potential tenderers/candidates have to obtain tender documentation is less than 50% of time limits for receipt of tenders (in line with relevant provisions). 10% if the time that potential tenderers/candidates have to obtain tender documentation is less than 60% of time limits for receipt of tenders (in line with relevant provisions). 5% if the time that potential tenderers/candidates have to obtain tender documentation is less than 80% of time limits for receipt of tenders (in line with relevant provisions).
5.	Lack of publication of - extended time limits for receipt of tenders; or - extended time limits for receipt of requests to	Article 2 and Article 38(7) of Directive 2004/18/EC Articles 10 and 45(9) of Directive 2004/17/EC	The time limits for receipt of tenders (or receipt of requests to participate) were extended without publication in accordance with the relevant rules (i.e., publication in the OJEU if the public procurement is covered by the Directives).	10% The correction can be decreased to 5% depending on the seriousness of the irregularity.

	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
	participate			
6.	Cases not justifying the use of the negotiated procedure with prior publication of a contract notice.	Article 30(1) of Directive 2004/18/EC	Contracting authority awards a public contract by negotiated procedure, after publication of a contract notice, but such procedure is not justified by the relevant provisions.	25% The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.
7.	For the award of contracts in the field of defence and security falling under directive 2009/81/EC specifically, inadequate justification for the lack of publication of a contract notice	Directive 2009/81/EC	Contracting authority awards a public contract in the area of defence and security by means of a competitive dialogue or negotiated procedure without publication of a contract notice whereas the circumstances do not justify the use of such a procedure.	100%. The correction can be decreased to 25%, 10% or 5% depending on the seriousness of the irregularity.
8.	Failure to state: - the selection criteria in the contract notice; and/or - the award criteria (and their weighting) in the contract notice or in the tender specifications.	Articles 36, 44, 45 to 50 and 53 of Directive 2004/18/EC and Annexes VII-A (public contract notices: points 17 and 23) and VII-B (public works concessions notices: point 5) thereof. Articles 42, 54 and 55 and Annex XIII of Directive 2004/17/EC	The contract notice does not set out the selection criteria. And/or When neither the contract notice nor the tender specifications describe in sufficient detail the award criteria as well as their weighting.	25% The correction can be decreased to 10% or 5% if the selection/award criteria were stated in the contract notice (or in the tender specifications, as regards award criteria) but with insufficient detail.
9.	Unlawful and/or discriminatory selection	Articles 45 to 50 and 53 of Directive 2004/18/EC	Cases in which operators have been deterred from bidding because of	25% The correction can be decreased to 10% or 5%

	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
	and/or award criteria laid down in the contract notice or tender documents	Articles 54 and 55 of Directive 2004/17/EC	<p>unlawful selection and/or award criteria laid down in the contract notice or tender documents. For example:</p> <ul style="list-style-type: none"> • obligation to already have an establishment or representative in the country or region; • tenderers' possession of experience in the country or region. 	depending on the seriousness of the irregularity.
10	Selection criteria not related and proportionate to the subject matter of the contract	Article 44 (2) of Directive 2004/18/EC Article 54(2) of Directive 2004/17/EC	When it can be demonstrated that the minimum capacity levels of ability for a specific contract are not related and proportionate to the subject matter of the contract, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of public procurement to competition.	25% The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
11	Discriminatory technical specifications	Article 23(2) of Directive 2004/18/EC Article 34(2) of Directive 2004/17/EC	Setting technical standards that are too specific, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening up of	25% The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.

	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
			public procurement to competition.	
12	Insufficient definition of the subject-matter of the contract	Article 2 of Directive 2004/18/EC Article 10 of Directive 2004/17/EC Cases C-340/02 (Commission/France) and C-299/08 (Commission/France)	The description in the contract notice and/or the tender specifications is insufficient for potential tenderers/candidates to determine the subject-matter of the contract.	10% The correction can be decreased to 5% depending on the seriousness of the irregularity. In case the implemented works were not published, the corresponding amount is subject to a correction of 100%

