

Commonalities and specificities of the public procurement schemes

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List of abbreviations and terms

AREA	stands for AREA Science Park, head quartered in Trieste, Friuli Venezia Giulia region, Italy
CAP	is a short name of the Capenergies cluster, headquartered in Aix-en-Provence, PACA region, France
CIRCE	Stands for Centro de investigación de recursos y consumos energéticos, headquartered in Zaragoza, Aragón region, Spain
IAT	stands for Instituto Andalousian de Technologico, headquartered in Seville, Andalousia region, Spain
IJS	stands for Institute Josef Stephan, headquartered in Ljubljana, Ljubljana region, Slovenia
REA	stands for Regionalna Energija Agenci, headquartered in Rijeka, Kvarner region, Croatia
PACA	stands for Provence Alpes Côte d’Azur, the south-east region of France
SunLab	is the short name of the pilot action implemented in Italy, Friuli Venezia Giulia region, addressing <i>Solar Cooling technology Lab for building conditioning</i>
HVACLab	is the short name of the pilot action implemented in Spain, Andalousia region, addressing a <i>HVAC technology Lab for office buildings</i>
SmartEE	is the short name of the pilot action implemented in France, PACA region, demonstrating a <i>Smart interface to impulse behaviour changes favourable to Energy Efficiency</i>
InfraSun	is the short name of the pilot action implemented in Slovenia, Ljubljana region, approaching <i>Sun as an energy infrastructure</i>
Glassolating	is the short name of the pilot action implemented in Spain, Aragón region, dealing with <i>Phase Material Change technology in glass envelopes</i>
SunCool	is the short name of the pilot action implemented in Croatia, Kvarner region, addressing <i>Solar Cooling technology for a thermal comfort laboratory</i>
IPA	stands for Instrument for Pre-accession Assistance and designates States associated to programmes of the European Commission without being Members of the Union at the date of signature of the programme.

Executive summary and abstract

The analysis of the European Directive and national laws related to public procurement in the participating countries revealed that only the Josef Stefan Institute of Ljubljana is bound by law to publish an open tender. The other partners were allowed to go through a restricted or a competitive negotiation procedure, thanks to the higher threshold of budget above which an open tender is necessary.

Most of the countries have settled more constraining rules for public procurement than the minimum requirement of the European Directive 2004/18/EC, the main variant being about the threshold above which an open tendering procedure is compulsory.

1 Introduction

This Deliverable D4.2.1 aims at describing the public procurement scheme applicable to all the partners participating in the EMILIE project, in view of selecting the companies that will implement the pilot plants at the test sites. The 6 pilot plants are:

- SunLab in Italy, Venezia region, under the lead of AREA
- HVACLab in Spain, Andalusia region, under the lead of IAT
- SmartEE in France, PACA region, under the lead of Capenergies
- InfraSun in Slovenia, Ljubljana region, under the lead of IJS
- Glassolating in Spain, Aragon region, under the lead of CIRCE
- SunCool in Croatia, Kvarner region, under the lead of REA

The common basis of the tendering procedure makes reference to the Treaty of the European Union and to the European Directive 2004/18/EC related to public procurement. Yet, countries and regions applying some stricter rules within such a procedure further constrain the partners' obligations with regards to enforceable law. These specificities will be highlighted in a second section, so that comparison between the schemes applicable to each country can be pinpointed and discussed.

2 The common basis of the tendering procedures

Several layers of binding rules apply to all the participating partners in the EMILIE project. They are specified in the following documents, by decreasing authority level:

- The consolidated version of the treaty establishing the European Community,
- The European Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,
- Where applicable, the Commission Regulation 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid,
- The Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund
- The Council Decision 2006/702/EC of 6 October 2006 on Community strategic guidelines on cohesion, which includes the public procurement rules within the use of ERDF funds,
- The Implementation Guide of the European Territorial Cooperation Programme Med 2007-2013 (CCI 2007 CB 163 PO 045) established upon European Regional Development Fund (ERDF) of February 2011,
- Where applicable, the Commission Regulation (EU) No 80/2010 of 28 January 2010 amending Regulation (EC) No 718/2007 implementing Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA)
- For IPA partners, the European Commission's Practical Guide to contract procedures for EU external actions (PRAG).

