



Public Procurement

Below-Threshold Contracts

CONTENTS

- [Introduction](#)
- [Information on national procurement rules, policies and procedures](#)
- [Impact of Treaty principles on below-threshold procurement](#)
- [Further information](#)

Authorised for publication by Karen Hill, Head of the SIGMA Programme

Introduction

This Brief considers the procurement of below-threshold contracts. In this context, “below-threshold” contracts are to be used for purchases by contracting authorities that are below the EU financial thresholds for works, supplies and services contracts. The EU financial thresholds for the period from 1 January 2016 to 31 December 2017 are EUR 5 225 000 for works, EUR 209 000 (sub-central government authorities) or EUR 135 000 (central government authorities) for supplies and services, and EUR 750 000 for light regime services. For further information, including an explanation of the different thresholds for supplies and services, see SIGMA Public Procurement Brief 5, *Understanding the EU Financial Thresholds*.

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

Below-threshold contracts are not covered by the procedural requirements of the Public Sector Directive (the Directive)¹. As a result, 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**, using processes, timescales and documents that reflect the needs and outcomes of the particular procurement.
- **Be proportionate and avoid unnecessary bureaucracy** so as to avoid imposing overly complex or disproportionate bureaucratic and administrative burdens or costs on the contracting authority or on the economic operator in relation to the size, value and complexity of the contract being procured.
- **Ensure appropriate competition**, as open, fair competition should help to attract a broader range of potential bidders, including SMEs and start-up companies that may be attracted to lower-value contracts in particular.
- **Be transparent**, since transparency of the process assists open and fair competition and also assists in safeguarding against corruption and favouritism.
- **Comply with Treaty² rules and principles** and, where relevant to a particular contract, comply with the basic standards developed by the Court of Justice of the European Union (CJEU).
- **Make the most efficient use of public money**, ensuring the optimal allocation of resources to achieve the intended outcomes.

As a reflection of their economic, social and administrative diversity, Member States may balance the above and other issues when deciding how best to regulate the award of below-threshold contracts.

This Brief provides a concise overview of the approaches that Member States have taken in drawing up their national procurement rules, policies and procedures. The information is taken from SIGMA Paper No. 45³, which analyses information received from 22 Member States.

¹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

² Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012. The Treaty is referred to in the Procurement Brief as “TFEU” or “Treaty”.

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 often reflected to a certain extent in Member States' own procurement rules, policies and procedures applying to below-threshold contracts, for example by including references 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 SIGMA Paper No. 45)

The information in this brief is taken from SIGMA Paper No. 45, which analyses information received from 22 Member States. The information reflects the position at the date of publication of the Paper (2010).

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 procurement in the classic sector by law or regulation and require that the award of below-threshold contracts is 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 contracts both above and below the thresholds, although the actual rules that apply may differ.

National thresholds and common procurement procedures: Below-threshold contracts are generally subject to simplified procedures and rules, which are less rigorous than the full EU regime. It is also frequently the case that two or three additional value-related bands for contracts are below the threshold, and in that case different procedural requirements and time limits apply to contracts in the different bands. The purpose of the thresholds and related procedures is well described in Slovenia's answer to the questionnaire used for SIGMA Paper No. 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. The definition of a very low-value contract varies between Member States, but the ceiling value for allowing this procedure to be used commonly ranges between EUR 5 000 and EUR 15 000. In other countries, a lower threshold may be more appropriate.

Other examples of simplified procedures include: (1) the requirement imposed on contracting authorities to request quotations, offers or written tenders from a specified number of tenderers without prior publication of an advertisement, thereby ensuring some level of competition; and (2) the search for two offers by publishing an advertisement on a national portal but using a simplified procedure, thereby ensuring transparency and competition – while using a process that is proportionate to the nature and value of the contract – and avoiding an overly bureaucratic approach.

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

³ SIGMA (2010), *Public Procurement in EU Member States – The Regulation of Contracts Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives*, SIGMA Paper No.45, OECD Publishing, Paris.

- Works, supplies and services contracts up to a value of EUR 15 000 can be procured by using direct purchasing.
- Supplies and services contracts up to EUR 125 000 and works contracts up to EUR 4 845 000 can be procured by using simplified procedures (request for tenders), which signifies, for example:
 - 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 days by using an electronic submission (much shorter periods than for over-threshold procurement).
 - The standstill period is 6 days, rather than 11 days for over-threshold procurement.
- Supplies and services contracts over EUR 125 000 must be procured using EU procedures, but with reduced timescales. 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).