Evaluation of tenders

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
13.	Modification of selection criteria after opening of tenders, resulting in incorrect acceptance of tenderers	Article 2 and Article 44 (1) of Directive 2004/18/EC Article 10 and Article 54(2) of Directive 2004/17/EC	The selection criteria were modified during the selection phase, resulting in acceptance of tenderers that should not have been accepted if the published selection criteria had been followed.	25% The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
14.	Modification of selection criteria after opening of tenders, resulting in incorrect rejection of tenderers	Articles 2 and 44 (1) of Directive 2004/18/EC Articles 10 and 54(2) of Directive 2004/17/EC	The selection criteria were modified during the selection phase, resulting in rejection of tenderers that should have been accepted if the published selection criteria had been followed.	25% The correction can be decreased to 10% or 5% depending on the seriousness of the irregularity.
15.	Evaluation of tenderers/candidates using unlawful selection or award criteria	Article 53 of Directive 2004/18/EC Article 55 of Directive 2004/17/EC	During the evaluation of tenderers/candidates, the selection criteria were used as award criteria, or the award criteria (or respective sub-criteria or	25% The correction can be decreased to 10% or 5% depending on the seriousness of

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
			<p>weightings) stated in the contract notice or tender specifications were not followed, resulting in the application of unlawful selection or award criteria.</p> <p>Example: Sub-criteria used for the award of the contract are not related to the award criteria in the contract notice/tender specifications.</p>	the irregularity.
16.	Lack of transparency and/or equal treatment during evaluation	<p>Articles 2 and 43 of Directive 2004/18/EC</p> <p>Articles 10 of Directive 2004/17/EC</p>	<p>The audit trail concerning in particular the scoring given to each bid is unclear/unjustified/lacks transparency or is non-existent.</p> <p>and/or</p> <p>The evaluation report does not exist or does not contain all the elements required by the relevant provisions.</p>	<p>25%</p> <p>The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.</p>
17.	Modification of a tender during evaluation	<p>Article 2 of Directive 2004/18/EC</p> <p>Article 10 of Directive 2004/17/EC</p>	The contracting authority allows a tenderer/candidate to modify its tender during evaluation of offers	<p>25%</p> <p>The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.</p>
18.	Negotiation during the award procedure	<p>Article 2 of Directive 2004/18/EC</p> <p>Article 10 of Directive 2004/17/EC</p>	In the context of an open or restricted procedure, the contracting authority negotiates with the bidders during the evaluation stage, leading to a substantial modification of the initial conditions set out in the contract notice or tender specifications.	<p>25%</p> <p>The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.</p>

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
19.	Negotiated procedure with prior publication of a contract notice with substantial modification of the conditions set out in the contract notice or tender specifications	Article 30 of Directive 2004/18/EC	In the context of a negotiation procedure with prior publication of a contract notice, the initial conditions of the contract were substantially altered, thus justifying the publication of a new tender.	25% The correction can be reduced to 10% or 5% depending on the seriousness of the irregularity.
20.	Rejection of abnormally low tenders	Article 55 of Directive 2004/18/EC	Tenders appear to be abnormally low in relation to the goods, works or services but the contracting authority, before rejecting those tenders, does not request in writing details of the constituent elements of the tender which it considers relevant.	25%
21.	Conflict of interest	Article 2 of Directive 2004/18/EC Article 10 of Directive 2004/17/EC	When a conflict of interest has been established by a competent judicial or administrative body, either from the part of the beneficiary of the contribution paid by the Union or the contracting authority.	100%

Contract implementation

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
22	Substantial modification of the contract elements set out in the contract notice or tender specifications	Article 2 of Directive 2004/18/EC Article 10 of Directive 2004/17/EC Case C- Case C-	The essential elements of the award of the contract include but are not limited to price, nature of the works, the Completion period, the terms of payment, and the materials used. It is	25% of the amount of the contract plus the value of the additional amount of the contract resulting from the substantial

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
		496/99 P, CAS Succhi di Frutta SpA [2004] ECR I-3801 paragraphs 116 and 118 Case C-340/02, Commission v. France [2004] ECR I-9845 Case C-91/08, Wall AG, [2010] ECR I-2815	always necessary to make an analysis on a case by-case basis of what is an essential element.	modification of the contract elements.
23	Reduction in the scope of the contract	Article 2 of Directive 2004/18/EC Article 10 of Directive 2004/17/EC	The contract was awarded in compliance with the Directives, but was followed by a reduction in the scope of the contract.	Value of the reduction in the scope Plus 25% of the value of the final scope (only when the reduction in the scope of the contract is substantial).
24	Award of additional works/services/supplies contracts (if such award constitutes a substantial modification of the original terms of the contract) without competition in the absence of one of the following conditions - extreme urgency brought about by unforeseeable events; - an unforeseen circumstance for	Point 1(c) and point 4(a) of Article 31 of Directive 2004/18/EC	The main contract was awarded in accordance with the relevant provisions, but was followed by one or more additional works/services/supplies contracts (whether or not formalised in writing) awarded without complying with the provisions of the Directives, i.e., the provisions related to the negotiated procedures without publication for reasons of extreme urgency brought about by	100% of the value of the supplementary contracts. Where the total of additional works/services/supplies contracts (whether or not formalised in writing) awarded without complying with the provisions of the Directives does not exceed the thresholds of the Directives and 50% of the value of the original contract, the correction may be reduced to 25%.

