**Essential Update August 2019 – Focus on Procurement**

**Focus on Procurement**

There is an increasing focus on procurement by the A127 and A125 teams, while the sampling methodology remains random, should a line be picked that was procured, **a full suite of procurement documentation** will need to be provided as evidence.

Additionally the teams will need assurance the correct methodology was followed as set out in the [ESF procurement guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825719/ESIF-GN-1-001_ESIF_National_Procurement_Requirements_v6.pdf) depending on whether the organisation is a contracting authority or not.

The ESF procurement guidance is clear that ESF grant recipients (both leads and partners for BBO) prior to procurement must determine if the organisation is within the definition of a “contracting authority” [under Regulation 2(1) of the Public Contracts Regulations 2015](http://www.legislation.gov.uk/uksi/2015/102/regulation/2/made) or Regulation 3 of the [Public Contracts Regulations 2006](http://www.legislation.gov.uk/uksi/2006/5/pdfs/uksi_20060005_en.pdf). This status will determine the procurement methodology that needs to be followed depending on the value of the contract or contract extension and the financial corrections for failure to comply with requirements.

As the Fund is unable to provide procurement advice, **we recommend that organisations take legal advice to determine whether or not they would be considered a contracting authority**. This will help prevent potential financial corrections in the future.

You may be aware that the Managing Authority recently released an action note [‘039-19 Revised EU Procurement Requirements’](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825574/039-19_Revised_EU_Procurement_Requirements.pdf) this outlines changes made to financial corrections that can be levied for failure to comply with the [ESF procurement guidance](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825719/ESIF-GN-1-001_ESIF_National_Procurement_Requirements_v6.pdf). These corrections would be raised as a result of issues found by A125 and A127 checks. The changes to financial corrections are being cascaded down following a change in guidance by the European Commission.

**The following is taken verbatim from action note 039-19**:

***Purpose of the guidelines***

*The general purpose of the revised Commission Decision on financial corrections for Procurement breaches is two-fold:*

* *to increase****legal certainty****for the Member States.*

*It is important to clarify the circumstances under which breaches of applicable Union law on public procurement, or national law related to its application, can lead to financial corrections by the Commission.*

* *to ensure****proportionality****.*

*It is important that the Commission considers the nature and the gravity of the irregularity and the related financial implications for the budget of the Union when deciding on a financial correction.*

*The Commission Decision and annex outlining revised financial corrections can be found here:*

[*https://ec.europa.eu/regional\_policy/sources/docgener/informat/2014/GL\_corrections\_pp\_irregularities\_annex\_EN.pdf*](https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/GL_corrections_pp_irregularities_annex_EN.pdf)

*These guidelines will be used to determine the amount of the financial corrections to be applied to expenditure in cases of irregularities that constitute breaches of public procurement rules.*

*The revised EU guidelines will be applied to Irregularities detected in relation to public contracts and to contracting authorities as defined in the Directives and will be used in by the Managing Authority, the Audit Authority, DG Emploi Audit Service and the European Court of Auditors when carrying out Article 125, Article 127 and other audit activities.*

*Please note these revised corrections are in force from the****14th May 2019****and apply to****both contacting and non-contracting authorities.***

*The revised guidelines place greater emphasis on:*

* *Timescale for receipt of tenders or Expressions of Interest - if restricted to 5 days or less, 100% penalty applies.*
* *If the audit trail is insufficiently robust to demonstrate the fair award of the contract, 25% penalty applies.*
* *If a body letting a contract refuses to provide the relevant documentation to demonstrate a compliant audit trail, 100% penalty applies.*
* *Any increase in price exceeding 50% of the value of the original contract will attract a penalty 25% of the original contract plus 100% of the increase*

*The revised guidelines also reduce the level of penalty for some infringements including; not subdividing a contract into lots (5%); minor reductions in the regulatory timescales to receive tender documents (10%); lack of publication on OJEU of extended timescales for tenders as long as notice has been posted elsewhere (5%); use of criteria which limits competition i.e. trademarks, standards (10%).*

***Non-contracting authorities****e.g. (SMEs, other private sector organisations, third sector organisations, research organisations, and universities whose income is more than 50% private) should note that the revised guidance will apply. Particular attention is drawn to:*

* ***Advertising.****If a Non contracting authority does not advertise a contract opportunity with a value over £25,000 in an openly accessible manner (such as website advertisement) 100% correction applies*
* ***Direct awards to linked organisations****, i.e. conflict of interest with related parties, whether organisations, or individuals involved in the process (Guidance on Identifying, Managing and Monitoring Conflicts of Interest within ERDF and ESF ESIF-GN-1-027 refers). 100% penalty applies*
* ***Discriminatory tender conditions****which prevent competition.100% penalty.*
* ***Artificial splitting of contracts****to avoid advertising thresholds. 100% penalty.*
* ***Modification of contracts****i.e. if originally below an advertising threshold and extended to a value which would have required advertising penalty 25% of the original contract plus 100% of the increase*
* *Any****increase in price****exceeding 50% of the value of the original contract. 25% of the original contract + 100% of the increase applies*
* ***Non advertising extension of tender submission deadlines****10% penalty applies*

*The above is an indicative list only, for further information, please read the full EC guidelines and Commission Decision (see hyperlink at the start of this Action Note).*