

NCTM
Studio Legale Associato

PUBLIC PROCUREMENT

PUBLIC PROCUREMENT

- €18,000,000,000 to 20,000,000,000 spent by EU Institutions each year
- Another €53 billion on R&D (up to 2013)
- These monies are not subject to the EU procurement Directives
- Spent according to special procurement rules of the EU Institutions (mainly Commission):

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- The budget of the European Union is regulated by two principle instruments:
 - the 2002 Financial Regulation (FR) and;
 - the 2002 Implementing Regulation (IR).

- Both Regulations devote a single Title (V) to Procurement.

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- The Practical Guide to Contract Procedures for EU External Actions is commonly as PRAG.
 - External aid contracts financed from the EU General Budget and the
 - European Development Fund (EDF).

- The purpose of the rules set in the PRAG:
 - is to ensure that Union funds are for the implementation of the external aid projects
 - and that programmes are used exclusively and entirely for the purposes intended in the applicable agreements.

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➤ The FR sets the framework for:

- The scope of the procurement rules
- The rules on publication
- Procedures
- The exclusion data base (blacklist)
- Guarantees and supervision
- Applicability of the WTO Government Procurement rules.

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- FR Article 88 sets out some important criteria.
The public contracts must be:
- In writing
 - For payment of a pecuniary price
 - Their payment must come, in part, from the Union budget.

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- The payment from the Union budget criteria only applies when the contract is with a contracting authority within the meaning of FR Article 104:
 - The Commission on behalf of and for the account of one or more beneficiaries;
 - The beneficiary or beneficiaries;
 - A national or international public sector body or natural or legal persons who are beneficiaries of a grant for the implementation of an external action.

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➤ These contracts can be:

- Contracts for the purchase or rental of a building;
- Supply contracts;
- Works contracts;
- Service contracts;
- Framework contracts.

➤ External Procurement

- The procurement of services is limited to contracts for consultancy services (studies, technical assistance, etc) supporting the preparation and implementation of projects and programmes.

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- FR Article 89: Union procurement is subject to certain general principles of law including:
 - Transparency
 - Proportionality
 - Equal treatment
 - Non-discrimination.

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➤ The Union institutions have a duty to inform all applicants:

- Of the outcome of tender procedures based on the award criteria
- The reasons behind :
 - ✓ The award or;
 - ✓ The rejection.

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- FR Article 91 provides for different types of procurement procedures:
 - The open procedure;
 - The restricted procedure;
 - Contests;
 - The negotiated procedure;
 - The competitive dialogue.

- FR Article 92 sets out that the documents published must give a :
 - full,
 - clear and
 - precise description of the subject of the contract and
 - specify the exclusion, selection and award criteria applicable.

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- FR Article 97(2) provides that contracts shall be awarded on the basis of:
 - The automatic award procedure; or
 - The best-value-for-money procedure.

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➤ FR Articles 93, 96, sets out the criteria as to whom can participate in procurement procedures. Excluded persons include inter alia:

- Bankrupts
- Those convicted of professional misconduct
- Those who have not fully complied with social security obligations
- Or been convicted of fraud or corruption or criminal organizations.
- Those subject to a penalty
- Persons who are subject to a conflict of interest or have made misrepresentations.

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- FR Article 106 and 107 provide that tender procedures shall be:
- Open
 - On equal terms
 - To all natural and legal persons coming within the scope of the Treaties
 - To persons of third countries with which the Union has an agreement
 - To persons who have signed the WTO Government Procurement Agreement.

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➤ The Procurement Procedures

- Contract threshold values
- Value of the contract and methods of calculation
- Duration of the contract
- Calls for tenders
- Numbers of operators allowed to take part in procurement procedures
- Types of procurement procedures.

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➤ Publications and notices of public contracts

- Pre-information notice
- Contract notice
- Award notice.

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- PARTICIPATION IN EU TENDER PROCEDURES
 - Natural or legal person
 - Public entity
 - Consortium of such persons and/or bodies.

- RULES APPLICABLE TO EXTERNAL PROCUREMENT
 - **External procurement financed directly from the Union Budget**
 - ✓ All legal persons who are established in:
 - ❖ -A MS of the EU, a candidate country or a MS of the EEA.
 - ❖ -A developing country specified in the OECD Development Assistance Committee list
 - ❖ -Any other country where reciprocal access to their external assistance has been established.
 - ❖ -International Organizations

 - **External Procurement financed from the EDF**
 - ✓ All natural and legal persons from:
 - ❖ -Africa, Caribbean and Pacific (ACP)
 - ❖ -EU MS contributing to the EFF
 - ❖ -International Organizations

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- The invitation to tender needs to contain at least:
 - The invitation to tender or to negotiate or to take part in the competitive dialogue
 - The attached specifications
 - The model contract.

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➤ The criteria for evaluating tenders:

- Exclusion
- Selection
- Award criteria:
 - ✓ Automatic award procedure: The contract is awarded to the lowest bid which satisfies the conditions laid down.
 - ✓ Best value for money: The contract is awarded to the tender with the best price-quality ratio: price quoted, technical merit, aesthetic and functional characteristics and environmental characteristics.

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➤ CANCELLATION OF THE PROCEDURE

The contracting authority is not legally bound with regard to an economic operator until the contract is signed.

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➤ The submission and opening of tenders:

- By letter
- By electronic means
- Conditions:
 - ✓ All the information required for its evaluation;
 - ✓ The integrity of data is preserved;
 - ✓ Contracting authorities examine the content of tenders only after the time limit set for submitting them has expired.

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- Examination and evaluation of tenders:
 - The evaluation committee undertakes three tasks:
 - ✓ Determine if the tender meets the selection criteria
 - ✓ Determine how the tenders meet the award criteria.
 - ✓ Opening of the economic offer.

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- The notice to tenderers and the award of the contract
 - The authorizing officer must draw up the reasoned award decision.
 - The award of the contract must comply with the selection and award criteria originally stipulated as well the procurement rules.

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➤ Reasons for rejection of failed tenders

- The contracting authority must within 15 calendar days at most of receiving a **written request**, provide additional information about the reasons for rejections.

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➤ Bonds, securities and penalties

- IR Article 144 provides that the contracting authority may require a tender guarantee representing 1% to 2% of the total value of the contract.
- IR Article 134(b) provides that candidates or tenderers who have:
 - ✓ made false declarations,
 - ✓ have made substantial errors or committed irregularities or fraud or
 - ✓ have been found to be in serious breach of their contractual obligations,
 - ❖ may be excluded from all contracts and grants financed by the Union budget for a maximum of 5 years.
 - ❖ may be subject to financial penalties from between 2% and 10% of the estimated value of the contract being awarded.

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➤ The exclusion database (Blacklist)

- In application of FR Article 95 and IR Article 134(a) the Commission has established the Central Exclusion Database.
- Commission Regulation 1302/2008 of 17 December 2008 sets out the detailed functioning of the database.

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➤ The early warning system

- In December 2008 the College of Commissioners adopted a Decision on the Early Warning System (EWS):

“to ensure the circulation of restricted information concerning third parties who could represent a threat to the Communities’ financial interest and reputation...”

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➤ Remedies

- Administrative appeal to the contracting institution
- Access to documents
- Complaint to the Ombudsman
- Complaint to the European Parliament
- Action for annulment before the General Court
- Action for an injunction
- Action for damages.

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THANKS FOR YOUR ATTENTION

Bernard O'Connor