2.1 Treaty establishing the European Community

The relevant Articles of the Treaty say:

PART ONE: PRINCIPLES

- **Article 2.** The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.
- **Article 3 - 1.** For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
 - (g) a system ensuring that competition in the internal market is not distorted;
 - (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;

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- **Article 4** - 1. For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.
- 3. These activities of the Member States and the Community shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

PART THREE: COMMUNITY POLICY

- **TITLE VI: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - CHAPTER 1: RULES ON COMPETITION - SECTION 2: AIDS GRANTED BY STATES -**
- Article 87** - 1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
- 2. The following shall be compatible with the common market:
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.
- 3. The following may be considered to be compatible with the common market:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
 - (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
 - (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;
 - (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.
- **Article 88** - 1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of

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the common market.

➤ **TITLE XVII: ECONOMIC AND SOCIAL COHESION -**

Article 158: In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.

➤ **Article 160:** The European Regional Development Fund is intended to help to redress the main regional imbalances in the Community through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions.

Basically, the Treaty settles the high level principles for a fair competition in the open market economy.

2.2 The European Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

The whole Directive 2004/18/EC is relevant to the procurement rules applicable to the partners. Yet, a particular emphasis should be put on:

- Title 1 – Article 2: Principles of awarding contracts
- Title 2 – Chapter 1. – Article 4: Economic operators, within the rules for public contracts
- Title 2 – Chapter 2. – Section 1: Thresholds – All articles
- Title 2 – Chapter 4. Specific rules governing specifications and contract documents – All articles
- Title 2 – Chapter 5. Procedures – All articles
- Title 2 – Chapter 6. Rules on advertising and transparency – All articles
- Title 2 – Chapter 7. Conduct of the procedure – All articles

The above listed articles establish the following main rules:

- ✓ Economic operators are treated equally and non-discriminatorily, in a transparent way.
- ✓ On an equal basis, natural and legal persons may tender within a public procurement. Yet, when specific professional qualifications and or insurances are required for purpose of the works or services to deliver, a restriction to legal persons may apply, provided it is mentioned in the tender documents.
- ✓ The Directive applies to public supply and service contracts amounting to more than, or equal to, 162.000 € VAT excluded in most cases (which is applicable to all Member States involved in the EMILIE project).
- ✓ The technical specifications shall contain all the required documentation to describe precisely the current status and express sound expectations.
- ✓ Technical specification shall take into account any potential end user (including accessibility for disable persons).
- ✓ Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

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- ✓ Technical specifications in terms of performance or functional requirements are accepted, provided that parameters are sufficiently precise to allow tenderers determining the subject-matter of the contract and to allow contracting authorities awarding the contract.
- ✓ It is the responsibility of the tenderer to prove that the supply or service meets the specified performances or applicable standards.
- ✓ It is the responsibility of the contractor, eventually under its national law, to require the indication of the subcontractors, if any. In any case the principal economic operator remains solely liable to the contract signed with the contractor.
- ✓ A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender, whichever the type of procedure (open, restricted, competitive dialogue, negotiated procedure) implemented to outreach tenderers.
- ✓ Publication of the call for tenders must be done either through the Commission service or by the contractor according to their buyer profile.
- ✓ All information and documents to be included in the tender notice are detailed in Annex VII-A of the Directive.
- ✓ In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent. In the case of restricted procedures, the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent. The time limit goes down to 37 days for the remaining possible procedures. When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days but under no circumstances to less than 22 days.
- ✓ Unavailable documents needed by a tenderer to apply must be provided by the contractor within 6 days from the request of the tenderer.
- ✓ In restricted procedures, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders.
- ✓ Contracting authorities shall, as soon as possible, inform candidates and tenderers of decisions reached concerning the award of the contract.
- ✓ On request from the party concerned, the contracting authority shall as quickly as possible inform:
 - any unsuccessful tenderer of the reasons for the rejection of his tender, including the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
 - any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.
- ✓ Contracts shall be awarded on the basis of the criteria laid down in the call for tenders. The contracting authorities may require candidates and tenderers to meet minimum capacity levels (selection thresholds).
- ✓ In restricted procedures, contracting authorities may limit the number of suitable candidates they will invite to tender, provided a sufficient number of suitable candidates is available, the minimum number being five. In the negotiated procedure with publication of a contract notice and the competitive dialogue procedure the minimum shall be three. In

