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Public Procurement

Below Threshold Contracts

CONTENTS

- Introduction
- Information on national procurement rules, policies and procedures
 - The regulation of below threshold contracts
 - Common procurement procedures
 - Rules for tender invitation and publication
 - Timescales
 - Qualitative selection
 - Complaints
- Impact of Treaty principles on below threshold procurements

Introduction

This Procurement Brief considers the procurement of below threshold contracts. In this context, “below threshold” means contracts for purchases by contracting authorities that are below the EU financial thresholds for works, supplies and services contracts. The EU financial thresholds for 2010-2011 are: EUR 4 845 000 for works contracts and Euro 125 000 for supplies and EUR 193 000 for services. For further information including an explanation of the two different thresholds for supplies and services, See *Procurement Brief 5 – Understanding the EU Financial Thresholds* for further information including an explanation of the two different thresholds for supplies and services.

Below threshold contracts comprise the vast majority of contracts awarded by contracting authorities and are therefore of great importance in all EU member states. They represent significant expenditure by contracting authorities and major business opportunities for economic operators, not least for small and medium enterprises (SMEs).

Below threshold contracts are not covered by the procedural requirements of the public sector procurement Directive 2004/18EC (“the Directive”). This means that the majority of contracts awarded by contracting authorities are awarded using national rules, policies and procedures. However a number of other important considerations do apply.

Procurement processes for below threshold contracts should:

- **Be efficient and effective** and therefore use processes, timescales and documents which reflect the needs and outcomes of the particular procurement
- **Be proportionate and avoid unnecessary bureaucracy** so as to avoid imposing over complex or disproportionate bureaucratic and administrative burdens or costs on the contracting authority or the economic operator relative to the size, value and complexity of the contract being procured.
- **Ensure appropriate competition** since open, fair competition should help to attract a broader range of potential bidders, including SMEs and start up companies which may be attracted to lower value contracts in particular.
- **Be transparent** since transparency of process assists open and fair competition and also assists in safeguarding against corruption and favouritism
- **Comply with Treaty rules and principles** and, where relevant to a particular

contract, comply with basic standards developed by the Court of Justice of the European Union (CJEU) - see Part C of this Brief for further information

- **Make the most efficient use of public money** ensuring the optimal allocation of resources to achieve the intended outcomes.

Reflecting their economic, social and administrative diversity, member states may balance these and other issues in deciding how best to regulate the award of below threshold contracts.

Part B of this Brief provides a very brief overview of the approaches member states have adopted in drawing up their national procurement rules, policies and procedures. The information is taken from SIGMA Paper No. 45 (2010) which analyses information received from 22 member states (for further information, please see the Paper).

Part C of this Brief concludes with further information on the way in which the Treaty rules and principles, basic standards, and some provisions of the Directive may impact on the procurement of below threshold contracts. These influences are to a certain extent often reflected in member states' own procurement rules, policies and procedures applying to below threshold contracts, for example by including reference to the need to comply with principles of equal treatment, non-discrimination and transparency.

Information on national procurement rules, policies and procedures (For in-depth information, see OECD/SIGMA Paper No. 45)

The regulation of below threshold contracts: It is common practice for member states to distinguish between above threshold and below threshold contracts and to treat them differently in terms of the procurement procedures that apply. The large majority of member states regulate below threshold procurements in the classic sector by law or regulation and require that the award of below threshold contracts be based on open, fair and competitive procedures. Only a very few member states govern the regulation of below threshold contracts by way of voluntary codes or guidance. Member states often use the same law or regulation to cover both contracts above and below

the threshold – although the actual rules which apply may differ.

National thresholds and common procurement procedures. Below threshold contracts are generally subject to simplified procedures and rules that are less rigorous than the full EU regime. It is also frequently the case that there are two or three additional value-related bands for contracts below the threshold, and in that case different procedural requirements and time limits apply to contracts in different bands. The purpose of the thresholds and related procedures is well described in Slovenia's answer to the questionnaire used for SIGMA Paper 45: "to frame award procedures to the subject matter of the contract and particularly the estimated value of the contract according to the principle of proportionality."

Direct purchasing, i.e. purchasing from an economic operator without a requirement for an advertisement or competitive process, is often permitted for very low value contracts. What constitutes a very low value contract varies between member states but the ceiling value for allowing this procedure to be used is commonly ranges between EUR 5 000 and 15 000. In other countries, a lower threshold may be more appropriate.