No	Type of irregularity	Applicable law / reference document	Description of the irregularity	Rate of correction
	Complementary works, services, supplies.		unforeseeable events or for award of Complementary supplies, works and services.	
25	Additional works or services exceeding the limit laid down in the relevant provisions	Last subparagraph of 4(a) of Article 31 of Directive 2004/18/EC	The main contract was awarded in accordance with the provisions of the Directives, but was followed by one or more supplementary contracts exceeding the value of the original contract by more than 50%	100% of the amount exceeding 50% of the value of the original contract.

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.

⁶ 2007/66/EC

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

CHAPTER FOUR: COMMON ERRORS AND HOW TO AVOID THEM

1. Below is a list of common errors encountered during the ESIF 2007-2013 programme:

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.</p> <p>Inaccurate and discriminatory advertising.</p>
Express breaches of public procurement law	<p>Not meeting the prescribed time limits.</p> <p>Using frameworks which they are not permitted 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	Not having documentation to show how the process was followed and the rationale for decisions taken.
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2. 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 projects⁸.
3. 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.
4. 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
5. 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.
6. 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 responsible for carrying out gateway checks at the end of each stage of the procurement.
7. 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.

⁸ 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.

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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:

- 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

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 net of 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 is covered.
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?

Type of Contracting Authority

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. Works⁹;
- 10.1.2. Supplies¹⁰ and
- 10.1.3. Services.
11. Where there is a mix of activities, the dominant activity determines the category.
12. The current thresholds are:

Thresholds from 1 January 2016 – 31 December 2017¹¹ (net of 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

⁹ The definition of “works” can be found at [Regulation 2\(1\) of the Public Contracts Regulations 2015](#) and includes building and civil engineering works.

¹⁰ 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”.

¹¹ Previous thresholds can be found in Annex 4

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.
 - 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 considered¹².

¹² Please note that this is required for record keeping purposes, the Department cannot “sign off” such procurements as compliant.

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 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 framework¹³. 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).

¹³ In this situation contracts would need to be awarded in accordance with [Regulation 33\(7\) of the Public Contracts Regulations 2015](#).

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 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 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?¹⁴"; and
 - award criteria aim to establish "based on the proposal to deliver the contract which bid is the best?¹⁵"
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) ¹⁶

¹⁴ 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).

¹⁵ Used to identify which tenderer is the most economically advantageous so as to determine to whom to award the contract

¹⁶ 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 tenders¹⁷</p>

42. Any divergence from the minimum timescales is likely to lead to a financial correction¹⁸.
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,

¹⁷ Capable of being shortened, subject to rules relating to the procedure applied.

¹⁸ 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 stage¹⁹. 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](#)²⁰.
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.

¹⁹ Unless permitted as part of the process, for example in the Innovation Partnership process.

²⁰ [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 days²¹ 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](#).

²¹ From the date of the dispatch of the notice.
National ESIF Procurement Requirements
ESIF-GN-1-001, Version 5
Date published 20 February 2017

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, for example they are (i) not a contracting authority (ii) the value of the contract does not meet the thresholds²² or (iii) who are procuring Part B supply contracts under the Public Contracts Regulations 2006, 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 Part B of the 2006 Regulations.
- 4 The relevant Treaty Principles are:
 - 4.1 Equal treatment;
 - 4.2 Transparency;
 - 4.3 Non-discrimination;
 - 4.4 Mutual recognition²³; 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.

²² 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.

²³ 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 Part B services (under the 2006 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 the National Rules 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 Department²⁴.
- 14 The evaluation as to whether a contract may generate cross border interest must be made by the ESIF grant recipient²⁵, 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 information²⁶.
- 15 The assessment of the existence of cross border interest must be taken prior to letting the contract²⁷ 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 evidence²⁸.

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”²⁹. In practical terms this means that

²⁴ The Department requires such documentation for the purposes of monitoring but is not in a position to verify whether cross border interest is present.

²⁵ Or a specialist engaged for this task

²⁶ 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.