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any event the number of candidates invited shall be sufficient to ensure genuine competition.

This extract should not prevent any interested partner from reading the complete Directive.

2.3 Commission Regulation related to De Minimis aid

In the framework of EMILIE, any entity registered with a private legal status subject to competitive economic activities is submitted to the standard de minimis thresholds of grant under the abovementioned regulation, which shall not exceed EUR 200 000 over any period of three fiscal years.

2.4 Community strategic guidelines related to the public procurement rules within the use of ERDF funds

These guidelines have been computed online at the following address:

http://europa.eu/legislation_summaries/internal_market/businesses/public_procurement/index_en.htm

They are fully in line with the general rules related to public procurement rules detailed in the Directive (§ 2.2). Yet, the thresholds giving the applicability of the guidelines are reduced. In the case of EMILIE project, the rules apply above 130.000 € of awarded contract VAT excluded.

2.5 MED programme restrictions

Here are highlighted only the procurement rules of the implementation guide of the MED programme that go beyond the basic requirements of the European Directive (§ 2.2).

Actually, it only refers to the European Treaty and the requirement for an equal treatment of tenderers, fair and transparent rules with regards to public procurement. It mentions explicitly that national laws apply when they are stricter than the Commission Regulation.

Yet, it specifies that, when public procurement by the IPA partner is necessary for the implementation of a project, relevant provisions of the PRAG should be respected. If national rules are stricter than PRAG guidelines, the stricter rules should apply.

2.6 Practical Guide to contract procedures for EU external actions (PRAG)

The PRAG document constitutes the legal contract linking the European Commission to the pre-accessing countries. It details the requirements for these countries to benefit from the financial support of the EC. Especially, obligations related to the public procurement procedure in the EU are replicated and applicable to IPA countries similarly.

- **Article 28:** Functions and responsibilities of the operating structure
1. For each IPA component or programme, an operating structure shall be established to deal with the management and implementation of assistance under the IPA Regulation. The operating structure shall be a body or a collection of bodies within the administration of the beneficiary country.

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2. The operating structure shall be responsible for managing and implementing the programme or programmes concerned in accordance with the principle of sound financial management. For those purposes, it shall carry out a number of functions that include:

(f) arranging for tendering procedures, grant award procedures, the ensuing contracting, and making payments to, and recovery from, the final beneficiary;

➤ **Article 121:** Procurement

1. For the award of service, supply and work contracts, the procurement procedures shall follow the provisions of Chapter 3 of Part 2, Title IV of Regulation (EC, Euratom) No 1605/2002 and Chapter 3 of Part 2, Title III of Regulation (EC, Euratom) No 2342/2002, as well as Commission Decision C (2006) 117 of 24 January 2006 on the rules and procedures applicable to service, supply and work contracts financed by the general budget of the European Communities for the purposes of cooperation with third countries.

Those provisions shall apply in the whole area of the crossborder programme, both on the Member States' and on the beneficiary countries' territory.

To summarize, the same rules as at EU level apply to IPA countries with regards to public procurement, with further restrictions related to the nuclear activities.

