

EU CC PUBLIC PROCUREMENT AUDIT 2018
SAIs PUBLIC PROCUREMENT AUDIT REPORTS (additional information)
Typical irregularities identified in public procurement audit

Hellenic Court of Audit, Greece

Main observations resulting from a priori, pre-contractual and a posteriori audits, in the area of public procurement, during the period 2010-2016, included in the respective Annual Reports of the HCA.

MANAGEMENT OF THE PROCUREMENT FUNCTION

- Outsourcing and public private partnerships adopted without prior and grounded studies about alternatives (namely in-house providing)
- Inappropriate division of risks in public private partnerships
- Procurements occasionally not complying with the applicable legislation
- Side contracts that change the balance of duties and obligations and financial equations of public contracts
- Contracts that are not executed according to their terms, including concrete works to be performed or quality of materials to be employed
- New contracts for services or works already included in other contracts
- Executed contracts and payments made without compliance with required authorisations, procurement procedures or seal approvals
- Splitting of needs and contracts to avoid procurement procedures or high level authorisations
- Programme contracts concealing unlawful subsidies
- Violation of the principle of economy, because of unnecessary outsourcing of services and unduly high prices

PREPARATION OF THE PROCUREMENT

- Lack of evidence that the European Union funding envisaged for the investment was secured
- Acquisition of services which, due to the absence of the necessary prior authorisation, led to the violation of the rules regarding budget allocation and coverage of expenditure, registry of commitments and control of available funds
- Inadequacy of the budget allocations with respect to the programmed payments of

the works

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- Lack of authorisation of multiannual financial commitment

 - Authorisation of expenditures by the non-competent authority

 - Lack of the required authorisations and justifications for the procurement

 - Lack of the required environmental studies and authorisations

 - In centralised purchasing, the authorisation for the framework of the procedure by the competent authority was not based on the estimate of the respective global value of the contracts

 - Illegal assignment of subrogation claims in a framework agreement

 - Lack of competence of the contracting authority

 - Lack or insufficiency of the design project of works
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PROCEDURE CHOSEN TO PROCURE

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- Award of contracts by direct awarding procedures or based on the "excluded contracts" regime without complying with the applicable legal requirements

 - Award of contracts by direct award procedure or direct invitations violating the principles of equality and competition stressed in the European and national Legislation

 - Programme-contracts concluded between municipalities and their local entities, without a previous tender procedure, violating the requirements set in the public procurement regime for 'excluded contracts'

 - Use of an urgent type public tender procedure for public works contracts where the alleged urgency was not grounded and/or where the very short deadline scheduled for submission of proposals was inadequate

 - Modifying the object and other key points of the contract, namely those related to the area of the concession of public services, the renewal period of the contract, the investment's plan and the sharing of risks and revenues, actually constituting conclusion of a new contract, without being subject to competition.

 - Erroneous legal classification of the contract's subject leading to the erroneous selection of the applicable award procedure

 - Violation of the principle of equal treatment and undistorted competition by a contract notice not defining quantitatively and qualitatively the purchase/provision of services option

 - Violation of publication requirements in case of unlawful posterior amendment of the initially fixed terms of the contract notice

 - Negotiated procedure without prior publication of contract notice non-justified by reasons of extreme urgency brought about by events unforeseeable by the contracting authority
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TENDER DOCUMENTS

- Insufficient definition of award criteria, where essential elements regarding their implementation were not included:
 - Absence of a formula for the evaluation of one of the factors of the award criteria
 - Absence of a scoring system for the evaluation of factors and sub-factors of the award criteria
 - Inappropriate evaluation model
 - Lack of explanation on elements of the evaluation model

- Definition of award criteria and evaluation models that:
 - Refer to qualities of competitors and not only to the attributes of the proposals
 - Include aspects of contracts not subject to competition
 - Hinder effective competition
 - Violate the principles of equality and fair competition

- Tendering documents providing that the abnormally low price threshold is also a criteria for exclusion of proposals, thus violating the abnormally low price regime set out in the public procurement legal framework

- Tendering documents providing the joint awarding of several lots to a same bidder, hindering the correct application of the award criteria

- Absence in the tendering notices and in the tendering documents of essential aspects of the contract, preventing a fair, transparent and competitive procurement

- Demanding excessive technical authorisations, licenses, certifications or proofs of financial capabilities to bidders and contractors

- Discriminatory technical specifications

- Failure to separately specify, in the contract notice, the value of the different kinds of products to be supplied

- Erroneous supply contracts award criterion based on the lowest price only when calculated on the discount rate on average daily price

AWARD PROCEDURES

- Illegal exclusion of bidders during the evaluation of their tenders, e.g. without reasoning on whether minor market regulations' infringements constitute grave professional misconduct, leading to a distortion of competition through reduction of the universe of possible awardees.