²⁷ Paragraph 43, [Mansfield District Council v Secretary of State for Communities and Local Government](#) [2014] EWHC 2167 (Admin)

²⁸ In Commission audits, the burden of proof lies on the Commission to demonstrate that there would have been cross border interest.

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

the offer must be advertised on a forum allowing interested operators from other Member States to consider bidding³⁰ 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 bids³¹. 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 Principles³²:

Value of contract ³³	Minimum Procedure ³⁴	Advertising Required
£0 - £2,499 ³⁵	Direct award ³⁶	None
£2,500 - £24,999 ³⁷	3 written quotes or prices sought from relevant suppliers of goods, works and services	None
£25,000 ³⁸ – 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 ³⁹ .

- 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:

³⁰ Paragraph 21, C-231/2003 Coname

³¹ 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.

³² Deviation from the guide is permitted, but will need to be justified at audit.

³³ The same principles apply to the valuation of the tender as set out in Chapter 3.

³⁴ A particular organisation's standing orders may require a more rigorous procedure.

³⁵ Revised threshold applies from 7th October 2015

³⁶ It is necessary to retain documentation on such awards as manifestly excessive payments will be subject to correction.

³⁷ 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.

³⁸ 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

³⁹ 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.

- 18.1 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 parties⁴⁰;
- 18.4 Putting in place appropriate time limits to allow bidders to consider the contract and submit a meaningful bid⁴¹;
- 18.5 Managing potential conflicts of interest⁴²;
- 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
 - 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

⁴⁰ Including responses to questions from interested bidders

⁴¹ In most cases, ESIF grant recipients apply a time period between 10 days and the timescales set out in Public Procurement Law.

⁴² 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)

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 Rules

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 **national** rules⁴³. These national rules are designed to achieve sound financial management of public funds⁴⁴ 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 ⁴⁵	Minimum Procedure	Advertising Required
£0 - £25,000	Direct award	None
£25,000 - £200,000 (services) and £4.5m (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 10 days.
£25,000 - £200,000 (supplies)	<p>3 written quotes or prices sought from relevant suppliers against a clear specification</p> <p>Justification that a</p>	None

⁴³ Under Article 2(2) of the TFEU

⁴⁴ 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

⁴⁵ 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

	reasonable decision has been made on the basis of the quotes/prices	
Over £200,000 (services and supplies) and £4.5m (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>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>	Advertise the opportunity on the grant recipients/or other appropriate website for 10 days.

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)
- Non compliance with the thresholds above – including artificial splitting of contracts

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.

Corrections

26 For breaches of the Treaty Principles and in order to protect the ESIF budget, the Department shall apply the corrections based on the same headings as set out in the Commission's corrections note, which is explained in Chapter 3 of this guidance.

27 Breaches of the National Rules will be treated as a breach of contract and also an irregularity within the meaning of the Structural Funds Regulations. The following corrections will apply.

Breach	Correction⁴⁶
Direct awards to linked organisations	10%
Non compliance with the thresholds above	5%
A lack of audit trail to demonstrate the process followed and decisions taken	5%
Failure to advertise the opportunity on the grant recipients website for 10 days	10%
Failure to adhere to the Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF, and submit a declaration to MHCLG or DWP	5%
Failure to impartially assess each bid against the same criteria and demonstrate this through use of a score sheet	5%
Failure to provide evidence to demonstrate that the winning bidder has been selected on merit	5%

⁴⁶ The MA reserves the right to apply higher corrections where repeat breaches occur
National ESIF Procurement Requirements
 ESIF-GN-1-001, Version 5
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CHAPTER SEVEN: RECORD KEEPING

1. For the 07-13 Programme records must be retained for verification until at least the end of 2015, or until otherwise 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:
 - a. Explanation of procurement procedure selected with justification
 - b. Copy of OJEU notice or relevant advertisement and OJEU Prior Information Notice (PIN) if applicable (including for Framework Agreements)
 - c. Lists of Expressions of Interest
 - d. PQQ template including the associated selection criteria (where used) and log of responses received (where relevant)
 - e. PQQ scoring matrix
 - f. Completed PQQ individual score sheets and summary sheet
 - g. Copy of tender specification with clear award criteria
 - h. Log sheet for all tenders received (time and date)
 - i. Tender evaluation matrix
 - j. Copy of all tenders
 - k. Copy of tender score sheets dated and signed by two people and summary sheet
 - l. Copy of OJEU award notice
 - m. Copy of tender evaluation report
 - n. Copy of correspondence, including interview questions and clarification questions where appropriate
 - o. Copy of letters to unsuccessful tenderers giving an appropriate standstill period (where appropriate)
 - p. Copy of award letter /signed contract
 - q. Copy of notes from inception meeting