3 Specificities of the procurement schemes per country/region

3.1 In Italy

The Consorzio per l'AREA di Ricerca Scientifica e Tecnologica di Trieste is a national research body and it is submitted to the public procurement law in its purchasing processes on the basis of the Legislative Decree n.163 /2006, article 3, clause 25.

Provided that the total budget for SunLab supply and installation amounts to 85.000 € (VAT excluded), AREA has adopted the **negotiated process** for this public procurement (following art. 122, clause 7, legislative Decree D.Lgs 163/2006).

In the negotiated process at least 5 selected service providers must be invited (by certified e-mail or postal service) to present their best offer to provide services or selling products.

With the aim of ensuring transparency, the launch of the procedure has been published on the contracting authority website (http://www.area.trieste.it/opencms/opencms/area/it/opportunita/gare_appalto/index.html) without any obligation to make use of the Official Journal or other legal advertisement newspaper.

Because of the technical difficulty of SunLab pilot plant (that implies an integration on the existing solar thermal power plant) every enterprise wishing to participate to the tender must do a site inspection.

In this procedure, the cheapest economic offer wins the tender.

3.2 In Spain

IAT is a private non-profit association, directed by a board benefitting from public and private financial schemes. It employs directly all personnel and is subject to the taxation on added value (VAT). As such, IAT is not submitted to the public procurement law.

Since the affair submitted to tenderers within the HVACLab pilot action amounts to 45.000 € VAT excluded, IAT is bound according to article 191 of Law 3/2011, 14th November.

This law does not make compulsory a publication of the call for tender. A restricted consultation is allowed, but 3 offers at least must be received to validate that the call is truly competitive.

In the exceptional situation of less than 3 offers are collected after the open consultations, it may be accepted to select service providers on a peer to peer basis, provided that one supply evidences of a truly open competitive procedure requiring unique skills.

CIRCE is a private non-profit Foundation, founded by the Government of Aragon, the University of Zaragoza and some relevant companies within the Energy sector. It employs directly all personnel and is subject to the taxation on added value (VAT). As such, CIRCE is not submitted to the public procurement law. However, the infrastructures and buildings of CIRCE are owned by the University of Zaragoza, thus being properties under public ownership.

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The Glassolating pilot plant will, therefore, be installed within the University premises, and will be owned by this same entity. Summarizing in legal terms, the private entity CIRCE Foundation will undertake the procurement tasks for the pilot plant which will be owned and hosted by the public entity University of Zaragoza.

For private entities as the CIRCE Foundation, the Spanish law does not make compulsory a publication of the call for tender, or a request of any specific number of budgets or offers. However, due to the linkage with the University and aiming at enforcing the transparency of the process, CIRCE has voluntarily decided to behave as it was a public entity itself, thus adopting the rules for a public procurement process.

In this respect, the rule states that at least 3 competitive offers must be requested for every purchase over 3.000€ and under 18.000€. Since the Glassolating procurement needs adjust to this situation, at least 3 competitive offers will be required for every group of expenses:

- Infrastructures (Cubicles and PCM Windows)
- Installation and maintenance works
- Measuring and monitoring specific devices

In the exceptional situation of less than 3 competitive offers are received, due to the specificity of the requested product, or the lack of a sufficient number of suppliers on the market, a document stating so, duly signed by the Executive Director of CIRCE will be provided.

3.3 In France

Capenergies is a private non-profit association benefitting from public financial support and private co-financing from its members and sponsors. It employs directly some personnel and is subject to the taxation on added value (VAT). As such, in France, it is not submitted *stricto sensu* to the public procurement law, provided that the total budget of the subcontracted service amounts to less than 125.000 €, VAT excluded.

Since the affair submitted to tenderers within the SmartEE pilot action amounts to 65.000 € VAT excluded, Capenergies is bound by law to the Ordinance of the 06th of June 2005.