Other examples of simplified procedures include: (a) the requirement on contracting authorities to request quotations, offers or written tenders from a specified number of tenderers without prior publication of an advertisement – thus ensuring some level of competition; and (b) seeking two offers using an advertisement on a national portal but using a simplified procedure – so ensuring transparency and competition but using a process which is proportionate to the nature and value of the contract and avoiding an over bureaucratic approach.

The use of value-related bands and procedures for contracts below the threshold is best explained by using an example. In Romania:

- **Works, supply and service contracts up to a value of EUR 15 000** can be procured using direct purchasing.
- **Supply and service contracts up to EUR 125 000 and works contracts up to EUR 4 845 000** can be procured using simplified procedures (request for tenders), meaning for example, that:
 - The contract notice must be published on the central web portal (e-notice platform) - but in a simplified manner;
 - The time limit for submission of tenders is 10 days, which can be reduced to 6 by using an electronic submission -(much shorter periods than for over threshold procurements);
 - The standstill period is 6 days, rather than 11 days for over threshold procurements.
- **Supply and service contracts over 125 000 Euro** must be procured using EU procedures but with reduced timescales. So, for example, the time limit for an open procedure is 20 days (15 days for an electronic submission) rather than the EU time limit of 52 days (47 days for an electronic submission used).

Rules for tender invitation and publication: Publication of contract notices or advertisements for contract opportunities, whatever the value of the contract, can encourage competition, assist in obtaining value for money outcomes, and contributes to the transparency of the process. Publication of contract notices or advertisements for below threshold contracts is often required under national rules, policies and procedures. It is important that these requirements are proportionate to the nature and value of the contract but also that the notices reach their target audience.

Some member states require publication using the standard national online portals and/or electronic formats, which are used for contracts of all values. Other countries require that contracting authorities also advertise on their own websites or leave contracting authorities with more discretion to decide where to advertise. Publication in local or national newspapers may also be relevant but careful consideration should be given to whether such requirements are appropriate and proportionate in terms of administration and cost and whether they contribute to an overly bureaucratic approach.

See *Procurement Brief 17 – E-procurement* for further information on advertising and tender invitations using e-procurement methods and tools.

Timescales: Many member states choose to differentiate between above threshold and below threshold procurements. This differentiation often includes setting different timescales for procurement procedures for contracts of different values below threshold values. The shortening of time limits, both for submission of applications and submission of tenders, is a common simplification. When a minimum time limit is imposed, which is usually the case, the limit tends to range from 10 to 15 days for applications and from 10 to 25 days for submission of tenders. These time limits can often be shortened in the case of electronic submissions.

Qualitative selection: A number of member states apply essentially the same regulations on qualitative selection for both above and below threshold contracts. The main variation from the provisions of the above threshold regime concerns the provision of proof of qualification requirements, reflecting the need to ensure that the process followed is proportionate and not over-bureaucratic. So, for example, in some member states, economic operators may provide proof of qualification requirements through a declaration instead providing of specified documents. In some member states, and in order to reduce red tape, economic operators are not obliged to provide evidence for which public authorities hold data. It is up to the public authorities to obtain these data. See *Procurement Brief 7 – Selecting Economic Operators* for further information on the requirements applying to qualitative selection under the Directive.

Technical specifications: Nearly all the countries reviewed in SIGMA Paper 45 have the same technical specifications rules for above and below threshold contracts. The rules on technical specifications applying to above-threshold contracts are set out in the Directive and are aimed at ensuring that specifications are transparent and non-discriminatory.

Award criteria and tender evaluation: The choice of award criteria in the Directive is based on either the lowest price or the most economically advantageous tender. Most member states studied also allow for this choice for below threshold contracts. See *Procurement Brief 8 – Setting the Award Criteria* and *Procurement Brief 9 – Tender Evaluation and Contract Award* for further information on how these issues are dealt with for above threshold contracts.

Handling of complaints: The European Commission's view for below threshold contracts and other contracts not or not fully subject to the provisions of the Directive is that the remedies available must be not less efficient than those applying to similar claims based on domestic law, and must not make it impossible or excessively difficult to obtain judicial protection. In practice, the majority of countries studied adopt the same approach to remedies for both above and below threshold contracts. See *Procurement Brief 12 – Remedies* for further information

Impact of Treaty principles and other legal principles on below threshold procurements

Note: The following section provides a very short bullet point summary of the *Commission's Interpretative Communication (IC) on the Community Law Applicable to contracts not, or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)*. For more information, see the full IC.