- r. Summary record of the above process to assist with future monitoring and audits – Tender Evaluation Report
 - s. Framework – core document (where relevant)
4. Those documents highlighted in red above are the minimum core documents that will also need to be submitted to the Managing Authority, as soon as they are available, for all OJEU level procurements carried out by Contracting Authorities. This is likely to be during the application process or prior to submission of the first claim. Wherever possible, documents should be submitted electronically.
 5. Contracts subject to the Public Contracts Regulations 2015 and above €10m for works and €1m for supplies and services also have to follow record keeping requirements at [Regulation 84 of the Public Contracts Regulations 2015](#).

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 FORM⁴⁷

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>

⁴⁷ Annexes 2 and 3 are available as separate Word documents on GOV.UK
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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 FORM⁴⁸

Grant recipient name	
Address	
Contact name	
Email	
Telephone number	

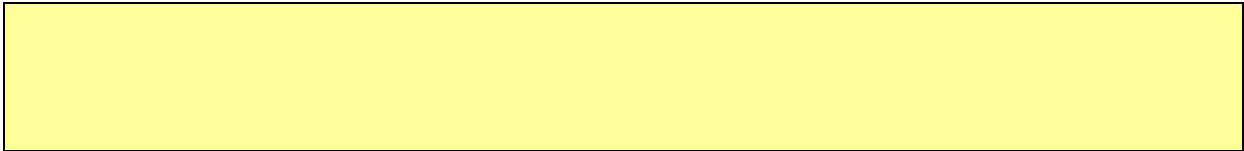
Project title	
Details of proposed contract	
Proposed contract value (ex VAT)	
Proposed contractor (if known)	

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>

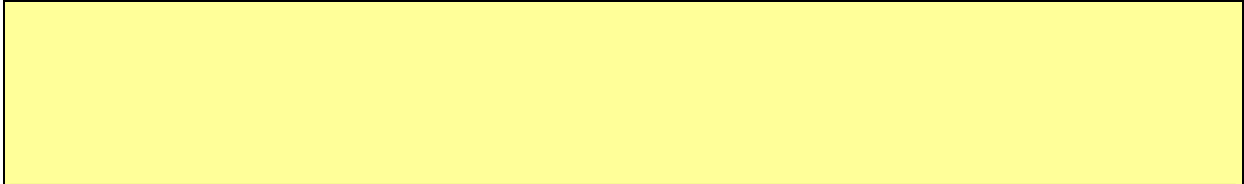
⁴⁸ Annexes 2 and 3 are available as separate Word documents on GOV.UK



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

ANNEX 4 – PREVIOUS OJEU THRESHOLDS

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

	SUPPLIES	SERVICES	WORKS
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](#)⁴⁹ 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 net of VAT but, where relevant, incorporating expected inflation;

⁴⁹ The audit services will take action where the aggregation rules are not applied or where contracts have been artificially divided to avoid the thresholds.

- 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 law⁵⁰. 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

⁵⁰ For example Teckal Srl v Commune di Viano C107/98; Commission v Germany C480/06
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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 candidates⁵¹.

⁵¹ Providing there are three viable candidates available.
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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 managed⁵².
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 criteria separate⁵³. Failure to do so, for example including assessments of qualitative criteria such as experience as part of the award criteria⁵⁴ 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?⁵⁵"; and
- 32.2 award criteria aim to establish "based on the proposal to deliver the contract which bidder is the best?⁵⁶"
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).

⁵² 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.

⁵³ Case 31/87, Gebroeders Beentjes v the Netherlands [1988] ECR 4635

⁵⁴ Lianakis & Ors [2008] EUECJ C-532/06 (24 January 2008)

⁵⁵ 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).

⁵⁶ Used to identify which tenderer is the most economically advantageous so as to determine to whom to award the contract

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 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 correction⁵⁷.
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:

⁵⁷ 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 Principles⁵⁸.

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 post⁵⁹.

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 rejected⁶⁰.

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

⁵⁸ 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)

⁵⁹ 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.

⁶⁰ 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 days⁶¹ 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.

⁶¹ From the date of the dispatch of the notice
National ESIF Procurement Requirements
ESIF-GN-1-001, Version 5
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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 which⁶²:
- 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.

⁶² 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.