This ordinance makes compulsory a publication of the call for tender, without obligation to make use of the Official Journal or a legal advertisement newspaper. A restricted consultation is allowed, but 3 offers at least must be received to validate that the call is truly competitive.

In the exceptional situation of less than 3 offers are collected after the restricted consultation, it may be accepted to select service providers within a negotiated procedure in view of getting the lowest price.

3.4 In Slovenia

The Jožef Stefan Institute (JSI) is the leading Slovenian scientific research institute covering a broad spectrum of basic and applied research. It is a public research institute managed by director,

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managing board and scientific council. The JSI is financed through the national projects of the ministries of the Republic of Slovenia and the Slovenian Research Agency, international bilateral and multilateral projects and industrial projects in Slovenia and abroad. An important fraction of the JSI's revenues derive from international contracts.

The institute is obliged to take into consideration the following financial rules: the Accounting Act, the Public Finance Act; the Rules on the single chart of accounts for the budget, budget users and other public entities; the Rules on Drawing up Annual Reports for the Budget, Budget Spending Units and other Entities of Public Law; the Rules on the method and rates of depreciation of intangible fixed assets and tangible fixed assets; the Rules on breaking down and measuring revenues and expenses of legal entities under public and Slovenian Accounting Standards.

The public tenders are carried out on the basis of the Public Procurement Act (ZJN-2) (the Official Gazette of the Republic of Slovenia, Nos. 128/06, 16/08, 19/10, 18/11, 90/12 and 19/14). If the value of goods and services exceeds 20.000 €, it is compulsory that an invitation to tender is published on the Public Procurement Portal of the Republic of Slovenia <http://www.enarocanje.si>. The tender documentation shall be publicly available, for the IJS "InfraSUN" pilot plant it was published on the IJS website dedicated to the public tenders <http://www.ijs.si/ijsw/Objave>. In line with the Public Procurement Act, the contract is awarded to the most cost-effective bidder with regard to the realisation of the supply requirement expressed in the published public tender.

3.5 In Croatia

Regional Energy Agency Kvarner Ltd. has been established by the County of Primorje - Gorski Kotar as a non-profit public owned enterprise. It is subject to taxation on added value (VAT) and also, being a body governed by public law (legal entity established for specific purpose of meeting the needs of general interest), it is subject to public procurement act and regulations.

As IPA partner in MED programme, REA Kvarner is required to follow the rules of the European Commission's Practical Guide to contract procedures for EU external actions (PRAG). The time necessary to carry out the contract negotiation procedure depends on the procedure that is applied.

In the case of EMILIE pilot, due to the maximum tender value, the Competitive negotiated procedure will be applied, where 3 subjects will be contacted and asked for submitting their offer.

4 Comparison between schemes

The above section showed discrepancies between applicable laws for the different partners.

4.1 Differences arising from the organization statutes

The first difference comes from the legal statutes of the partners. Some of them are fully public bodies: AREA, IJS, REA, whereas the three others: Capenergies, CIRCE and IAT are submitted to the law applicable to private organizations making use of public funds for a small amount of money (< 130.000 € VAT excluded). The first three partners had to apply strictly the public procurement procedure under their respective national laws. The three others were subject to a lighter procedure, thanks to the limited budgets of the actions that remain under the thresholds leading to more constraining procedures.

4.2 Differences within the applicable public procurement laws

Within the various implementation procedures allowed by the public procurement procedures stated in the European Directive 2004/18/EC, the partners AREA and REA went through the Competitive negotiated process, taking advantage of the limited budget under the threshold of an open tender, whereas IJS applied the general Open public procurement procedure.

4.3 Differences within the simplified procedures for private bodies

The procedures applicable to Capenergies and IAT are very similar. Publication to an official journal is not compulsory. Yet, both should demonstrate a restricted consultation offering a real competition, as well as a fair and transparent selection process. The calls for tender were both published on the organizations' websites. Both entities received 3 offers at least, which avoided an extended negotiated procedure with a selection of potential candidates.