The state of implementing procurement procedures in EU Agencies: enhancing transparency and assessing flexibility

Introduction

Every year, public authorities in the EU spend around 14% of GDP (around EUR 2 trillion per year) on the purchase of services, works and supplies. High quality public services depend on modern, well-managed and efficient procurement. Improving public procurement can yield big savings: a 1% efficiency gain could save EUR 20 billion per year.

To create a level playing field for businesses across Europe, EU law sets out minimum harmonised public procurement rules. These rules govern the way public authorities and certain public utility operators purchase goods, works and services. They are transposed into national legislation and apply to tenders whose monetary value exceeds a certain amount. In cases where national rules apply, these also have to respect the general principles of EU law.

Regulations and rules applicable to the procurement procedures in EU decentralised agencies

EU directives, regulations and rules on public procurement cover tenders that are expected to be worth more than a given amount. The core principles are transparency, equal treatment, open competition, and sound procedural management. The rules and procedures are set out in Financial Regulation, delegated Framework Financial Regulation, and Financial Rules of the EU bodies.

Financial Regulation

The procurement rules are primarily defined by the Financial Regulation (2018/1046) (“FinReg”), in particular, its Title VII and Annex I.

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For the EU decentralised agencies, FinReg specifies a delegated act:

“Article 70

Bodies set up under the TFEU and the Euratom Treaty

1. The Commission is empowered to adopt delegated acts in accordance with Article 269 of this Regulation to supplement this Regulation with a framework financial regulation for bodies which are set up under the TFEU and the Euratom Treaty and which have legal personality and receive contributions charged to the budget.

2. The framework financial regulation shall be based on the principles and rules set out in this Regulation, taking into account the specificities of the bodies referred to in paragraph 1.

3. The financial rules of the bodies referred to in paragraph 1 shall not depart from the framework financial regulation except where their specific needs so require and subject to the Commission’s prior consent”.

Framework Financial Regulation

In line with the provision of Art 70 of the FinReg, provisions, the rules and procedures are further set out in a delegated act, Framework Financial Regulation (Com. delegated regulation EU 2019/715)\(^3\) (FFR).

On the basis of that, the Agencies adopt their Individual Financial Rules:

FFR, Article 1: “This Regulation lays down the essential financial rules for bodies which are set up by the Union under the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community and which have legal personality and receive contributions charged to the Union budget (‘Union bodies’).

On the basis of this Regulation each Union body is to adopt its own financial rules. The Union body’s financial rules shall not depart from this Regulation except where its specific needs so require and with the Commission’s prior consent.”.

The adopted Financial Rules are public (FFR Art 112 specifies that “… The Union body shall publish its financial rules on its website”).

Remedies directives and EU network of first instance review bodies

To address shortcomings in the procurement procedures, EU has put in place additional mechanisms like Remedies directives and a network of review bodies. The remedy directives ensure that EU companies have access to rapid and effective review. The EU network of review bodies helps guarantee the effective enforcement of public procurement rules at national level.

Remedies Directives

The Remedies Directives set minimum national review standards to ensure that rapid and effective means of redress are available in all EU countries when an economic operator that has an interest in a public

procurement procedure believes that it has been run without proper application of the EU Public Procurement Directives.


The Remedies Directives provide for a ten-day standstill period between the award and the signature of a public contract, and make it necessary to inform all tenderers about the outcome of tender procedures. These Directives also include provisions related to the granting of interim measures to correct alleged deviations or prevent further damages, the setting aside of decisions taken unlawfully, the award of damages, as well as time limits for pre-contractual remedies, sanctions for ‘ineffectiveness’, and the possibility to introduce alternative penalties via fines or the limitation of contract duration.

EU network of first instance review bodies

16 EU countries have set up specialised first instance public procurement review bodies (administrative and/or judicial). In the remaining countries, an existing judicial review body is responsible for the review of procurement procedures. Since March 2017, delegates from EU countries plus Norway and Switzerland meet twice a year to discuss follow-up actions to the 2017 evaluation (European Commission’s report of 24 January 2017).

Parliament’s comments and recommendation on procurement procedures in EU decentralised agencies

Building on the findings of the European Court of Auditors Specific annual reports on the EU decentralised agencies, Parliament has repeatedly drawn attention to the procurement related risks and issues in the EU decentralised agencies. The comments have been quite consistent in the three latest discharge procedures.

Discharge 2019

In its latest EU decentralised agencies discharge resolution4, Parliament pointed out that high risks usually derive from procurement and grant payments that involve large amounts (Par. 7), and noted the main areas of observation of the Court, where public procurement management remained the most error prone area (Par. 8). This concerned also human resources, where compliance issues were identified in procurement and in the signature of contracts and framework agreements with recruitment of interim workers (Par 52).