Treaty Rules and Principles: Contracting authorities have to comply with the rules and principles of the EC Treaty (now the TFEU) whenever they conclude contracts falling under the scope of the Treaty. In the context of procurement, these rules and principles include:

- The free movement of goods
- The right of establishment
- The freedom to provide services
- Non-discrimination and equal treatment
- Transparency
- Proportionality
- Mutual recognition

Obligation of Transparency: The CJEU has held that principles of non-discrimination on the grounds of nationality and equal treatment imply an obligation of transparency.

Basic Standards: The ECJ has developed a set of basic standards for the award of public contracts which are derived directly from the rules and principles of the Treaty. According to CJEU case law the obligation of transparency “consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed”.

The IC points out that the basic standards only apply to contracts which are of relevance to the internal market and so of potential interest to economic operators located in other member states. See note in the box below.

If the contracting authority comes to the conclusion that the contract in question is relevant to the internal market, it is not required to comply with the Directive but it does have to award the contract in conformity with the basic standards.

Relevance to the EU internal market

The European Commission is of the view that it is the responsibility of the individual contracting authorities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States and that this decision has to be based on the individual circumstances of each case. The EC provides examples of the factors to be taken into account which could include the subject matter of the contract, its estimated value, the size and structure of the particular market, commercial practices and the geographic location of the place of performance.

Compliance with the basic standards: The European Commission in its IC identifies the basic standards under three headings: “advertising”, “contract award” (i.e. the impartiality of procedures relating to contract award) and “judicial protection”. It also sets out its view of what compliance with the basic standards means in practice as follows:

- **Obligation to ensure adequate advertising:** this requires a degree of advertising sufficient to enable the market to be opened up to competition, and ensures that an undertaking located in another member state has the appropriate information regarding the contract before it is awarded in order to be in a position to express its interest in obtaining that contract. The IC provides examples of adequate and commonly used means of publication.
- **Principles applying to contract award:** the award should be in line with the rules and principles of the Treaty so as to guarantee fair competition to all economic operators interested in the contract and impartial procedures for award. These include:
 - Non-discriminatory descriptions of the subject matter of the contract
 - Equal access for economic operators from all member states
 - Mutual recognition of diplomas, certificates and other evidence of formal qualifications
 - The use of appropriate time limits
 - The use of transparent and objective approach
- **Judicial protection:** There is also the requirement to ensure that impartial and effective review mechanisms of the procedure are available.

Comment

As is clear from Part B of this Brief, member states' rules, policies and procedures on the award of below threshold contracts generally aim to reflect these principles. It is worth noting that, in practice, many member states also have rules which effectively exclude very low value sub-threshold contracts from the obligation to advertise and run a full competitive process. This pragmatic solution acknowledges that the majority of very low value contracts are unlikely to be of relevance to the internal market and that there is a need to ensure that the process used to procure contracts is proportionate to the contract being procured.

Note on aggregation

Impact of the aggregation rules on below threshold contracts: A particular danger in relation to below threshold contracts comes from ignoring the operation of the aggregation rules. These rules, which are set out in the Directive, require, for example, that contracting authorities aggregate the value of separate contract lots for works or services to be awarded at the same time for a particular project. The value of each of the individual contracts may be less than the relevant EU financial threshold, but when added together the total value of these sub-threshold contracts may exceed the EU financial threshold. In such a case, the Directive will generally apply to the award of each of those sub-threshold contracts.

Similarly, where a contracting authority has a requirement for similar supplies to be awarded at the same time in a number of separate lots, the total value of all purchases must be aggregated in order to establish whether or not the purchases are over the EU financial threshold.

When a contracting authority has repeat or similar requirements, a practical way to ensure compliance with the Directive while minimising the administrative burden of procurement is to use central purchasing and/or framework agreements. See *Procurement Brief 19 – Framework Agreements* and *Procurement Brief 20 - Central Purchasing Bodies* for further information.

For further information on thresholds and the aggregation rules, see *Procurement Brief 5 – Understanding the EU Financial Thresholds*.

Further reading:

OECD SIGMA website: <http://www.sigmaweb.org>

for SIGMA Paper 45 (2010) Public Procurement in EU Member States - The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives

European Commission's website:

http://ec.europa.eu/internal_market/publicprocurement

for the European Commission's Interpretative Communication on the Community law applicable to contracts not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02)