Rules for tender invitation and publication: The 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 contribute to the transparency of the process. The publication of Contract Notices or advertisements for below-threshold contracts is often required by national rules, policies and procedures. It is important to ensure 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. Others require that contracting authorities also advertise on their own websites or leave contracting authorities 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 SIGMA Public 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 procurement. This differentiation often includes setting different timescales for procurement procedures concerning contracts of different below-threshold values. The shortening of time limits for the submission of both applications and 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 the submission of applications and from 10 to 25 days for the 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-threshold 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 overly bureaucratic. For example, in some Member States economic operators may provide proof of qualification requirements by means of a declaration instead of providing the specified documents. In some Member States, and in order to reduce red tape, economic operators are not obliged to provide evidence of data that public authorities

already hold. It is up to the public authorities to obtain this data. See SIGMA Public Procurement Brief 7, *Selecting Economic Operators*, for further information on the requirements applying to qualitative selection under the Directive.

Technical specifications: Nearly all of the countries reviewed in SIGMA Paper No. 45 (see footnote 3) have the same technical specification rules for above-threshold 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 with regard to below-threshold contracts. See SIGMA Public Procurement Brief 8, *Setting the Award Criteria*, and SIGMA Public Procurement Brief 9, *Tender Evaluation and Contract Award*, for further information on how these issues are dealt with for above-threshold contracts.

Complaints: The view of the European Commission for below-threshold contracts and other contracts that are not, or not fully, subject to the provisions of the Directive is that the remedies available must not be less efficient than those applying to similar claims based on domestic law, and these remedies 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-threshold and below-threshold contracts. For further information, see SIGMA Public Procurement Brief 12, *Remedies*.

Impact of Treaty principles and other legal principles on below-threshold procurement

Note: The following section provides a very short summary of the European 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 version of the IC.

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

- free movement of goods
- right of establishment
- freedom to provide services
- non-discrimination and equal treatment
- transparency
- proportionality
- mutual recognition.

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

Basic standards: The CJEU has developed a set of basic standards for the award of public contracts that are directly derived 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 that are of relevance to the internal market and thus of potential interest to economic operators located in other Member States. See the 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 authority 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 European Commission 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: In the IC, the European Commission identifies the basic standards under three headings: “advertising”, “contract award” (i.e. the impartiality of procedures relating to the contract award), and “judicial protection”. It also sets out its view as to the meaning of “compliance with the basic standards” in practice, as follows:

- **Obligation to ensure adequate advertising:** This obligation demands a degree of advertising that is sufficient to enable the market to be opened up to competition, and it ensures that an undertaking located in another Member State has received the appropriate information regarding the contract before it is awarded so that it is in a position to express its interest in obtaining that contract. Examples of adequate and commonly used means of publication are provided in the IC.
- **Principles applying to the 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 to ensure impartial procedures for the award. These principles 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
 - Use of appropriate time limits
 - Use of a transparent and objective approach
- **Judicial protection:** This requirement ensures that impartial and effective review mechanisms of the procedure are available.

Comment

The rules, policies and procedures of Member States on the award of below-threshold contracts generally aim to reflect the Treaty principles. It is worth noting that, in practice, many Member States also have rules that effectively exclude very low-value, sub-threshold contracts from the obligation to advertise and to go through 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 below-threshold contracts may exceed the EU financial threshold. In such cases, the Directive will generally apply to the award of each of those below-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 repeated 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 SIGMA Procurement Brief 19 - *Framework Agreements* and SIGMA Procurement Brief 20 - *Central Purchasing Bodies* for further information.

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

Further Information

Publications

SIGMA (2010), *Public Procurement in EU Member States – The Regulation of Contracts Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives*, SIGMA Paper No. 45, OECD Publishing, Paris, http://www.oecd-ilibrary.org/governance/public-procurement-in-eu-member-states_5km91p7s1mxv-en

Public Procurement Briefs

<http://www.sigmaxweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *Central Purchasing Bodies*, Brief 20, OECD Publishing, Paris

SIGMA (2016), *E-Procurement*, Brief 17, OECD Publishing, Paris

SIGMA (2016), *Framework Agreements*, Brief 19, OECD Publishing, Paris

SIGMA (2016), *Remedies*, Brief 12, OECD Publishing, Paris

SIGMA (2016), *Setting the Award Criteria*, Brief 8, OECD Publishing, Paris

SIGMA (2016), *Tender Evaluation and Contract Award*, Brief 9, OECD Publishing, Paris

SIGMA (2016), *Understanding the EU Financial Thresholds*, Brief 5, OECD Publishing, Paris

Other sources

European Commission (2006), 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), Brussels, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398246549340&uri=CELEX:52006XC0801%2801%29>