- Failure to submit the required qualification documents and illegal admittance of bidders lacking valid legal supporting documents required for the participation in the procedure

- Evidence of collusive practices by the intervention of the same person, individually and as a member of a consortium, in several bids to the same procurement procedure

- Evaluation of tenders using other than the exact evaluation criteria and model publicised

- Ungrounded award decisions for being based on insufficiently substantiated tender evaluation reports

- Award to bids that should have been excluded from the procurement due to incompliance with tender requirements, either because of failure to comply with requirements regarding tenderers or because the bids did not respect established requisites, such as maximum unit prices

- Award to more than one bidder against the rules of procedure

- Non submission of appropriate or sufficient financial guarantees to cover the risk of non-performance

- Failure by the successful bidder to prove the necessary technical skills needed for the implementation of the works

- Disregard of the rules preventing contracts with entities that do not fulfill their tax obligations

- Award procedure exceeding the time-limit set by the contract notice not justified in the public interest

- Unlawfully directly awarded contracts

- Delays in the award procedure that render unnecessary the supply contract

- Limiting access to award procedure by imposing rigorous requirements of financial standing

- Illegal award decision, for being vague on the awarded products and their value

- Violation of principles of equity and equal treatment during evaluation of bids

CONTRACTS

- Contracts with effects fixed from a date prior to the award, violating the legal regime applicable to public expenditure as well as fair competition in respect to contract preparation

- Contracts that do not include legally mandatory clauses

- Contractual clauses allowing unconditional renewal of contracts beyond the time period determined in the contract notice.

- Contractual clauses leading to the increase of the natural and economic subject of the contract defined in the contract notice

- Vague and unfair contractual clauses

- Contractual clauses contrary to the tender notice

- Contracts that do not specify the quantities of the purchased items

- Programme contracts not including necessary conditions, such as duration, timetable and financing modalities

MODIFICATIONS IN CONTRACTS, WORKS OR DELIVERIES

- Substantial changes introduced during the performance of contracts violating the principle of economy
- Additional works or services executed without any prior authorisation or decision
- Additional contracts for the provision of services and the execution of works already provided for in the tendering notice
- Additional works exceeding quantitative limits established by law
- Conclusion of an additional contract instead of launching a new award procedure
- Illegal conclusion of additional contract after expiration of the initial one
- Financial rebalance of contracts without complying with the legal requirements for that
- Additional works and services introduced although causes already existed before the contracts

Tribunal de Contas, Portugal

Main observations resulting from a priori, concomitant and a posteriori audits, in the area of public procurement, during the period 2011-2018

MANAGEMENT OF THE PROCUREMENT FUNCTION

- Outsourcing and public private partnerships adopted without prior and grounded studies about alternatives (namely in-house providing)
- Insufficient justification for investments and procurements, either for their need or for the concrete solution adopted
- Inappropriate division of risks in public private partnerships
- Inappropriate organisation and management or inappropriate controls in the procurement function
- Lack of project managers in big investment projects
- Procurements that sometimes don't comply with the applicable legislation
- Financial compensations with no justification or against legal prescriptions
- Public procurement of services where a staff contract should be adopted
- Inadmissible subsidies to investment through public procurement
- Lack of capability of the government officials to cope with the negotiation skills of private contractors, resulting in non-advantageous contracts for the public part
- Side contracts that change the balance of duties and obligations and financial equations of public contracts
- Insufficient control over performance and payments due

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- Contracts that are not executed according to their terms, including concrete works to be performed or quality of materials to be employed

 - New contracts for services or works already included in other contracts

 - Executed contracts not paid in due time due to insufficient funding or funding that was not made available

 - Payments made with no clear correspondence with executed services or works

 - Executed contracts and payments made without compliance with needed authorisations, procurement procedures or seal approvals

 - Splitting of needs and contracts to avoid procurement procedures or high level authorisations
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PREPARATION OF THE PROCUREMENT

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- Commitment to financial expenses without a planned or authorised budgetary allocation

 - Lack of evidence that the European Union funding envisaged for the investment was secured

 - Acquisition of services which, due to the absence of the necessary prior authorisation, led to the violation of the rules regarding budget allocation and coverage of expenditure, registry of commitments and control of available funds

 - Inadequacy between the budget allocations and the programmed payment of the works

 - Lack of authorisation for the assumption of financial expenditure in more than one financial year or in a future year

 - Authorisation of expenditures by the inadequate authority

 - Lack of the needed authorisations and justifications for the procurement

 - Lack of the needed environmental studies

 - Lack or insufficiency of implementation works' projects

 - In centralised purchasing, the authorisation for the framework of the procedure by the competent authority was not based on the estimate of the respective global value of the contracts

 - In centralised purchasing, the central purchasing bodies responsible for the reopening of competition under a framework agreement did not ensure that the entities targeted by the goods or services to be acquired fulfilled their legal obligations

 - In centralised purchasing, the framework agreements were not timely renegotiated, resulting in outdated market conditions
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PROCEDURE CHOSEN TO PROCURE

- Award of contracts by direct awarding procedures, or based on the "excluded contracts" regime without complying with the applicable legal requirements
- Award of contracts by direct award procedure or direct invitations violating the principles of equality and competition stressed in the European Treaties and the Portuguese Law and Constitution
- "Direct purchase" not complying with specific rules of any procurement procedure typified in the public procurement regime such as the direct award procedure
- Purchases conducted outside framework agreements that are mandatory for the public contracting entity
- Program-contracts concluded between municipalities and their local companies, without a previous tender procedure, violating the requirements set in the public procurement regime for 'excluded contracts', given the participation of private partners in the creation of the companies
- Leasing contracts concluded with financing bodies chosen without following the required selection procedure
- Use of an urgent type public tender procedure for public works contracts where the alleged urgency was not grounded and/or where the very short deadline scheduled for submission of proposals was inadequate
- Non substantiated or irregular decisions to launch institutional public-private partnerships or to acquire shares in societies due to the lack of prior cost-benefit analysis, to the use of illegal procedures or to inadmissible side contracts
- Changing the object and other key points of the contract, namely those related to the area of the concession of public services, the renewal period of the contract, the investment's plan and the sharing of risks and revenues, representing the conclusion of a new contract, without being submitted to competition.

TENDER DOCUMENTS

- Insufficient definition of award criteria, where essential elements regarding its implementation were not included:
 - Absence of a formula for the evaluation of one of the factors of the award criteria
 - Absence of a scoring system for the evaluation of factors and sub-factors of the award criteria
 - Inappropriate evaluation model
 - Lack of explanation on elements of the evaluation model
 - Use of binary classification scales based only on the tenders' compliance with the specifications or on its structure as a document, which are incompatible with a correct evaluation of bids, namely the need for prioritisation and

definition of degrees of appropriateness of the proposed solutions.

- Definition of award criteria and evaluation models that:
 - Refer to qualities of competitors and not only to the attributes of the proposals
 - Include aspects of contracts not subject to competition
 - Are based on formal circumstances, such as the "*proposal submitted earlier*"
 - Define inadmissible minimum limits of price
 - Hinder effective competition
 - Violate the principles of equality and competition

- Definition of evaluation models disregarding the different prices of bids and favouring higher prices, both discouraging competition in delivering better prices

- Tendering documents providing that the abnormally low price threshold is also a criteria for exclusion of proposals, thus violating the abnormally low price regime set out in the public procurement legal framework

- Tendering documents providing the joint awarding of several lots to a same bidder, hindering the correct application of the award criteria

- Absence in the tendering notices and in the tendering documents of essential aspects of the contract, preventing a fair, transparent and competitive procurement

- Demanding excessive technical authorisations, licenses, certifications or proofs of financial capabilities to bidders and contractors

- Demanding local experience, with discriminatory effects and limiting competition

- Discriminatory specifications in the projects

AWARD PROCEDURES

- Acceptance of tenders submitted after the established deadline.

- Illegal exclusion of bidders during the analysis of their tenders, reducing the universe of possible awardees

- Failure to submit the required qualification documents

- Evidence of collusive practices by the intervention of the same person in several bids to the same procurement procedure

- Evidence of tenders submitted by those who are in conflict of interest, in violation of the principles of fairness and competition

- Amendment of bids before the award, following negotiations that were inadmissible either by law or the settled rules of procedure

- Evaluation of tenders using other than the exact evaluation criteria and model publicised

- Ungrounded award decisions once based in tender evaluation reports that were not sufficiently substantiated

- Award to bids that should have been excluded from the procurement because of in compliance to tender requirements, either because failure to comply with requirements about tenderers or because the bids did not respect established requisites, such as maximum unit prices or risk matrixes in institutional public-

private partnerships

- Award to more than one bidder against the rules of procedure
 - Non submission of appropriate or enough financial guarantees to cover the risk of non-performance
 - Failure by the successful bidder to prove the necessary technical skills needed for the implementation of the works
 - Disregard of the rules preventing contracts with entities that do not fulfill their taxes obligations
 - Non notification to all bidders of the submission of qualification documents by the successful one
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CONTRACTS

- Contracts with effects fixed from a date prior to the award, violating the legal regime applicable to public expenditure as well as fair competition in respect to contract preparation
 - Contracts that do not include legally mandatory clauses
 - Renewable contracts with no indication of denouncing deadlines
 - Contractual clauses which, if accepted, would allow the *ad aeternum* renewal of contracts
 - Contractual clauses allowing the renewal of contracts beyond 3 years (typical maximum duration, according to law) without the demonstration of the need of such a duration
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MODIFICATIONS IN CONTRACTS, WORKS OR DELIVERIES

- Renewal of a contract with modification of its substantial aspects: in practice, a new contract was concluded without the due competitive procedure
 - Substantial changes introduced during the performance of contracts
 - Financial rebalance of contracts without complying with the legal requirements for that
 - Additional works or services executed without any prior authorisation or decision and that later are asked to be paid
 - Additional works introduced although causes already existed before the contracts
 - Payments to contractors in situations where they are responsible for project errors or project execution and should bear the respective risks
 - Acceptance of additional works proposed without a proper control of their need
 - Additional works exceeding quantitative limits established by law
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