Parliament noted with concern that the Court made 82 observations addressing areas for improvement in 29 agencies, and most observations concerned shortcomings in public procurement procedures (Par 55). These shortcomings mostly concerned sound financial management and regularity. Parliament urged the agencies to implement recommendations and eliminate shortcomings, and reiterated its calls on the Commission to improve its efforts to implement clear and unified budgetary measures and procedures in agencies to tackle the identified issues recurring in a majority of the agencies.

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Parliament called on the affected Justice and Home Affairs agencies (Europol and CEPOL) to improve their public procurement procedures with a view to ensuring full compliance with the applicable rules, and called on eu-LISA to improve the recruitment procedure (Par 56).

Discharge 2018

Also in the previous agencies discharge procedure the Parliament noted the Court’s observation that the risk to sound financial management is medium and is identified mainly in the areas of information technology (IT) and public procurement (Par 7), regretted that IT and public procurement remain areas prone to error, and reiterated its call on the Commission to provide for additional training and exchange of good practices for Agencies’ procurement teams. Parliament also acknowledged that when using interinstitutional contracts, agencies remain responsible for the application of public procurement principles for their specific purchases, and that agencies’ internal controls must ensure they are respected (Par 55).

Discharge 2017

Also in the 2017 procedure the risk to sound financial management was mainly identified in the areas of information technology (IT) and public procurement (Par 7), and Parliament noted with concern that according to the Court’s report shortcomings persist in the management of procurements, with 14 agencies showing weaknesses in this area (Par 32), and considered the situation in EASO regarding procurement procedures to be unacceptable (Par 33).

Parliament welcomed the use of the Joint Procurement Portal, making communication among agencies regarding procurement services more transparent and easier to manage (Par 34), and shared the Court’s view regarding the use of similar tools and a single solution for the procurement (e-procurement) to achieve a more harmonised IT framework among agencies (Par 35). Parliament also regretted that the Financial Regulation did not foresee a reduction of the administrative burden that continues to be borne by the decentralised agencies (Par 46).

Procurement in performance audits – ECA Special Reports and Parliament’s observations

While the public procurement issues in EU decentralised agencies are regularly taken up in compliance audits (in particular, ECA Specific Annual reports on EU decentralised agencies), Special Reports (SR) auditing the performance of procurement procedures are less common. Recently two ECA SRs have looked into procurement issues.

ECA Special Report 17/2016 “The EU institutions can do more to facilitate access to their public procurement”.

Among other things, the SR found that the TED eTendering platform is only used on a voluntary basis. Using TED eTendering has been possible since April 2011 but it was not compulsory for the Commission’s directorates-general (DGs) and executive agencies, although DG Budget encourages them to use the system. The same holds for the European Parliament, where the aim is that all DGs use TED eTendering.

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7 https://www.eca.europa.eu/Lists/ECADocuments/5R15_17/5R_PROCUREMENT_EN.pdf
Annex I provided a list of all entities which had used TED eTendering by mid-April 2016. The limited number of EU bodies and agencies on the list confirmed the finding of the Court’s survey that about two thirds of them rarely or never used TED eTendering at the time.

Specifically on the agencies, the Court found that at the time almost half of the agencies surveyed either did not conduct or rarely conducted market consultation. Only three respondents made use of market consultation templates.

The Parliament followed this up in its resolution on the Court of Auditors’ special reports in the context of the 2015 Commission discharge 8, Parliament welcomed Court’s findings, and made a string of recommendations. First and foremost Parliament called for increased transparency of public procurement within Union institutions, as well as at national level, through public availability of documents and data on public procurement (Par 286), and strongly supported the recommendation of the Court for the Union institutions to create a common electronic one stop shop for their procurement activities (Par 287).

An earlier ECA Special Report (SR 10/2015) was entitled “Efforts to address problems with public procurement in EU cohesion expenditure should be intensified”9.

In it, the Court observed that systematic analysis of public procurement errors by the Commission and Member States is very limited, and the lack of sufficiently detailed, robust and coherent data on the nature and extent of public procurement errors has precluded a comprehensive analysis of the underlying causes. This report did not look into specific issues of procurement in the EU decentralised agencies.

In its resolution on the Court of Auditors’ special reports in the context of the 2014 Commission discharge10, Parliament among other things drew attention to the fact that the complexity of the legal and administrative public procurement framework was viewed as one of the causes of errors, and noted that 90 % of 69 audit authorities claimed that the level of complexity at that time was higher than it needed to be, and nearly 50 % pointed out that the main area for improvement in public procurement practices could be simplification of the procedures (Par 179).

The latest ECA SR on EU decentralised agencies “Future of EU agencies – Potential for more flexibility and cooperation”11 concentrates on other questions rather than procurement.

It could be conjectured that procurement-related issues have been seen as pertinent mainly to compliance audits and to a lesser degree to performance audits.

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For more information on EU public procurement and the role of Parliament, please, see EP Fact Sheet “Public procurement contracts”: