EU public sector procurement Directive 2004/18/EC

Guideline for auditors

Appendices

June 2010

Disclaimer

This guideline – which is intended to serve general information purposes only – has been compiled with the greatest care. Under no circumstances will liability be accepted for damages of whatever nature, in any way resulting from the use of this guideline or resulting from or related to the use of information presented in or made available through this guideline.

The user is recommended to check periodically the websites mentioned in Appendix IX and of course to use the text of the most recent version of the Public Sector Directive 2004/18/EC.

EU public sector procurement Directive 2004/18/EC

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Appendices

Appendix I: Glossary of Terms

Award Criteria: criteria, set out in tender documentation, on which tenders will be evaluated and the award of the contract will be based, i.e. relating to how a tenderer addresses and proposes to perform or deliver the object of the contract and at what cost.

Buyer Profile: a dedicated online area containing procurement related information. The purpose of a Buyer Profile is to provide details about a contracting authority's procurement practices and intentions, so that potential suppliers will be better informed about the purchaser, and better able to judge whether they want to bid for a particular tender opportunity. A Buyer Profile includes copies of all notices required by the Directive, tender specifications and additional documents, future procurement requirements, the purchaser's procurement process and contact details. The Buyer Profile may also include scheduled purchases, contracts concluded, procedures cancelled and any other useful general information.

Contracting Authority: a Government department or office; local or regional authority; any public body, commercial or non commercial; a subsidiary or body established by a public body; any institution or entity funded largely from public funds.

Public Contract: a contract for the provision of works, supplies or services to a contracting authority. It includes all procurements, not just those which are undertaken on the basis of a full tendering process and formal signing of a contract.

Qualification Criteria: exhaustive criteria (set out in Articles 45 to 48 of Directive 2004/18/EC) to be used in pre-qualifying/pre-selecting candidates who are invited to submit tenders. The criteria relate to a candidate's professional conduct and standing, professional or technical expertise, financial or economic standing, general capacity and competency, i.e. criteria which relate to a candidate's character and capability to perform a particular contract. Proposals in relation to a particular project are not sought and are not a consideration at this stage.

Restricted Procedure: a procedure under EU procurement Directives whereby expressions of interest are invited through a notice in the OJEU (and other appropriate media) and only those who meet certain qualification criteria are issued with the full tender documentation and invited to submit tenders.

RFT (Request for Tenders): all the documentation related to the tendering process. It normally includes a general overview of the tender requirements, a detailed specification of requirements, the format and structure for submission of tenders, how tenders will be examined and the criteria on which they will be evaluated, and some general conditions of tendering. The RFT should normally include a set of conditions for a contract which will be concluded with the successful tenderer.

Segmentation: process by which the global value of a public contract is subdivided to prevent its coming within the scope of the Directive.

Appendix II: Main thresholds (exclusive of VAT) above which advertising of contracts in the Official Journal of the EU is obligatory, applicable from 1 January 2010 to 31 December 2011 ([1])

Works		
	€ 4,845,000	Threshold applies to Government departments and offices, local and regional authorities and other public bodies.
Supplies and Services		
	€ 193,000	Threshold applies to local and regional authorities and public bodies outside the utilities sector.
	€ 125,000	Threshold applies to Government departments and offices

(1) Thresholds are revised every two years and published in the OJEU.

Appendix III: Overview of priority and non-priority services

A. Priority Services (*i.e.* Services subject to the full scope of EU procurement Directives)

1. Maintenance and repair services
2. Land transport services, including armoured car services and courier services, except transport of mail and transport by rail
3. Air transport services of passengers and freight, except transport of mail
4. Transport of mail by land (except by rail) and by air
5. Telecommunications services
6. Financial services (a) Insurance services (b) Banking and investment services
7. Computer and related services
8. Certain Research and Development services
9. Accounting, auditing and book-keeping services
10. Market research and public opinion polling services
11. Management consultant services and related services
12. Architectural services: engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services
13. Advertising services
14. Building-cleaning services and property management services
15. Publishing and printing services on a fee or contract basis
16. Sewage and refuse disposal services sanitation and similar services

B. Non-Priority Services (*i.e.* Services not subject to the full scope of the EU procurement Directives: contracts must be awarded using non-restrictive technical specifications and EU Commission informed of award of contract if the value of the awarded service contract has reached the European threshold)

17. Hotel and restaurant services
18. Rail transport services
19. Water transport services
20. Supporting and auxiliary transport services
21. Legal services
22. Personnel placement and supply services (but not employment contracts)
23. Investigation and security services (except armoured car services)
24. Education and vocational education services
25. Health and social services
26. Recreational, cultural and sporting services
27. Other services

The user of this guide should of course be beware that also for these non-priority services the treaty principles such as non-discrimination, transparency, freedom of movement and freedom to provide goods and services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders. See section 9 of the guideline.

APPENDIX IV

GUIDANCE FOR AUDITORS ON:

a. **Contracts below threshold for application of the Public Procurement Directives, and**
b. **Contracts for Services listed in Annex IIB to Directive 2004/18/EC**

The following principles are to be observed in such circumstances:

- Non-discrimination on grounds on nationality and equal treatment
- Free movements of goods and prohibition of quantitative restrictions on imports and exports and measures having equivalent effect.
- Right of establishment also including activities as self employed persons
- Freedom to provide services
- Transparency and proportionality.

The auditor should aim to ensure that public procurement rules are complied with and that the principles of the Treaty have been respected. The audit should be carried out as soon as possible after the public procurement process has occurred. When a sample check method of audit is employed the intensity employed may vary according to the risks encountered eg. The value of the tender, type of contact, experience (or lack of it) of the contracting authority.

Checks recommended during the audit process:

Pre-tender stage, issue of documents (see section 14):

- Has there been sufficient advertising?
- Segmentation into smaller tenders is not permitted
- Has the correct tender procedure been used?
- No use of brand names or other references are to be used, as these favour or eliminate potential providers or services.
- Have principles being correctly announced?

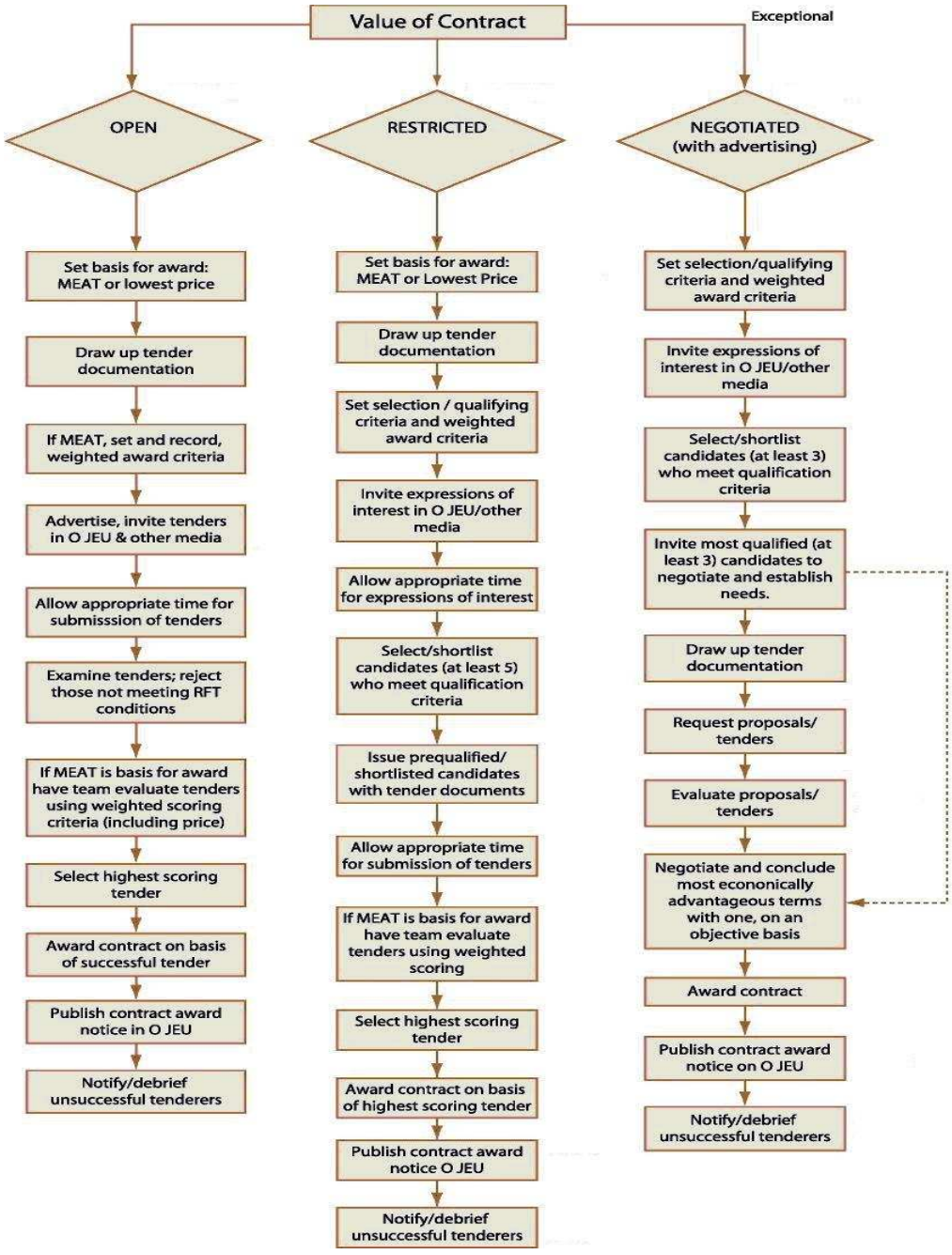
Evaluation stage (see section 17):

- Basis for ejecting applicants (unsuitability, financial soundness, technical capacity)
- Have principles been consistently applied?
- Have decisions been properly verified and documented?
- Has the specified time frame been observed?
- Have there been any complaints submitted by any of the renderers? Investigate.

Appendix V: Public Sector Timescales

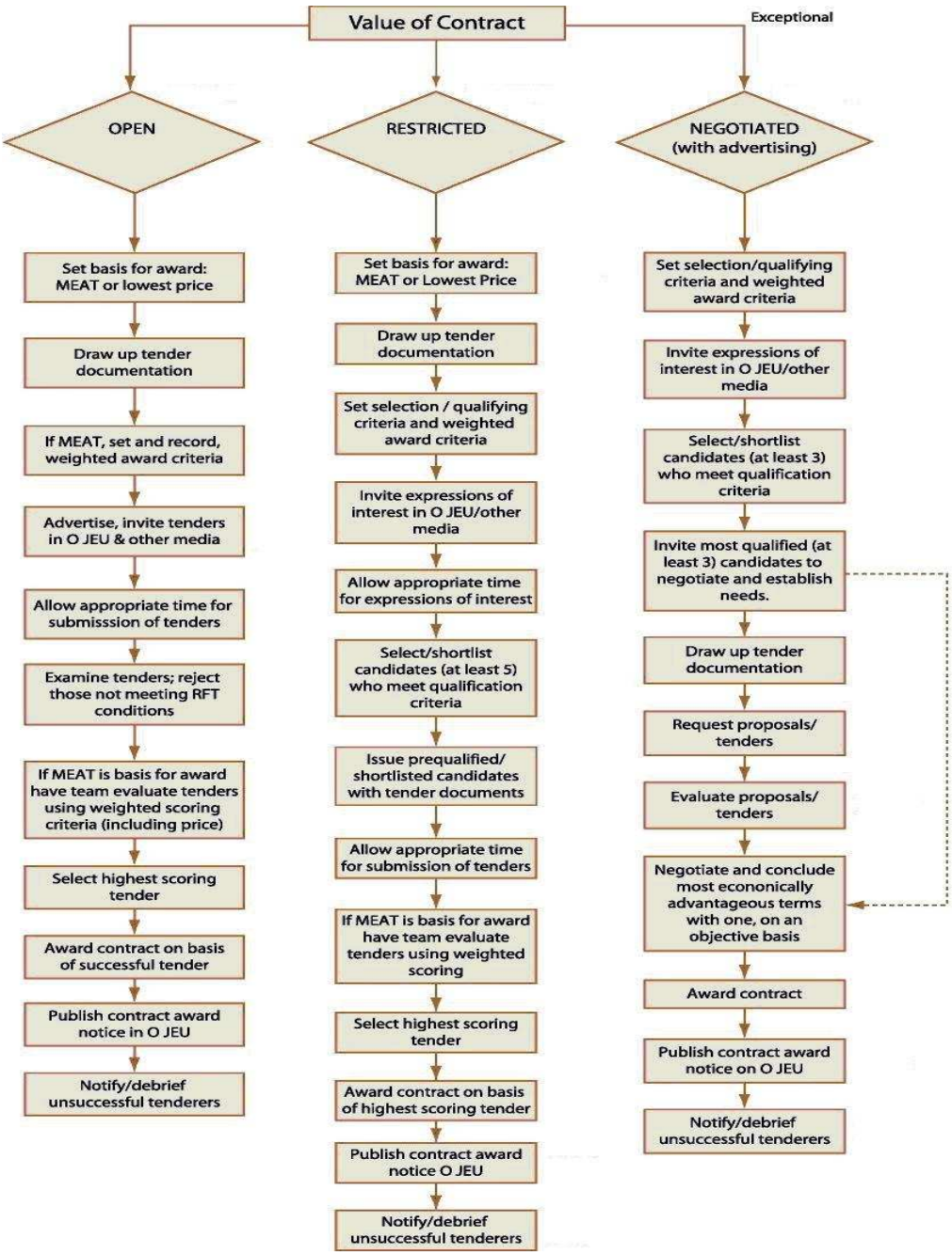
Procedure	Article	Text	Days
Open	38(2)	Minimum time for receipt of tenders from date contract notice sent	52
	38(4)	Reduced when PIN published (subject to restrictions) to, generally, – And no less than -	36 22
	38(5)	Electronics transmission reduces all the above by 7 days so 52 becomes – And 36/22 become -	45 29/22
	38(6)	Full electronic access to contract docs reduces 52 by 5 days so it becomes – This can also be added to the reduction for 52 days to 45 for electronic transmission so can become –	47 40
Restricted	38(3)(a)	Minimum time for receipt of requests to participate from the date contract notice sent	37
	38(5)	Electronic transmission reduces the 37 days by 7 days so becomes -	30
	38(3)(b)	Minimum time for receipt of tenders from the date invitation sent	40
	38(4)	Reduced when PIN published (subject to restrictions) to, generally, - And no less than -	36 22
	38(6)	Full electronic access to contract docs reduces 40 by 5 days so it becomes -	35

Appendix VI: Steps in conducting a Competitive Process for contracts above EU Thresholds (open, restricted and negotiated procedures) ([2])



[2] Source: Irish Departement of Finance, *Public Procurement Guidelines – Competitive Process*, 2004

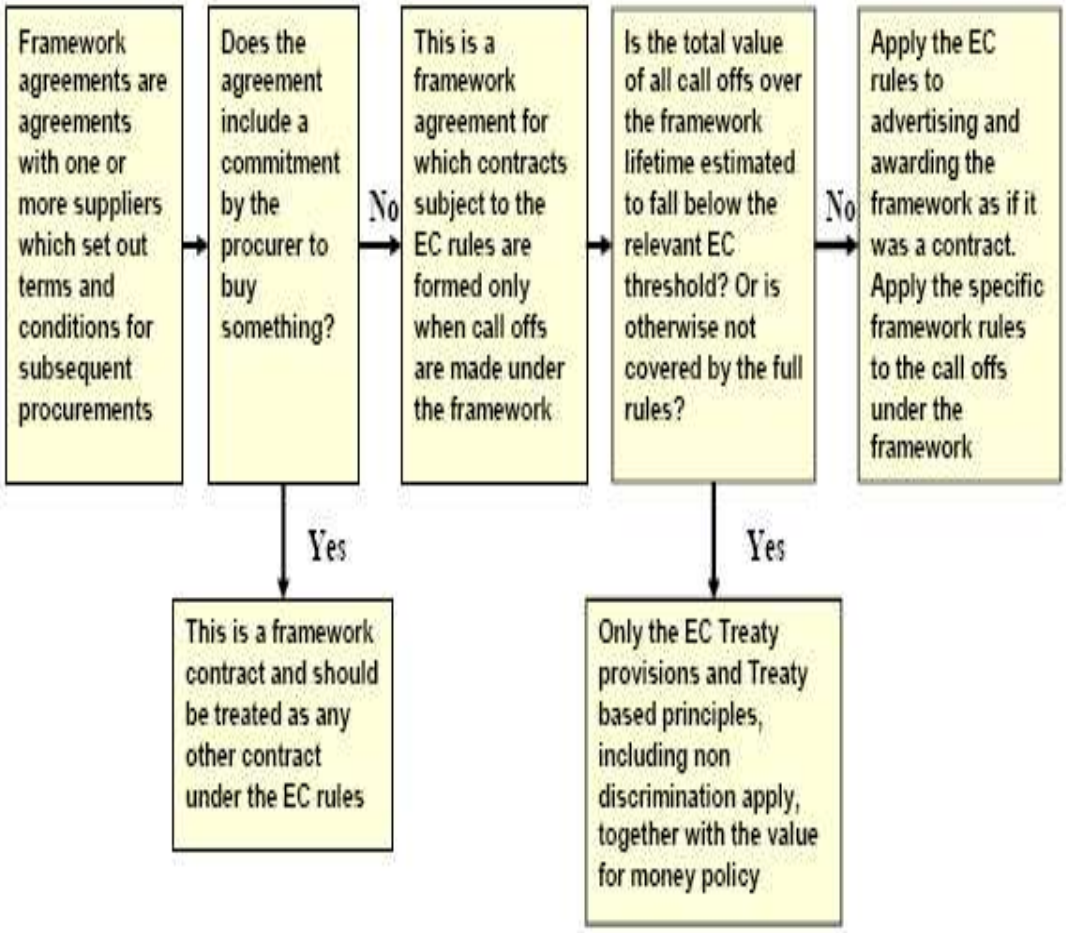
Appendix VII – 'Framework Agreements' and 'Framework call off stage'([3])



[3] Source: OGK (U.K.) publication: "*EC Public Procurement Directives*"

Article 32

Framework Agreements



Article 32

Framework Call Off Stage

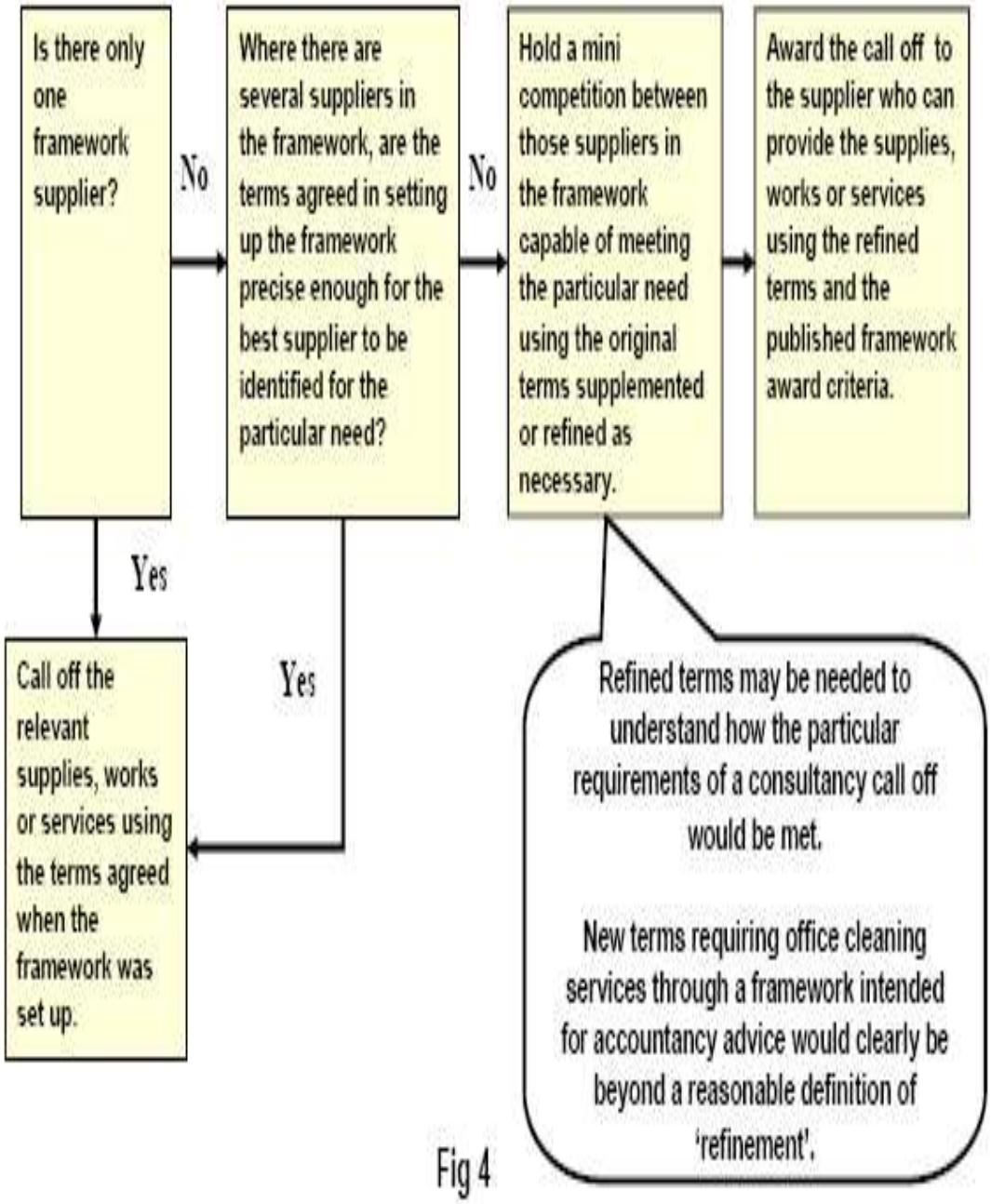
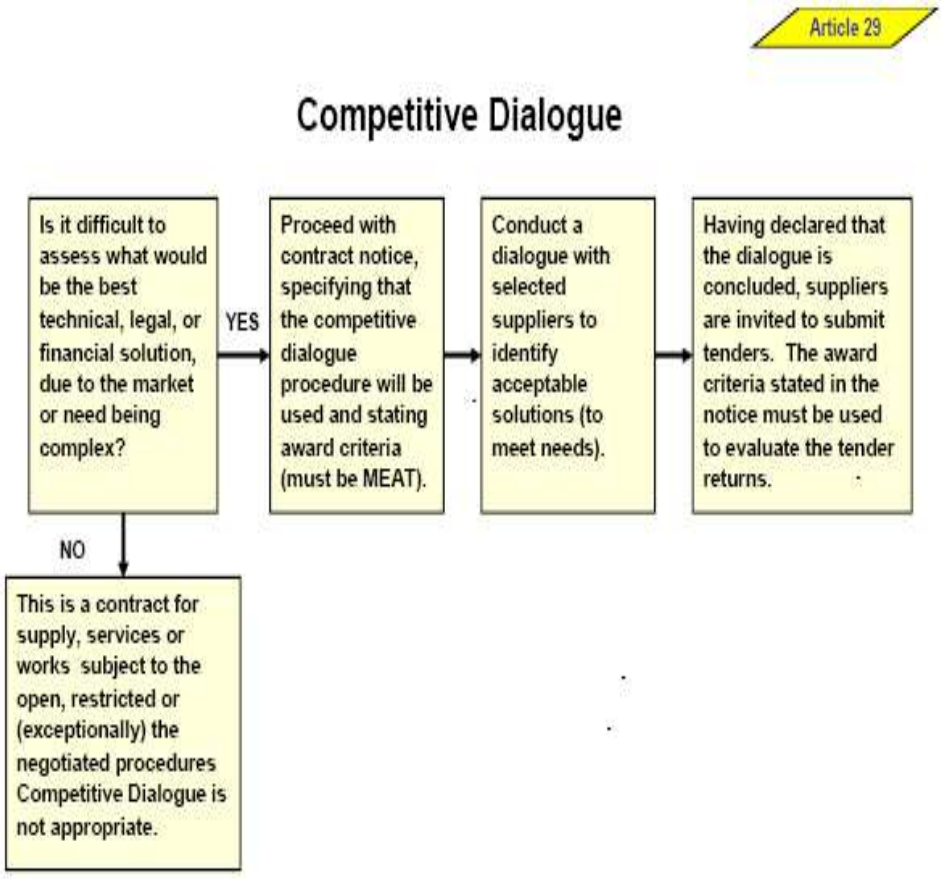


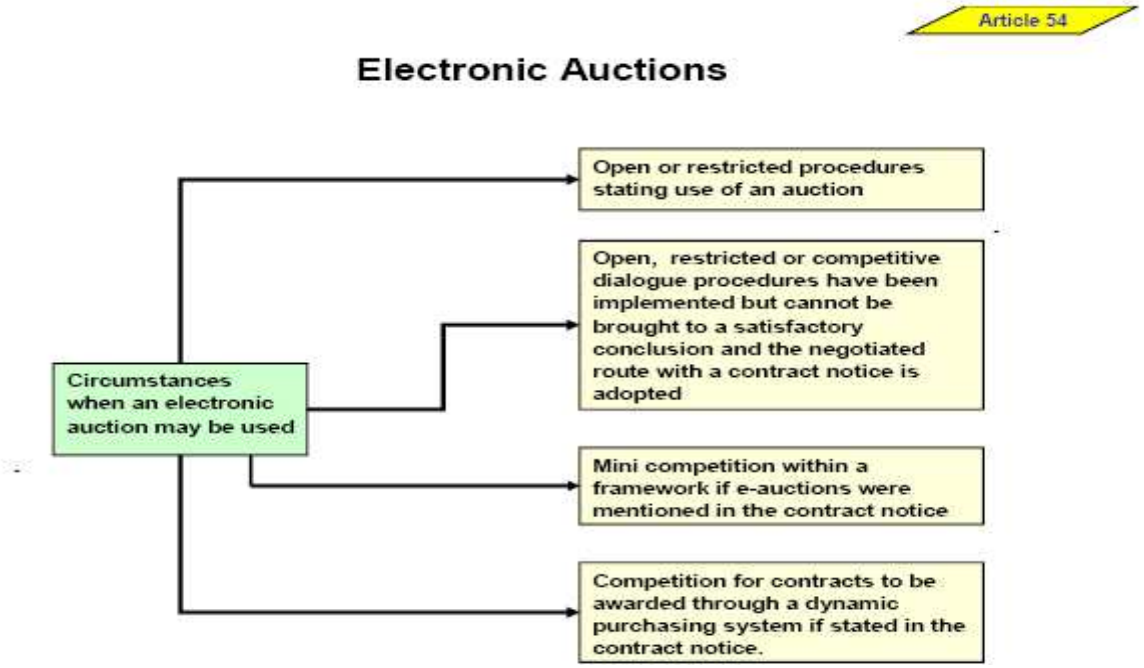
Fig 4

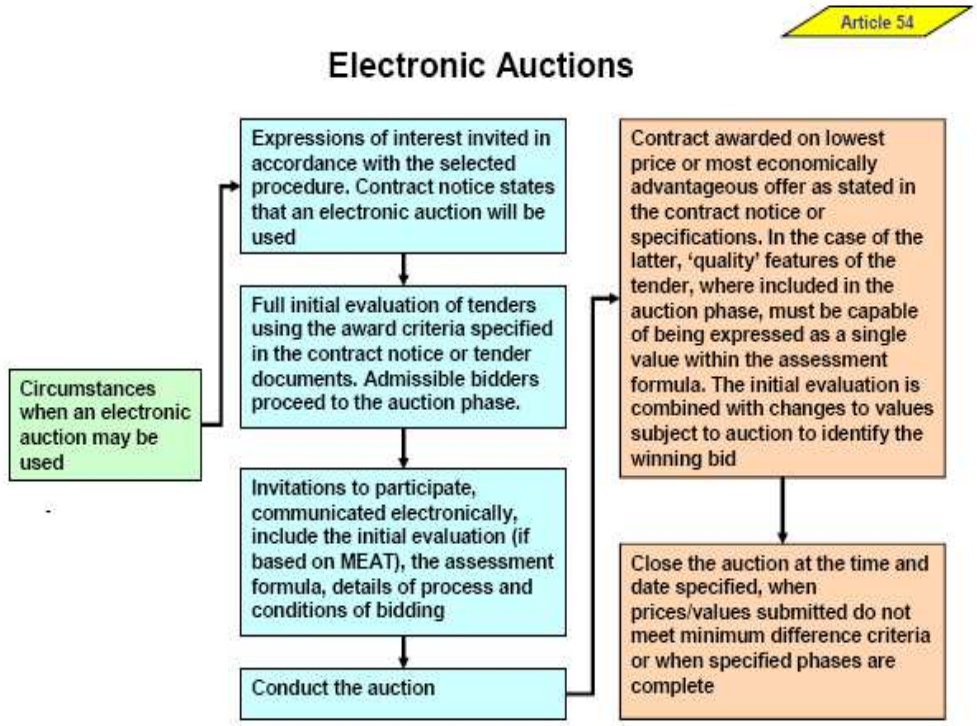
Appendix VIII – 'Competitive Dialogue Procedure" ([4])



[4] Source: OGK (U.K.) publication: "*EC Public Procurement Directives*"

Appendix IX – 'Electronic Auctions' ([5])

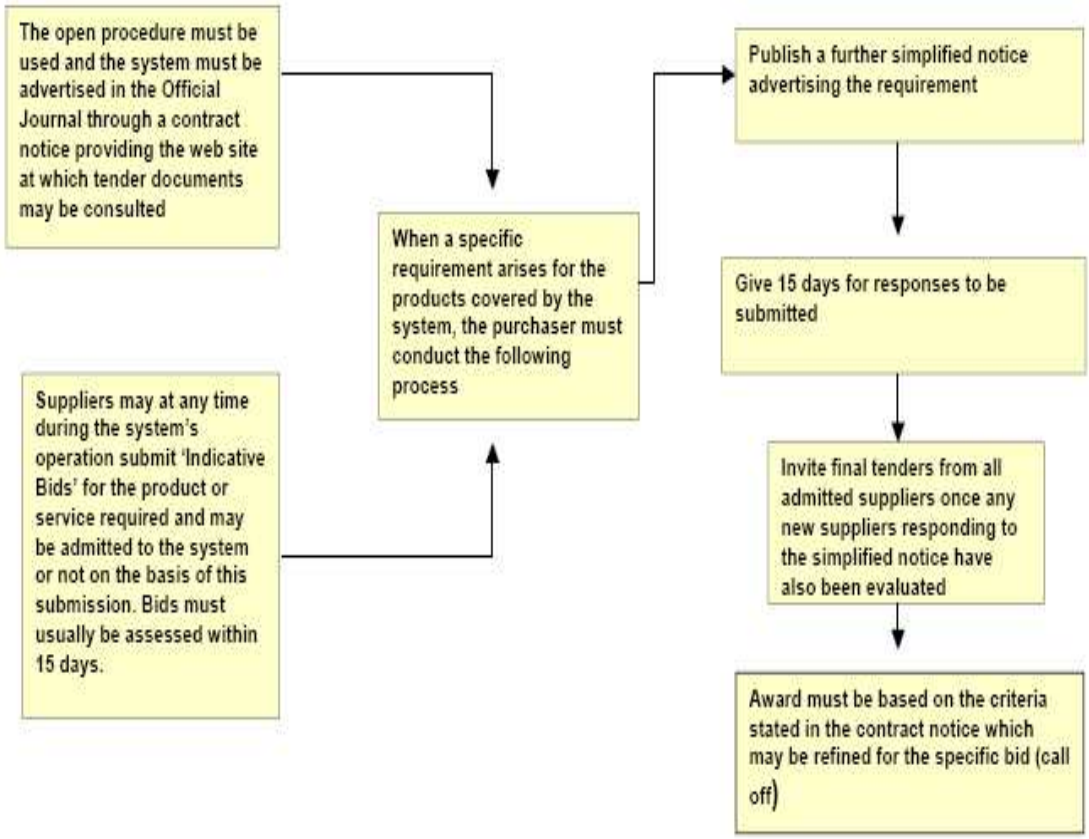




[5] Source: OGK (U.K.) publication: "EC Public Procurement Directives"

Appendix X – 'Dynamic Purchasing Systems'([6])

Article 33



6 Source: OGK (U.K.) publication: "*EC Public Procurement Directives*"

Appendix XI: Information Sources on Public Procurement

Guidelines and Directives

EU Directive 2004/18/EC covers the procurement of public sector bodies. Directive 2004/17/EC covers the procurement of entities operating in the utilities sector. These Directives were published in OJ No L 134 of 30 April 2004 and are available on http://eur-lex.europa.eu/en/index.htm

General information about public procurement can be found at the following website: http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

Official Journal of the EU

Online publication of notices is available on http:/simap.eu.int

Other relevant websites

- EU Public Procurement website : http://simap.europa.eu
- General EU website: http://europa.eu
- WTO site on the 1994 Government Procurement Agreement (GPA):http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm
- Court of Justice website: http://www.curia.europa.eu

Appendix XII: Case law of the European Court of Justice concerning public procurement (1982-2005)

Introduction

The Court of Justice has an important role in the European Union. According to the Treaty, it "shall ensure that in the interpretation and application of this Treaty the law is observed" (Article 19 TEU). The relevant judgments collected in this Appendix are thus an official interpretation of the EU procurement directive.

The analysis of the case law of the Court of Justice has been established - as far as possible - from the official Summaries of the Judgments published in the European Court Reports. Some relevant paragraphs of Judgments can also be found in the text.. The Summaries and Judgments are available on the website of the Court of Justice (http://curia.europa.eu/en/content/juris/index.htm) or on the portal "Eur-Lex" to European Union law (http://eur-lex.europa.eu/en/index.htm).

Reference to the factual context of each case has also be mentioned for a more "concrete" and "realistic" understanding of the rules provided by the EU procurement directive and their interpretation by the Court of Justice.

1. Judgment of 10 February 1982, case 76/81, Transporoute

- **Factual context** : see paragraphs 2 to 5 of the judgment.

- **Criteria for qualitative selection** - Proof of tenderer's good standing and qualifications - Requirement of an establishment permit not permissible [Directive 2004/18/EC, article 45 *et seq*.]

The EU procurement directive must be interpreted as precluding a Member State from requiring a tenderer in another Member State to furnish proof by any means, (for example by an establishment permit) other than those prescribed by that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualification.

- **Principle of non-discriminatory treatment** – Common market fundamental freedoms [Directive 2004/18/EC, article 2]

The aforementioned interpretation of the directive is also in conformity with the scheme of the treaty provisions concerning the provision of services, the purpose of those provisions being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

- **Principle of non-discriminatory treatment** [Directive 2004/18/EC, article 2]

The directive's rules regarding participation and advertising are intended to protect tenderers against arbitrariness on the part of the authority awarding contracts.

- **Award of contracts** - Abnormally low tender - Obligations of the authority awarding the contract [Directive 2004/18/EC, article 55]

When in the opinion of the authority awarding a contract a tenderer's offer is obviously abnormally low, the EU procurement directive requires the authority to seek from the tenderer, before coming to a decision as to the award of the contract , an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.

2. Judgment of 28 March 1985, case 274/83, Commission/Italy

- **Factual context** : see paragraphs 2 to 9 of the judgment.

- **Contract award criteria** - The most economically advantageous tender [Directive 2004/18/EC, article 54]

The award of a contract on the basis of the criterion of the most economically advantageous tender presupposes that the authority making the decision is able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and is not restricted solely to the quantitative criterion of the average price stated in the tenders.

3. Judgment of 10 March 1987, case 199/85, Commission/Italy

- **Factual context** : see paragraphs 1 to 9 of the judgment.

- **Contract award procedures** - Award by private contract - Derogations from the common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The derogations from the common rules must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation and in particular the award by private contract, lies on the person seeking to rely on those circumstances.

4. Judgment of 09 July 1987, joined cases 27-29/86, CEI and Bellini

- **Factual context** : see paragraphs 2 to 6 of the judgment.

- **Criteria for qualitative selection** - Economic and financial standing of tenderer - References required - Member States' discretion - Fixing of maximum value of the works which may be carried out at one time – Permissible [Directive 2004/18/EC, article 47]

The references enabling a contractor' s financial and economic standing to be determined are not exhaustively enumerated by the EU procurement legislation . A statement of the total value of the works awarded to a contractor may be required from tenderers as a reference and no provision precludes a Member State from fixing the value of the works which may be carried out at one time.

- **Criteria for qualitative selection** - Economic and financial standing of tenderer - Level required - Recognition in a Member State - Probative value in regard to an awarding authority in another Member State – Limits [Directive 2004/18/EC, article 47]

The EU procurement directive must be interpreted as not precluding an awarding authority from requiring a contractor recognized in another Member State to furnish proof that his undertaking has the financial and economic standing and technical capacity required by national law even when the contractor is recognized in the Member State in which he is established in a class equivalent to that required by the national law by virtue of the value of the contract to be awarded unless the classification of undertakings in both member states concerned is based on equivalent criteria in regard to the capacities required.

5. Judgment of 20 September 1988, case 31/87, Beentjes

- **Factual context** : see paragraphs 2 to 5 of the judgment.

- **Contracting authorities** - Contracts awarded by a body which falls within the notion of the State although it is not formally part of the State administration – Included [Directive 2004/18/EC, article 1(9)]

For the purposes of the EU procurement directive, the term "the State" must be interpreted in functional terms. A body whose composition and functions are laid down by national legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award must be regarded as falling within the notion of the State. The directive thus applies to public procurement contracts awarded by that body.

- **Criteria for qualitative selection** [Directive 2004/18/EC, article 44 *et seq.*]

The authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.

- **Criteria for qualitative selection** - Technical ability and knowledge of tenderers - Criteria for checking - Publicity requirements [Directive 2004/18/EC, article 48]

The criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors.

Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents.

- **Contract award criteria** - Most economically advantageous tender - Publicity requirements [Directive 2004/18/EC, article 54]

The criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice.

Where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents. A general reference to a provision of national legislation cannot satisfy the publicity requirement.

- **Conditions for performance of contracts** - Condition concerning employment of long-term unemployed persons - Principle of non-discriminatory treatment - Publicity requirements. [Directive 2004/18/EC, article 26]

The condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

6. Judgment of 22 September 1988, case 45/87, Commission/Ireland

- **Factual context** : see paragraphs 1 to 4 of the judgment.

- **Technical specifications** - Free movement of goods – Invitation to tender - Technical specification requiring the materials used to comply with a national standard - Not permissible [Directive 2004/18/EC, article 23]

Member States may not allow a public body for whose acts it is responsible to include in the contract specification for tender for a public works contract a clause stipulating that

the materials used must be certified as complying with a national technical standard. This may cause economic operators utilizing materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.

7. Judgment of 22 June 1989, case 103/88, Fratelli Costanzo

- **Factual context** : see paragraphs 2 to 13 of the judgment.

- **Award of contracts** - Abnormally low tenders - Automatic disqualification - Not permissible - Obligation to conduct an examination procedure - Tenders subject to examination. [Directive 2004/18/EC, article 55]

The EU procurement directive prohibits the Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. Member States may require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

8. Judgment of 5 December 1989, case 3/88, Commission/Italy

- **Factual context** : see paragraphs 1 to 4 of the judgment.

- **Principle of non-discriminatory treatment** - Equal treatment - Discrimination by reason of nationality - Prohibition - Covert discrimination – Included [Directive 2004/18/EC, article 2]

The principle of equal treatment, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

- **Activities connected with the exercise of official authority** - Contracts declared to be secret when their performance must be accompanied by special security measures - Derogations to the common market fundamental freedoms - Technical activities in the field of data processing carried out for the public authorities – Excluded [Directive 2004/18/EC, article 14]

The exception to freedom of establishment and freedom to provide services must be restricted to those of the activities which in themselves involve a direct and specific connection with the exercise of official authority.

That is not the case in respect of activities concerning the design, programming and operation of data-processing systems for the public authorities, since they are of a technical nature and thus unrelated to the exercise of official authority. It must be borne in

mind that the confidential nature of the data processed by the systems could be protected by a duty of secrecy, without there being any need to restrict freedom of establishment or freedom to provide services.

- **Contract award procedures** - Application of negotiated procedure without justification - National legislation giving companies controlled by the national public sector exclusive rights to supply goods in the field of data processing - Not permissible [Directive 2004/18/EC, article 31]

A Member State which provides that only companies in which all or a majority of the shares are either directly or indirectly in public or State ownership may conclude agreements for the development of data-processing systems for the public authorities thereby fails to fulfil its obligations

9. Judgment of 20 March 1990, case C-21/88, Du Pont de Nemours

- **Factual context** : see paragraphs 2 to 5 of the judgment.

- **Principle of non-discriminatory treatment** - Principle of freedom of movement of goods - Reservation of 30 % of public supply contracts to undertakings located in a particular region of the national territory - Not permissible - Measure benefiting only part of domestic production - No effect [Directive 2004/18/EC, article 2]

The principle of freedom of movement of goods precludes national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts.

Although the restrictive effects of a preferential system of that kind are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the relevant region and by products manufactured by undertakings established in the other Member States, the fact remains that all the products benefiting by the preferential system are domestic products. Moreover, the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some, cannot exempt the measure in question from the prohibition set out by the principle of freedom of movement of goods.

10. Judgment of 18 March 1992, case C-24/91, Commission/Spain

- **Factual context** : see paragraphs 1 to 8 of the judgment.
- **Contract award procedures -** Mandatory publication – Infringement - Application of negotiated procedure without justification - reasons of extreme urgency [Directive 2004/18/EC, article 31 and 35]

The EU procurement directive permits, in exceptional circumstances, derogations from the common rules, in particular those on advertising. That provision does not, however, apply if sufficient time is available to the authorities awarding contracts to organize an

accelerated award procedure such as that provided for in the directive.

11. Judgment of 3 June 1992, case C-360/89, Commission/Italy

- **Factual context** : see paragraphs 1 to 3 of the judgment.

- **Principle of non-discriminatory treatment** - Principle of equal treatment - Covert discrimination - Freedom to provide services - Award of public works contracts [Directive 2004/18/EC, article 2]

A Member State which reserves any public works to companies which have their registered offices in the region where the works are to be carried out and establishes a preference for temporary associations which include undertakings carrying on their main activity in that region is in breach of its obligations under the EC Treaty and the EU procurement directive.

- **Criteria for qualitative selection** - National rules favouring local undertakings – Prohibited [Directive 2004/18/EC, article 44 *et seq.*]

When a preference is to be accorded by a national legislation to temporary associations or consortia which include undertakings carrying on their main activity in the region where the works are to be carried out, such preference constitutes a criterion of selection which is not mentioned in the directive and, in particular, does not relate to any of the economic and technical standards provided for. Consequently, this national provision infringes the EU procurement Directive.

12. Judgment of 22 June 1993, case C-243/89, Commission/Denmark

- **Factual context** : see paragraphs 1 to 7 of the judgment.
- **Principle of non-discriminatory treatment** - Common market fundamental freedoms - Condition requiring the use to the greatest possible extent of national products and labour [Directive 2004/18/EC, article 2]

By letting tenders be invited, in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labour and equipment, a Member State fails to fulfil its obligations under the Treaty and the EU procurement directive.

- **Principle of equal treatment** [Directive 2004/18/EC, article 2]

The principle of equal treatment of tenderers lies at the very heart of the EU procurement directive whose purpose is to ensure in particular the development of effective competition in the field of public contracts

- **Contract award procedures** - Principle of equal treatment - Negotiations with a tenderer on the basis of a tender not complying with the tender conditions - Not permissible [Directive 2004/18/EC, article 2]

Observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

By letting negotiations be conducted with the selected tenderer on the basis of a tender not complying with the tender conditions, a Member State fails to fulfil its obligations under the Treaty and the EU procurement directive.

13. Judgment of 2 August 1993, case C-107/92, Commission/Italy

- **Factual context** : see paragraphs 1 to 10 of the judgment.

- **Contract award procedures -** Mandatory publication – Infringement - Application of negotiated procedure without justification - (no) reasons of extreme urgency [Directive 2004/18/EC, article 31, article 35]

The EU procurement directive allows, in exceptional circumstances, derogations from the general rules, in particular those concerning advertising. However, such derogations are not available if the authorities awarding contracts have sufficient time to arrange for an accelerated tendering procedure which is provided in the directive.

- **Contract award procedures -** Mandatory publication – Exemption – Conditions [Directive 2004/18/EC, articles 31 and 35]

The exemption from the obligation to publish a notice of a call for tenders, is available only if three conditions are fulfilled concurrently. It requires the existence of an unforeseeable event, extreme urgency rendering the observance of time-limits laid down by other procedures impossible and, finally, a casual link between the unforeseeable event and the extreme urgency resulting therefrom.

14. Judgment of 14 April 1994, case C-389/92, Ballast Nedam Groep I

- **Factual context** : see paragraphs 2 to 5 of the judgment.

- **Criteria for qualitative selection** - Registration of contractors - Suitability to pursue the professional activity - Relevant entity - Application by a holding company not itself carrying out the works but availing itself, for the purpose of proving its standing and competence, of references relating to its subsidiaries - Whether permissible – Conditions [Directive 2004/18/EC, article 44 *et seq*.]

The EU procurement directive must be interpreted as meaning that they permit, for the purposes of the assessment of the criteria to be satisfied by a contractor when an appli-

cation for registration by the dominant legal person of a group is being examined, account to be taken of companies belonging to that group, provided that the legal person in question establishes that it actually has available the resources of those companies which are necessary for carrying out the works.

15. Judgment of 19 April 1994, case C-331/92, Gestión Hotelera Internacional

- **Factual context** : see paragraphs 2 to 10 of the judgment.

- **Scope of the EU procurement directive** - Mixed contract relating both to the performance of works and to the assignment of property - Performance of the works incidental to the assignment of property - Exclusion [Directive 2004/18/EC, article 1 (2) by analogy]

A mixed contract relating both to the performance of works and to the assignment of property should not be considered as works if the performance of the works is merely incidental to the assignment of property.

16. Judgment of 26 April 1994, case C-272/91, Commission/Italy

- **Factual context** : see paragraphs 1 and 2 of the judgment.

- **Contract award procedures** - Common market fundamental freedoms - Invitation to tender restricting the right to tender for the concession of the lottery computerization system to bodies controlled by the public sector - Contract not relating to activities connected with the exercise of official authority [Directive 2004/18/EC, article 2]

The provisions of the Treaty on the common market fundamental freedoms and the EU procurement directive are infringed where a Member State restricts participation in a contract for the concession of the lottery computerization system to bodies the majority of whose capital is held by the public sector.

The contract, which relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery. The derogation to the fundamental freedoms regarding activities connected with the exercise of official authority does therefore not apply.

17. Judgment of 3 May 1994, case C-328/92, Commission/Spain

- **Factual context** : see paragraphs 1 to 7 of the judgment.

- **Contract award procedures** - Pharmaceutical products and specialities - Application of negotiated procedure without justification - (no) reasons of extreme urgency -

Derogations from common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The derogations from the common rules must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances. They cannot in any way justify general and indiscriminate recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to social security institutions.

If a derogation is to apply, it is not sufficient for the pharmaceutical products and specialities to be protected by exclusive rights; they must also be capable of being manufactured or delivered only by a particular supplier, a requirement which is satisfied only with respect to those products and specialities for which there is no competition in the market.

With regard to the derogation on the grounds of urgency although, having regard to the freedom of doctors to prescribe pharmaceutical products, an urgent need for a particular pharmaceutical speciality may well arise in a hospital pharmacy, that cannot justify systematic recourse to the single-tender procedure for all supplies of pharmaceutical products and specialities to hospitals. In any event, even if the requirement of urgency were considered to have been satisfied in a particular case, the derogation provided for by that provision may be relied on only if all the conditions it lays down are satisfied cumulatively.

18. Judgment of 24 January 1995, case C-359/93, Commission /Netherlands

- **Factual context** : see paragraphs 1 to 9 of the judgment.

- **Contract award procedures** – Tender notices - Information which must be given in tender notices - Information concerning the opening of tenders - Technical specifications - Use of technical specifications defined by reference to a trade mark – Condition [Directive 2004/18/EC, article 23]

A Member State fails to fulfil its obligations under the EU procurement directive where it:

1. fails to indicate in a tender notice the persons authorized to be present at the opening of tenders or the date, time and place of opening, when that information is compulsorily and unconditionally required by the directive in order to enable potential suppliers to discover the identity of their competitors and to check whether they meet the criteria laid down for qualitative selection;
2. and fails in such notice to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark, when the directive requires them to be added and when failure to do so may impede the flow of imports in intra-Community trade, contrary to the Treaty.

19. Judgment of 28 March 1996, case C-318/94, Commission/Germany

- **Factual context** : see paragraphs 1 to 9 of the judgment.

- **Contract award procedures** - Application of negotiated procedure without justification - (no) reasons of extreme urgency - Refusal by a body within a Member State, during the procedure provided for under national legislation, to give its approval for a public works project - Refusal not an unforeseeable event within the meaning of the directive [Directive 2004/18/EC, article 31]

The fact that a body in a Member State which must, in the procedure for approval of public works projects provided for under national legislation, approve a project may, before expiry of the period laid down for that purpose, raise objections for reasons which it is entitled to put forward cannot constitute an unforeseeable event.

A Member State whose competent authorities, after deciding not to award a public works contract by open procedure by reason of the delay resulting from the refusal by a body to approve the work plans originally envisaged, award a contract for partial work by negotiated procedure without prior publication of a tender notice, will therefore be in breach of its obligations under the directive

20. Judgment of 25 April 1996, case C-87/94, Commission/Belgium

- **Factual context** : see paragraphs 1 and 9 to 28 of the judgment.

- **Contract award criteria – Variants** - **Principle of equal treatment - Principle of transparency** - Taking into account, after the opening of tenders of amendments made to one of them - Contract awarded on the basis of figures not corresponding to the prescriptive requirements of the contract documents - Taking into account variants of the award criteria not mentioned either in the contract documents or in of the tender notice - Breach [Directive 2004/18/EC, article 2 and 54]

It follows from the EU procurement directive that the contracting entity's procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency.

A Member State which, in the procedure for the award of a public contract,

1) takes into account tender amendements submitted by a tenderer after the opening of tenders,
2) awards the contract to the same tenderer on the basis of figures which do not correspond to the prescriptive requirements of the contract documents,
3) takes into account, when comparing tenders for certain lots, the cost-saving features suggested by the same tenderer, without having referred to them in the contract documents or in the tender notice,

fails to fulfil that obligation.

21. Judgment of 18 December 1997, case C-5/97, Ballast Nedam Groep II

- **Factual context** : see paragraphs 2 to 5 of the judgment.

- **Criteria for qualitative selection -** Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability - Registration of contractors - Relevant entity – Obligation to take into accounts the resources of companies belonging to a holding in assessing suitability of dominant legal person of this group [Directive 2004/18/EC, article 45 *et seq*.]

The EU procurement directive is to be interpreted as meaning that the authority competent to decide on an application for registration submitted by a dominant legal person of a group is under an obligation, where it is established that that person actually has available to it the resources of the companies belonging to the group that are necessary to carry out the contracts, to take into account the references of those companies in assessing the suitability of the legal person concerned, in accordance with the criteria mentioned in the directive.

22. Judgment of 15 January 1998, case C-44/96, Mannesmann

- **Factual context** : see paragraphs 6 to 16 of the judgment.

- **Contracting authorities - Body governed by public law** – Definition - Needs in the general interest, not having an industrial or commercial character - Body such as the Austrian State printing office - Included - Public works contracts - Definition - Works contracts awarded by the body in question - Included irrespective of the nature of the contract [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive provides that bodies governed by public law mean any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and closely dependent on the State, regional or local authorities or other bodies governed by public law. The three conditions set out in the directive are cumulative

An entity such as the Austrian State Printing Office, must be regarded as a body governed by public law and thus as a contracting authority, in so far as:

a) the documents which this office must produce are closely linked to public order and the institutional operation of the State and require guaranteed supply and production conditions which ensure that standards of confidentiality and security are observed. In that respect the condition that the body must have been established for the `specific' purpose of meeting needs in the general interest, not having an industrial or commercial character, does not mean that it should be entrusted only, or even primarily, with meeting such needs;
b) this office has legal personality;

c) the Director-General of this office is appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries, this office is subject to scrutiny by the Court of Auditors, the majority of its shares are still held by the Austrian State and a State control service is responsible for monitoring the printed matter which is subject to security measures.

Contracts entered into by that entity are to be considered to be public contracts whatever their nature and irrespective of the relative proportion, whether large or small, which they represent of the activities of the State Printing Office pursued for the purpose of meeting needs not having an industrial or commercial character.

- **Contracting authorities - Body governed by public law** – Definition - Undertaking carrying on commercial activities and owned by a contracting authority – Excluded - Contract relating to a works project which, from the outset, falls within the objects of an undertaking which is not a contracting authority – Excluded [Directive 2004/18/EC, article 1(9)]

An undertaking which carries on commercial activities and in which a contracting authority, has a majority shareholding is not to be regarded as a body governed by public law within the meaning of the provisions of the EU procurement directive.

Furthermore, a public contract is not subject to the provisions of the directive when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the contracts relating to that project were entered into by a contracting authority on behalf of that undertaking.

23. Judgment of 17 September 1998, case C-323/96, Commission/Belgium

- **Factual context** : see paragraphs 1 to 5 of the judgment.

- **Contracting authorities - State** - Definition - Bodies exercising legislative, executive and judicial powers - Bodies of the federal authorities of a federal State – Included [Directive 2004/18/EC, article 1(9)]

The term “the State” referred to in the definition of “contracting authority” in the EU procurement directive necessarily encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal State, exercise those powers at federal level.

24. Judgment of 10 November 1998, case C-360/96, Arnhem and Rheden/BFI

- **Factual context** : see paragraphs 5 to 23 of the judgment.

- **Contracting authorities – Body governed by public law** - Needs in the general interest, not having an industrial or commercial character - Meaning - Existence of

private undertakings capable of satisfying such needs - Not relevant [Directive 2004/18/EC, article 1(9)]

The provision stipulating that “Body governed by public law means any body ... established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”, must be interpreted as meaning that the Community legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

The term “needs in the general interest not having an industrial or commercial character” does not exclude needs which are or can be satisfied by private undertakings as well. The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations.

The removal and treatment of household refuse may be regarded as constituting a need in the general interest. Since the degree of satisfaction of that need considered necessary for reasons of public health and environmental protection cannot be achieved by using disposal services wholly or partly available to private individuals from private economic operators, that activity is one of those which the State may require to be carried out by public authorities or over which it wishes to retain a decisive influence.

- **Contracting authorities** - Body governed by public law - Status not dependent on the relative importance of activities designed to satisfy needs in the general interest and of the way they are carried out [Directive 2004/18/EC, article 1(9)]

The status of a body governed by public law is not dependent on the relative importance, within its business as a whole, of the meeting of needs in the general interest not having an industrial or commercial character. It is likewise immaterial that commercial activities may be carried out by a separate legal person forming part of the same group or concern.

- **Contracting authorities** - Needs in the general interest, not having an industrial or commercial character - Legal form of provisions defining such needs - Not relevant [Directive 2004/18/EC, article 1 (9)]

The term “contracting authority” must be interpreted in functional terms. Therefore, the existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal forms of the provisions in which those needs are mentioned being immaterial in that respect.

25. Judgment of 17 December 1998, case C-353/96, Commission/Ireland

- **Factual context** : see paragraphs 8 to 19 of the judgment.

- **Contracting authorities – Body governed by public law** - Bodies corresponding to legal persons governed by public law - Public authorities whose public supply contracts are subject to control by the State [Directive 2004/18/EC, article 1 (9)]

A body such as the Irish Forestry Board, although established in the form of a private company, is a contracting authority within the meaning of the EU procurement directive. Such a body, which has legal personality and does not award public contracts on behalf of the State or a regional or local authority, cannot be regarded as being the State or a regional or local authority, but constitutes a body governed by public law within the meaning of the EU procurement directive, where the State may exercise control, at least indirectly, over the award of public supply contracts.

26. Judgment of 16 September 1999, case C-27/98, Fracasso and Leitschutz

- **Factual context** : see paragraphs 8 to 17 of the judgment.

- **Award of contracts** – Whether it is compulsory to award the contract to the sole tenderer considered suitable - No such obligation [Directive 2004/18/EC, article 41 (1)]

The EU procurement directive must be interpreted as meaning that the contracting authority is not required to award the contract to the only tenderer judged to be suitable. In the first place, the directive contains no provision expressly requiring a contracting authority which has put out an invitation to tender, to award the contract to the sole tenderer; secondly, the contracting authority is not required to complete a procedure for the award of a public works contract.

27. Judgment of 18 November 1999, case C-107/98, Teckal

- **Factual context** : see paragraphs 8 to 25 of the judgment.

- **Scope of the directive - Contracting authorities** - “In-house”-service or public procurement contract? - Contracts awarded by a contracting authority to a distinct and independent body - Covered - Where the successful tenderer is itself a contracting authority – Irrelevant [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive is applicable in cases where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority.

However this does not include the position where the local authority exercises over a legally distinct person a form of control similar to that exercised over its own departments and, at the same time, the person carries out the essential part of its activities together with the controlling local authority or authorities.

28. Judgment of 18 November 1999, case C-275/98, Unitron Scandinavia

- **Factual context** : see paragraphs 6 to 14 of the judgment.

- **Contract award procedures - Contracting authorities** - Where the contracting authority grants to a body other than such an authority the right to engage in a public service - Obligatory to require compliance with the principle of non-discrimination - No obligation to require compliance with tendering procedures [Directive 2004/18/EC, article 3]

Article 3 of the EU procurement directive is to be interpreted as follows:

1. it requires a contracting authority which grants to a body other than such a contracting authority special or exclusive rights to engage in a public service activity to require of that body, in relation to the public supply contracts which it awards to third parties in the context of that activity, that it comply with the principle of non-discrimination on grounds of nationality;
2. it does not, however, require in those circumstances that the contracting authority demand that, in awarding such public supply contracts, the body in question comply with the tendering procedures laid down by the Directive.

29. Judgment of 2 December 1999, case C-176/98, Holst Italia

- **Factual context** : see paragraphs 8 to 16 of the judgment.

- **Criteria for qualitative selection -** Suitability to pursue the professional activity - Economic and financial standing - Technical and/or professional ability - Service provider relying on the standing of another company as proof of its own standing – Conditions [Directive 2004/18/EC, articles 45 to 52]

The EU procurement directive is to be interpreted as permitting a service provider to establish that it fulfils the economic, financial and technical criteria for participation in a tendering procedure for the award of a public contract by relying on the standing of other entities, regardless of the legal nature of the links which it has with them, provided that it is able to show that it actually has at its disposal the resources of those entities which are necessary for performance of the contract.

30. Judgment of 26 September 2000, case C-225/98, Commission/France

- **Factual context** : see paragraphs 14 to 26 of the judgment.

- **Contract award procedures - Common rules on advertising** - Publication of a prior information notice by the contracting authorities - Scope - Limits [Directive 2004/18/EC, article 35]

The purpose of the rules on advertising laid down in the EU procurement directive,

including publication of the prior information notice, is to inform all potential tenderers at the Community level in good time about the main points of a contract in order that they may submit their tender within the time-limits. It follows from the provisions of the directive that the publication of a prior information notice is compulsory only where the contracting authorities exercise their option to reduce the time-limits for the receipt of tenders.

- **Contract award criteria** - Condition linked to the campaign against unemployment - Permissible - Conditions - Rules on advertising. [Directive 2004/18/EC, article 53 (1) (a)].

The criteria on which the contracting authorities are to base the award of contracts are either the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit. In the latter case, the contracting authorities are required to state these criteria in the contract notice or the contract documents.

None the less, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Furthermore, even if such a criterion is not in itself incompatible with the EU procurement directive, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising. It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

- **Contract award procedures -** Number of candidates invited to tender in the context of a restricted procedure - Limitation to a maximum number of five tenderers - Not permissible [Directive 2004/18/EC, article 44]

A Member State which, in contract notices, limits to five the number of candidates invited to tender in the context of a restricted procedure fails to fulfil its obligations under the EU procurement directive.

Although it is true that the directive does not provide for a minimum number of candidates which the contracting authorities are required to invite where they do not opt in favour of fixing a range, the Community legislature none the less considered that, in the context of a restricted procedure and where the contracting authorities prescribe a range, a number of candidates below five is not sufficient to ensure genuine competition. The same must be true a fortiori in cases where the contracting authorities opt for inviting a maximum number of candidates.

It follows that the number of undertakings which a contracting authority intends to invite to tender in the context of a restricted procedure cannot ever be less than five.

- **Criteria for qualitative selection** - Discriminating technical specifications - Designation of the lots by reference to classifications of national professional organisations - Proof of the tenderer's professional qualification - Requirement of proof of registration with the national Ordre des Architectes - Not permissible [Directive 2004/18/EC, article 2, articles 45 to 52]

A Member State which, in contract notices, uses as the mode of designating the lots references to classifications of national professional organisations and also requires from the designer, as minimum standards for participation, proof of registration with the Ordre des Architectes fails to fulfil its obligations under the Treaty and under the EU procurement directive.

To the extent that the designation of the lots by reference to classifications of French professional organisations is likely to have a dissuasive effect on tenderers who are not French, it thereby constitutes indirect discrimination and, therefore, a restriction on the freedom to provide services. Moreover, first, the requirement of proof that the designer is registered with the Ordre des Architectes can only give advantage to the provision of services by French architects, which constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services. Second, the EU procurement directive precludes a Member State from requiring a tenderer established in another Member State to furnish proof by any means other than those prescribed in that directive, that he satisfies the criteria laid down in those provisions and relating to his qualifications.

31. Judgment of 3 October 2000, case C-380/98, University of Cambridge

- **Factual context** : see paragraphs 2 to 13 of the judgment.

- **Contracting authorities** – Bodies governed by public law – Expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law” – Definition - Research awards and grants, student grants – Included – Payments made for the provision of services – Excluded – Percentage of public financing – Assessment [Directive 2004/18/EC, article 1 (9)]

In the definition of “Bodies governed by public law” provided by the EU procurement directive, the expression “financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law”, properly construed, includes awards or grants paid by one or more contracting authorities for the support of research work and student grants paid by local education authorities to universities in respect of tuition for named students. Payments made by one or more contracting authorities either in the context of a contract for services comprising research work or as consideration for other services such as consultancy or the organisation of conferences do not, by contrast, constitute public financing within the meaning of those directives.

On a proper construction, the term “for the most part”, cited above, means more than

half. In order to determine correctly the percentage of public financing of a particular body, account must be taken of all of its income, including that which results from a commercial activity.

- **Contracting authorities** – Bodies governed by public law – Financed by the State – Definition – Percentage of public financing – Reference period – Determination [Directive 2004/18/EC, article 1 (9)]

The decision as to whether a body such as a university is a contracting authority within the meaning of the EU procurement directive must be made annually and the budgetary year in which the procurement procedure commences must be regarded as the most appropriate period for calculating the way in which that body is financed, so that the calculation must be made on the basis of the figures available at the beginning of the budgetary year, even if they are provisional. A body which constitutes a contracting authority for the purposes of the directive when a procurement procedure commences remains, as far as that procurement is concerned, subject to the requirements of the directive until such time as the relevant procedure has been completed.

32. Judgment of 5 October 2000, case C-16/98, Commission/France

- **Factual context** : see paragraphs 12 to 22 of the judgment.

- **Public works contract** - Definition - Criterion - Economic and technical function of the result of the works - Artificial splitting of a single work – Assessment [Directive 2004/18/EC, article 1 (2)(b) , article 9 (3)]

The existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned in order to determine whether several lots of a single work have been artificially split. An electricity supply network and a street lighting network have a different economic and technical function and works on the electricity supply and street lighting networks cannot be considered to constitute lots of a single work artificially split.

- **Public works contract** - Definition - Existence of a single contracting entity and possibility of a single undertaking's carrying out the whole of the works - Not decisive criteria [Directive 2004/18/EC, article 1 (2)(b)]

While the existence of a single contracting entity and the possibility of a Community undertaking's carrying out the whole of the works described in the contracts concerned may, according to circumstances, constitute corroborative evidence of the existence of a work within the meaning of the EU procurement directive, they cannot constitute decisive criteria on that point. The definition of the term “work” in the Directive does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.

- **Principle of non-discrimination between tenderers** - Scope [Directive 2004/18/EC, article 2]

The principle of non-discrimination between tenderers applies to all the stages of the tendering procedure and not only from the time when a contractor submits a tender.

That interpretation is consistent with the purpose of the directive which is to open up the contracts to which it applies to Community competition. That purpose would be undermined if a contracting entity could organise a tendering procedure in such a way that contractors from Member States other than that in which the contracts are awarded were discouraged from tendering.

It follows that the directive, in prohibiting any discrimination between tenderers, also protects those who are discouraged from tendering because they have been placed at a disadvantage by the procedure followed by a contracting entity.

33. Judgment of 7 December 2000, case C-94/99, ARGE Gewässerschutz

- **Factual context** : see paragraphs 12 to 16 of the judgment.

- **Principle of equal treatment** - Participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders at prices lower than those of their competitors - No covert discrimination [Directive 2004/18/EC, article 2]

The mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in the EU procurement directive. The mere fact that a contracting authority allows such bodies to take part in a procedure for the award of a public service contract does not constitute either covert discrimination or a restriction contrary to the Treaty.

34. Judgment of 7 December 2000, case C-324/98, Telaustria Verlag

- **Factual context** : see paragraphs 13 to 27 of the judgment.

- **Scope of the EU procurement directive** - Public service concession – Excluded – Obligation of transparency of the contracting authority [Directive 2004/18/EC, article 2 and 17]

Notwithstanding the fact that, as Community law stands at present, public service concessions are excluded from the scope of the EU procurement directive, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality.

The obligation of transparency which is imposed on the contracting authority 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 procurement procedures to be reviewed.

35. Judgment of 1st February 2001, case C-237/99, Commission/France

- **Factual context** : see paragraphs 4 to 20 of the judgment.

- **Contracting authorities - Bodies governed by public law** - Definition - Low-rent housing corporations – Included – Conditions [Directive 2004/18/EC, article 1(9)]

A body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law.

With regard to that third condition characterising a body governed by public law : since management supervision constitutes one of the three criteria referred to in the directive, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, namely where the body in question is financed, for the most part, by the public authorities or where the latter appoint more than half of the members of the managerial organs of the body.

Consequently, low-rent housing corporations which meet needs in the general interest, not having an industrial or commercial character, which have legal personality and whose management is subject to supervision by the public authorities which allows the latter to influence their decisions in relation to public contracts, fulfil the three cumulative conditions which characterise a body governed by public law within the meaning of the EU procurement directive and are contracting authorities.

36. Judgment of 10 May 2001, joined cases C-223 and 260/99, Agora and excelsor.

- **Factual context** : see paragraphs 4 to 16 of the judgment.

- **Contracting authorities - Body governed by public law** - Meaning - Needs in the general interest, not having an industrial or commercial character –Body which carries on activities relating to the organization of fairs and exhibitions, which operates according to performance criteria and in a competitive environment - Exclusion [Directive 2004/18/EC, article 1 (9)]

A body governed by public law means a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, with legal personality and closely dependent on the State, regional or local authorities or

other bodies governed by public law. The first condition is not met by a body whose object is to carry on activities relating to the organization of fairs, exhibitions and other similar initiatives, which is non-profit-making but is administered according to the criteria of performance, efficiency and cost-effectiveness, and which operates in a competitive environment.

37. Judgment of 12 July 2001, case C-399/98, Ordine degli Architetti

- **Factual context** : see paragraphs 16 to 37 of the judgment.

- **Contract award procedures** - Purpose – Effectiveness [Provisions of the EC Treaty concerning the common market fundamental freedoms]

The EU procurement directive aims to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public contracts in order to open up such contracts to genuine competition. The development of such competition entails the publication at Community level of contract notices. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism.

- **Scope of the EU procurement directive -** National rule providing for the direct execution of infrastructure works of a value equal to or exceeding the ceiling fixed by the directive by a holder of a building permit or approved development plan by way of set-off against a contribution - Not permissible [Directive 2004/18/EC, articles 1(2)(b) and 1(9)]

The EU procurement directive precludes national urban development legislation under which, without the procedures laid down in the directive being applied, the holder of a building permit or approved development plan may execute infrastructure works directly, by way of total or partial set-off against the contribution payable in respect of the grant of the permit, in cases where the value of that work is the same as or exceeds the ceiling fixed by the Directive.

38. Judgment of 18 October 2001, case C-19/00, SIAC Construction

- **Factual context** : see paragraphs 4 to 27 of the judgment.

- **Award of contracts** - Principle of equal treatment - Scope [Directive 2004/18/EC, article 2]

Compliance with the principle that tenderers must be treated equally, which lies at the very heart of the EU procurement directive, requires that tenderers be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority

- **Contract award criteria** - Most economically advantageous tender – Choice of criteria by the awarding authority – Limits [Directive 2004/18/EC, article 54]

The EU procurement directive does not list exhaustively the criteria which may be accepted as criteria for the award of a public works contract. The choice of criteria made by the appointing authority may, however, relate only to criteria designed to identify the offer which is economically the most advantageous and must not confer on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract to a tenderer.

- **Contract award criteria** - Award criterion relating to a factual element that could be known precisely only after the contract had been awarded - Whether permissible - Conditions - Compliance with the principle of equal treatment [Directive 2004/18/EC, article 2 and 54]

In the case of the award of a public contract coming within the scope of the EU procurement directive, the use of a criterion for awarding the contract which relates to a factual element that will be known precisely only after the contract has been awarded will be compatible with the requirements of equal treatment of tenderers only on condition that the transparency and objectivity of the procedure are respected.

This presupposes that the criterion is mentioned in the contract documents or contract notice, that it is there formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret it in the same way, and that the adjudicating authority must keep to that interpretation throughout the procedure and apply the criterion in question objectively and uniformly to all tenderers.

Objectivity may be guaranteed by recourse to the professional opinion of an expert, on condition that his report is based, in all essential respects, on objective factors regarded in good professional practice as being relevant and appropriate to the assessment made

39. Judgment of 27 November 2001, joined cases C-285 and 286/99, Lombardini and Mantovani

- **Factual context** : see paragraphs 6 to 26 of the judgment.

- **Award of contracts** - Abnormally low tenders - Automatic exclusion - Not permissible - Duty to use an examination procedure allowing the parties to be heard - Application of a mathematical criterion for identifying abnormally low tenders not revealing the exclusion threshold to the undertakings concerned before submission of their tenders - Whether permissible - Conditions - Exclusion of certain justifications - Not permissible [Directive 2004/18/EC, article 55]

The EU procurement directive must be interpreted as precluding legislation and administrative practice of a Member State which,

3. allow the contracting authority to reject tenders offering a greater discount than the anomaly threshold as abnormally low, taking into account only those explanations of the prices proposed, covering at least 75% of the basic contract value mentioned in the contract notice, which tenderers were required to attach to their tender, without giving the tenderers the opportunity to argue their point of view, after the opening of the envelopes, on those elements of the prices proposed which gave rise to suspicions, and,
4. require the contracting authority to take into consideration, for the purposes of examining abnormally low tenders, only explanations based on the economy of the construction method, technical solutions chosen, or exceptionally favourable conditions available to the tenderer, but not explanations relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

However, provided all the requirements it imposes are otherwise complied with and the aims pursued by the EU procurement directive are not defeated, that directive does not in principle preclude legislation and administrative practice of a Member State which, in the matter of identifying and examining abnormally low tenders,

1. require all tenderers, under threat of exclusion from participation in the contract, to accompany their tender with explanations of the prices proposed, covering at least 75% of the basic value of that contract, and,
2. apply a method of calculating the anomaly threshold based on the average of all the tenders received for the tender procedure in question, so that tenderers are not in a position to know that threshold at the time they lodge their file, the result produced by applying that calculation method having, however, to be capable of being reconsidered by the contracting authority.

40. Judgment of 17 September 2002, case C-513/99, Concordia Bus Finland

- **Factual context** : see paragraphs 8 to 35 of the judgment.

- **Contract award criteria** - Most economically advantageous tender - Protection of the environment - Whether permissible - Conditions - Criterion which can be satisfied only by a few undertakings, one of which belongs to the contracting entity - No effect - Principle of equal treatment - Principle of non-discriminatory treatment [Directive 2004/18/EC, articles 2, 26, 23 (6), 48 (2)(f), 50, 53]

The EU procurement directive must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice,

and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

Moreover, the principle of equal treatment does not preclude the taking into consideration of such criteria solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

41. Judgment of 14 November 2002, case C-411/00, Felix Swoboda

- **Factual context** : see paragraphs 17 to 23 of the judgment.

- **Contract award procedures**- Public service contracts - Qualification of services (A or B) – Services falling partly within Annex II A and partly within Annex II B - Determination of the applicable regime – Criteria – Main purpose of the contract – Excluded – Comparison of the value of the services [Directive 2004/18/EC, article 22]

The determination of the regime applicable to public service contracts composed partly of services falling within Annex II A and partly of services falling within Annex II B to the EU procurement directive does not depend on the main purpose of those contracts and is to be made in accordance with the unequivocal test laid down by that directive, based on the comparison of the value of the services covered by Annex II A with that of the services covered by Annex II B.

- **Contract award procedures**- Public service contracts – Contract with a single purpose but composed of several services – Classification in Annexes II A and II B – Whether permissible – Obligation to award separate contracts when the value of services in Annex II B exceeds that of the services falling within Annex II A – No such obligation [Directive 2004/18/EC, article 22]

In the context of the award of a contract with a single object but composed of several services, the classification of those services in Annexes II A and II B to the EU procurement directive, far from depriving it of its effectiveness, is in accordance with the system laid down by the directive. When, following the classification thus made by reference to the CPC nomenclature, the value of the services falling within Annex II B exceeds the value of the services falling within Annex II A, there is no obligation on the part of the contracting authority to separate from the contract in question the services referred to in Annex II B and to award separate contracts in respect of them.
The position would only be different if the contracting authority artificially grouped in one contract services of different types without there being any link arising from a joint purpose or operation, with the sole purpose of increasing the proportion of the services referred to in Annex II B in the contract and thus of avoiding, by way of the second sentence of Article 10, the application of its provisions in full.

42. Judgment of 12 December 2002, case C-470/99, Universale-Bau

- **Factual context** : see paragraphs 14 to 39 of the judgment.

- **Contracting authorities - Body governed by public law** – Definition – Body which was not established to satisfy specific needs in the general interest, not having an industrial or commercial character, but in the meantime satisfying such needs – Covered [Directive 2004/18/EC, article 1 (9)]

The EU procurement directive provides that a 'body governed by public law' means, among others conditions, a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. For the purposes of deciding whether a body satisfies that condition, it is necessary to consider the activities which it actually carries on.

It follows that a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils that condition provides that the assumption of responsibility for the satisfaction of those needs can be established objectively.

- **Criteria for qualitative selection** – Restricted procedure – Rules laid down in advance for weighting the criteria for selecting the candidates invited to tender – Publication required [Directive 2004/18/EC, articles 44 to 52]

The EU procurement directive is to be interpreted as meaning that where, in the context of a restricted procedure, the contracting authority has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender, it is obliged to state them in the contract notice or tender documents.

Such an interpretation is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies.

43. Judgment of 23 January 2003, case C-57/01, Makedoniko Metro and Michaniki

- **Factual context** : see paragraphs 14 to 31 of the judgment.

- **Contract award procedures** - Group of tenderers – National rules prohibiting a change in the composition of the group after submission of tenders – Whether permissible [Directive 2004/18/EC, article 4]

The EU procurement directive does not preclude national rules which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession which occurs after submission of tenders.

Rules about the composition of such consortia are a matter for the Member States,

since the only provision of the directive dealing with groups of contractors is confined, first, to stating that tenders may be submitted by such groups and, second, to preventing them from being required to assume a specific legal form before the contract has been awarded to the group selected, and contains no provision about the composition of such groups.

44. Judgment of 27 February 2003, case C-373/00, Adolf Truley

- **Factual context** : see paragraphs 4 to 18 of the judgment.

- **Contracting authorities - Body governed by public law** – Needs in the general interest - Definition - Needs in the general interest, not having an industrial or commercial character [Directive 2004/18/EC, article 1 (9)]

In order for a body to be designated as a “body governed by public law” and, therefore, a “contracting authority” within the meaning of the EU procurement directive, that body must meet needs in the general interest which are not industrial or commercial in character, have legal personality and depend heavily, for its financing, management or supervision, on the State, regional or local authorities or other bodies governed by public law.

The term “needs in the general interest” is an autonomous concept of Community law which must be interpreted in the light of the context and the aims of the directive.

The activities of funeral undertakers may indeed be regarded as meeting a need in the general interest. First, such activities are linked to public policy in so far as the State has a clear interest in exercising close control over the issue of certificates such as birth and death certificates and, second, the State may be justified in retaining influence over those activities on manifest grounds of hygiene and public health. The fact that a regional or local authority is legally obliged to arrange funerals - and, where necessary, to bear the costs of those funerals - where they have not been arranged within a certain period after a death certificate has been issued constitutes evidence that there is such a need in the general interest.

With respect to the question whether the activities of funeral undertakers meets a need in the general interest, not having an industrial or commercial character within the meaning of the directive, the existence of significant competition, although not entirely irrelevant, does not, of itself, allow the conclusion to be drawn that there is no need in the general interest not having an industrial or commercial character.

The national court must assess whether or not there is such a need, taking account of all the relevant legal and factual circumstances, such as those prevailing at the time of establishment of the body concerned and the conditions under which it exercises its activity.

- **Contracting authorities - Body governed by public law** – Criterion of management supervision by public authorities – Mere review insufficient [Directive 2004/18/EC, article 1 (9)]

A mere review does not satisfy the criterion of management supervision by the State, regional or local authorities or other bodies governed by public law in the EU procurement directive since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts.

That criterion is, however, satisfied where the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a regional authority which holds, through another company, all the shares in the body in question.

45. Judgment of 10 April 2003, joined cases C-20 and 28/01, Commission/Germany

- **Factual context** : see paragraphs 6 to 18 of the judgment.

- **Contract award procedures** – Negociated procedure without prior publication of a contract notice – Conditions governing permissibility – Technical of artistic reasons, or reasons connected with the protection of exclusive rights – Meaning – Environmental protection – Whether included [Directive 2004/18/EC, articles 2, 31 (1)(b), 50]

A contracting authority may take into account criteria relating to environmental protection at the various stages of a procedure for the award of public contracts.

Therefore, environmental protection is capable of constituting a technical reason for the purposes of the provisions in the EU procurement directive stipulating that contracting authorities may award public contracts by negotiated procedure without prior publication of a contract notice when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the works, supply and services may be provided only by a particular economic operator.

However, the procedure used where there is a technical reason of that kind must comply with the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on common market fundamental freedoms.

46. Judgment of 15 May 2003, case C-214/00, Commission/Spain

- **Factual context** : see paragraphs 11 to 29 of the judgment.

- **Contracting authorities – Body governed by public law** – Definition – National legislation excluding commercial companies under public control – Not permissible [Directive 2004/18/EC, article 1 (9)]

National legislation that automatically excludes commercial companies under public control from the scope ratione personae of the EU procurement directive is not a correct transposition of the term “contracting authority” appearing in that directive.

An entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority within the meaning of the EU procurement directive, since the application of that directive to an entity which fulfils the three cumulative conditions set out therein, according to which it must be a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, which has legal personality and is closely dependent on the State, regional or local authorities or other bodies governed by public law, cannot be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law.

47. Judgment of 22 May 2003, case C-18/01, Korhonen and others

- **Factual context** : see paragraphs 4 to 14 of the judgment.

- **Contracting authorities** - **Body governed by public law** – Definition - Company set up by a regional or local authority to promote the development of industrial or commercial activities on the territory of that authority - Needs in the general interest, not having an industrial or commercial character – Assessment by the national courts - Criteria [Directive 2004/18/EC, article 1 (9)]

A limited company established, owned and managed by a regional or local authority meets a need in the general interest, within the meaning of the of the EU procurement directive, where it acquires services with a view to promoting the development of industrial or commercial activities on the territory of that regional or local authority by constructing premises to be leased to undertakings. Such activities are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services.

To determine whether that need has no industrial or commercial character, the national court must assess the circumstances which prevailed when that company was set up and the conditions in which it carries on its activity, taking account in particular of the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question. The fact that the premises to be constructed are leased only to a single undertaking is not capable of calling into question the lessor's status of a body governed by public law, where it is shown that the lessor meets a need in the general interest not having an in-

dustrial or commercial character

48. Judgment of 19 June 2003, case C-315/01, GAT

- **Factual context** : see paragraphs 16 to 22 of the judgment.

- **Contract award criteria** - Taking account of a list of the previous principal deliveries - Not permissible [Directive 2004/18/EC, article 53]

The EU procurement directive precludes the contracting authority, in a procedure to award a public contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract.

The submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included among the references or evidence which may be required to establish the suppliers' technical capacity. Furthermore, a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the suppliers' previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of the Directive, and therefore cannot in any event constitute an award criterion within the meaning of that provision.

- **Contract award criteria** - Requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within some fixed radius – Not permissible [Directive 2004/18/EC, article 53]

The EU procurement directive precludes, in a procedure to award a public contract, the requirement that the products which are the subject of the tenders be available for inspection by the contracting authority within a radius of 300 km of the authority as a criterion for the award of the contract.

Firstly, it is apparent from the Directive that for public contracts the contracting authorities may require the submission of samples, descriptions and/or photographs of the products to be supplied as references or evidence of the suppliers' technical capacity to carry out the contract concerned. Secondly, such a criterion cannot serve to identify the most economically advantageous offer within the meaning of the Directive and therefore cannot, in any event, constitute an award criterion within the meaning of that provision.

49. Judgment of 16 October 2003, case C-421/01, Traunfellner

- **Factual context** : see paragraphs 7 to 20 of the judgment.
- **Award of contracts** – Variants - Conditions for consideration and assessment for the purpose of awarding a contract [Directive 2004/18/EC, article 24]

The EU procurement directive is to be interpreted as meaning that the obligation to set out the minimum specifications required by a contracting authority in order to take variants into consideration is not satisfied where the contract documents merely refer to a provision of national legislation requiring an alternative tender to ensure the performance of work which is qualitatively equivalent to that for which tenders are invited.

Tenderers may be deemed to be informed in the same way of the minimum specifications with which their variants must comply in order to be considered by the contracting authority only where those specifications are set out in the contract documents. This involves an obligation of transparency designed to ensure compliance with the principle of equal treatment of tenderers, which must be complied with in any procurement procedure governed by the Directive.

The provision of the Directive which lists the permissible criteria for the award of contracts, can apply only to variants which have been properly taken into consideration by the contracting authority in accordance with the Directive

50. Judgment of 16 October 2003, case C-283/00, Commission/Spain

- **Factual context** : see paragraphs 13 to 22 of the judgment.

- **Contracting authorities - Body governed by public law** – Definition - Needs in the general interest, not having an industrial or commercial character – State commercial company governed by private law - Company's object consisting of the implementation of a plan for repaying the costs of and establishing prisons – Included [Directive 2004/18/EC, article 1(9)]

The concept of “Needs in the general interest, not having an industrial or commercial character” is one of Community law and must accordingly be given an autonomous and uniform interpretation throughout the Community, the search for which must take account of the background to the provision in which it appears and of the purpose of the rules in question. Those needs are generally needs which are satisfied otherwise than by the supply of goods and services in the marketplace and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence.

Whether or not there exists a need in the general interest not having an industrial or commercial character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question. As a matter of fact, if the body operates in normal market conditions, aims at making a profit and bears the losses associated with the exercise of its activity, it is

unlikely that the needs it aims at meeting are not of an industrial or commercial nature.

It follows that a State commercial company established for the specific purpose of putting into effect, alone, the programmes and actions provided for in the plan for paying off the costs of and establishing prisons for the purpose of implementing the Member State's prison policy must be treated as a body governed by public law for the purposes of the EU procurement Directive and, therefore, as a contracting authority. The needs in the general interest which such a company is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powers they are intrinsically linked to public order.

51. Judgment of 16 October 2003, case C-252/01, Commission/Belgium

- **Factual context** : see paragraphs 10 to 16 of the judgment.

- **Scope of the EU procurement directive** – Execution of services accompanied by special security measures - Contract for surveillance of a Member State coast by aerial photography [Directive 2004/18/EC, article 14]

When the execution of the services concerning the surveillance of a Member State coast by aerial photography must be accompanied by special security measures within the meaning of the EU procurement directive, the directive does not apply to such services.

52. Judgment of 4 December 2003, case C-448/01, EVN and Wienstrom

- **Factual context** : see paragraphs 15 to 26 of the judgment.

- **Contract award criteria** - Concept of the most economically advantageous tender – "Green" award criterion giving preference to electricity produced from renewable energy sources – Permissible – Conditions [Directive 2004/18/EC, article 53]

The EU procurement directive does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation does preclude such a criterion where
- it is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,
- it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

It is for the national court to determine whether, despite the contracting authority's failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts

53. Judgment of 14 September 2004, case C-385/02, Commission/Italy

- **Factual context** : see paragraphs 4 to 11 of the judgment.

- **Contract award procedure**- Derogations from the common rules - Strict interpretation - Existence of exceptional circumstances - Burden of proof [Directive 2004/18/EC, article 31]

The provisions the EU procurement Directive, which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the TFEU in relation to public works contracts, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.

Since the directive authorises the use of the negotiated procedure without prior publication of a contract notice for works which, for technical reasons, may only be carried out by a particular contractor, the Member State authorities must prove that technical reasons made it necessary to award the relevant contracts to the contractor who was entrusted with the original contract.

It is true that the aim of ensuring the continuity of works under complex projects which relate to the flood safety of an area is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor, particularly where the works are subdivided into lots which will be carried out over many years.

- **Contract award procedures**- Derogations from the common rules - Application of negotiated procedure without justification - Repetition of similar works entrusted to the undertaking to which an earlier contract was awarded – Duration [Directive 2004/18/EC, article 31]

The EU procurement Directive authorises the use of the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which an earlier contract was awarded. That procedure may only be adopted “during the three years following the conclusion of the original contract”.

In the light of a comparison of the language versions of that provision, the expression “conclusion of the original contract” must be understood as meaning the time when the original contract was entered into and not as referring to the completion of the works to

which the contract relates.

That interpretation is confirmed by the objective of the provision in question and its place in the scheme of the Directive.

First, as it is a derogating provision which falls to be strictly interpreted, the interpretation which restricts the period during which the derogation applies must be preferred rather than that which extends it. That objective is met by the interpretation which takes the starting point as being the date on which the original contract is entered into rather than the, necessarily later, date on which the works which are its subject-matter are completed.

Secondly, legal certainty, which is desirable where procedures for the award of public procurement contracts are involved, requires that the date on which the period in question begins can be defined in a certain and objective manner. While the date on which a contract is entered into is certain, numerous dates may be treated as representing the completion of the works and thus give rise to a corresponding level of uncertainty. Moreover, while the date on which the contract is entered into is clearly established at the outset, the date of completion of the works, whatever definition is adopted, may be altered by accidental or voluntary factors for so long as the contract is being carried out.

54. Judgment of 7 October 2004, case C-247/02, Sintesi

- **Factual context** : see paragraphs 7 to 17 of the judgment.

- **Award of contracts** - Right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender [Directive 2004/18/EC, article 53]

The EU procurement Directive is to be interpreted as meaning that it precludes national rules which, for the purpose of the award of public works contracts following open or restricted tendering procedures, impose a general and abstract requirement that the contracting authorities use only the criterion of the lowest price.

Indeed, such a national rule deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.

55 Judgment of 14 October 2004, case C-340/02, Commission/France

- **Factual context** : see paragraphs 7 to 17 of the judgment.

- **Principle of equal treatment - Principle of transparency** [Directive 2004/18/EC, article 2]

The principle of equal treatment of providers and the principle of transparency laid down in the EU procurement directive require the subject-matter of each contract and the criteria governing its award to be clearly defined.

That obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.

- **Contract award procedures**- Application of negotiated procedure without justification – Contract in several phases - Mandatory publication – Infringement [Directive 2004/18/EC, article 31]

The EU procurement Directive authorises contracting authorities using a negotiated procedure to derogate from the obligation of prior publication in certain cases which are exhaustively listed, derogation is permissible "where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidate". That provision, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances

In particular, the expression "follows a design contest" as used in the Directive implies that there must be a direct functional link between the contest and the contract concerned. Since the contest in question related to the first phase and was organized for the purpose of awarding the contract envisaged in that phase, the contract in the second phase cannot be regarded as following that contest.

56. Judgment of 18 November 2004, case C-126/03, Commission/Germany

- **Factual context** : see paragraphs 6 to 8 of the judgment.

- **Scope of the EU procurement directive** - Contract concluded by a contracting authority in relation to an economic activity subject to competition - Contract concluded by a contracting authority in order to be able to submit an offer in a tender procedure – Included [Directive 2004/18/EC, article 1(9)]

The EU procurement directive provides that, where contracts for pecuniary interest concluded in writing between a service provider and a regional or local authority have as their object the services listed in Annex I A to the directive, they must be the subject of an open, restricted or negotiated procedure within the meaning of that directive.

In that regard the directive makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task. It is likewise irrelevant that the contracting authority intends to operate as a provider of services itself and that the contract in question aims, in that context, to subcontract a part of the activities to a third

party.

57. Judgment of 11 January 2005, case C-26/03, Stadt Halle and RPL Lochau

- **Factual context** : see paragraphs 14 to 20 of the judgment.

- **Scope of the directive - Contracting authorities** - “In-house”-services - Contracting authority having a holding in the capital of a company legally distinct from it [Directive 2004/18/EC, article 1(9)]

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the EU procurement Directive with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, even as a majority, the public award procedures laid down by that directive must always be applied.

58. Judgment of 13 January 2005, case C-84/03, Commission/Spain

- **Factual context** : see paragraphs 1 and 12 to 15 of the judgment.

- **Contracting authorities - Body governed by public law** – Definition – National legislation excluding the bodies of private law satisfying the conditions laid down in the EU procurement directive – Not permissible [Directive 2004/18/EC, article 1(9)]

In order to determine whether a private law body is to be classified as a body governed by public law it is only necessary to establish whether the body in question satisfies the three cumulative conditions laid down in the EU procurement directive since an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority for the purposes of those directives.

Thus a national legislation constitutes an incorrect transposition of the definition of “contracting authority” in so far as it excludes the bodies of private law from its scope, even though they may satisfy the conditions laid down in the directive.

- **Public contract** – Definition – National legislation excluding the cooperation agreements concluded between bodies governed by public law - Not permissible [Directive 2004/18/EC, article 1(2)(a)]

In order to have a public contract within the meaning of the EU procurement directive, it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it.

The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

Consequently, in so far as it excludes, a priori, from its scope relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law, whatever the nature of those relations, national legislation constitutes an incorrect transposition of the EU procurement directive.

- **Contract award procedures** – Derogations from the common rules – Strict interpretation - Use of the negotiated procedure in cases not provided for by the directive [Directive 2004/18/EC, article 31]

The derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts must be interpreted strictly. To prevent the EU procurement directive being deprived of their effectiveness, the Member States cannot therefore, provide for the use of the negotiated procedure in cases not provided for in the Directives or add new conditions to the cases expressly provided for by that directives which make that procedure easier to use. It is for the Member States to show that their legislation constitutes a faithful transposition of the cases expressly provided for by the directive.

59. Judgment of 3 March 2005, joined cases C-21 and 34/03, Fabricom

- **Factual context** : see paragraphs 12 to 24 of the judgment.

- **Principle of non-discrimination between tenderers** - Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned – Not permissible [Directive 2004/18/EC, article 2]

The EU procurement Directive precludes a national regulation, whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.

Taking account of the favourable situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer. Nevertheless, a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers when it does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case, that situation would not be capable of distorting competition between tenderers.

60. Judgment of 21 July 2005, case C-231/03, Coname

- **Factual context** : see paragraphs 4 to 11 of the judgment.

- **Common market fundamental freedoms** – Direct award of a concession for the management of a public gas-distribution service – Not permissible without appropriate transparency [Provisions of the TFEU concerning the common market fundamental freedoms] [Directive 2004/18/EC, article 17]

The provisions of the Treaty on the common market fundamental freedoms preclude the direct award by a municipality of a concession for the management of the public gas-distribution service to a company in which there is a majority public holding and in which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements.

Without necessarily implying an obligation to hold an invitation to tender, those requirements are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.

61. Judgment of 13 October 2005, case C-458/03, Parking Brixen

- **Factual context** : see paragraphs 12 to 29 of the judgment.

- **Scope of the EU procurement directive** - Public service concession - Management of public pay car parks – Excluded [Directive 2004/18/EC, article 17]

The award, by a public authority to a service provider, of the management of a public pay car park, in consideration for which that provider is remunerated by sums paid by third parties for the use of that car park, is a public service concession to which the EU procurement Directive does not apply.

- **Principle of equal treatment and non-discrimination –** Common market fundamental freedoms – Scope - Public service concession contracts – Included - Limits [Provisions of the EC Treaty concerning the common market fundamental freedoms] [Directive 2004/18/EC, article 2]

The public authorities concluding public service concession contracts are, bound to comply with the fundamental rules of the TFEU, in general, and the principle of non-discrimination on the ground of nationality, in particular, which are specific expressions of the general principle of equal treatment. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.

Nevertheless, in the field of public service concessions, the application of the fundamental rules of the TFEU as well as the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority.

The aforementioned rules and principles are to be interpreted as precluding a public authority from awarding, without putting it out to tender, a public service concession to a company limited by shares which resulted from the conversion of a special undertaking of that public authority, whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

62. Judgment of 20 October 2005, case C-264/03, Commission/France

- **Factual context** : see paragraphs 11 to 21 of the judgment.

- **Common market fundamental freedoms** – Public contracts excluded from the scope of the EU procurement directive – Obligation to respect the fundamental rules of the Treaty [Directive 2004/18/EC, article 2]

The provisions of the TFEU relating to freedom of movement are intended to apply to public contracts which are outside the scope of the EU procurement Directive Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on grounds of nationality in particular.

That is particularly the case in relation to public contracts the value of which does not reach the thresholds fixed by that Directive. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law.

- **Contract award procedures** – Service providers - National legislation allowing the contracting authority to delegate some responsibilities – Mission of the agent re-served to certain exhaustively listed categories of legal persons under national law – Not permissible [Directive 2004/18/EC, article 2]

By reserving the task of delegated project contracting to an exhaustive list of legal persons under national law, a Member State fails to fulfil its obligations under the EU procurement Directive and under the TFEU for public service contracts outside the

scope of Directive.

63. Judgment of 10 November 2005, case C-29/04, Commission/Austria

- **Factual context** : see paragraphs 6 to 15 of the judgment.

- **Scope of the directive - Contracting authorities** - "In-house"-services - Contracting authority having a holding in the capital of a company legally distinct from it. [Directive 2004/18/EC, articles 1(2)(a) and 1(9)]

By permitting the award by a municipality of a public service contract to a company which is legally distinct from that municipality and 49% owned by a private undertaking without the public tendering procedure provided for in the EU procurement Directive being implemented, a Member State fails to fulfil its obligations under that directive.

Where a contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the Directive with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, even as a majority, the public award procedures laid down by that directive must always be applied.

64. Judgment of 24 November 2005, case C-331/04, ATI EAC and others

- **Factual context** : see paragraphs 5 to 13 of the judgment.

- **Contract award criteria -** The economically most advantageous tender - Observance of award criteria set out in the contract documents or the contract notice - Establishment of subheadings for one of the award criteria in the contract documents or the contract notice - Decision to apply weighting - Principles of equal treatment of tenderers and transparency. [Directive 2004/18/EC, articles 2 and 53]

The EU procurement directive must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:
- does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
- was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

65. Judgment of 9 February 2006, joined cases C-226/04 and C-228/04, La Cascina and Zilch

- **Factual context** : see paragraphs 9 to 17 of the judgment

- **Public service contracts – Procedures for the award of public service contracts – Qualitative selection –** Exclusion of candidate – Obligations of service providers – Payment of social security contributions and taxes [Directive 2004/18/EC, articles 2 and 45]

The EU procurement Directive enables Member States to exclude any candidate who 'has not fulfilled obligations' relating to the payment of social security contributions and taxes in accordance with national legal provisions.

That provision does not preclude a national law or administrative practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having paid in full when the period prescribed for submitting the request to participate in the contract expires, may subsequently regularise his position

- pursuant to a tax amnesty or leniency measures adopted by the State, or
- pursuant to an administrative arrangement of payment in instalments or debt relief, or
- by bringing administrative or legal proceedings,

provided that, within the period prescribed by national law or administrative practice, he provides evidence that he has benefited from such measures or arrangement or that he has brought such proceedings within that period.

66. Judgment of 6 April 2006, Case C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV)

- **Factual context** : see paragraphs 8 to 14 of the judgment.

- **Freedom to provide services – Local public transport service – Award with no call for tenders** – Award by a public authority to an undertaking of which it owns the share capital – In house? [Directive 2004/18/EC, articles 1(2), 1(9), 2 and 17]

Articles 49 and 56 TFEU, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority.

67. Judgment of 11 May 2006, Case C-340/04, Carbotermo and Consorzio Alisei

- **Factual context** : see paragraphs 8 to 30 of the judgment.

- **Public supply contracts – Award of contract without a call for tenders –** Award of the contract to an undertaking in which the contracting authority has a shareholding – In house? – Contracting authority must exercise over the successful tenderer for the public procurement contract at issue a control similar to that which it exercises over its own departments – Undertaking must carry out the essential part of its activities with the controlling authority. [Directive 2004/18/EC, article 1(2) and 1(9)]

The EU procurement Directive precludes the direct award of a public supply and service contract, the main value of which lies in supply, to a joint stock company whose Board of Directors has ample managerial powers which it may exercise independently and whose share capital is, at present, held entirely by another joint stock company whose majority shareholder is, in turn, the contracting authority.

In such circumstances, the condition relating to the inapplicability of the EU procurement Directive, namely that the contracting authority exercises over the successful tenderer for the public procurement contract at issue a control similar to that which it exercises over its own departments, is not fulfilled.

In order to determine whether that condition is fulfilled, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the successful tenderer is subject to a control enabling the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.

That is not the case where the control exercised by the contracting authority can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies. Moreover, where any influence which the contracting authority might have is through a holding company, the intervention of such an intermediary may weaken any control possibly exercised by the contracting authority over a joint stock company merely because it holds shares in that company.

In order to determine whether an undertaking carries out the essential part of its activities with the controlling authority, for the purpose of deciding on the applicability of the EU procurement Directive, account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided; the territory where the activities are carried out is irrelevant.

68. Judgment of 18 January 2007, Case C-220/05, Jean Auroux and Others

- **Factual context** : see paragraphs 12 to 20 of the judgment.

- **Public procurement – Definition of "public works contract' and "work' – Method of calculation of the value of the contract** - Award without call for tenders – Contract for the implementation of a development project concluded between two contracting authorities [Directive 2004/18/EC, article 1(2), 1(9) and 9]

An agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of the EU procurement directive, whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work.

In order to determine the value of a contract to determine if the European thresholds have been reached, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.

A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the EU procurement directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.

69. Judgment of 19 April 2007, Case C-295/05, Asociación Nacional de Empresas Forestales (Asemfo)

- **Factual context** : see paragraphs 16 to 24 of the judgment.

- **National legislation enabling a public undertaking to perform operations on the direct instructions of the public authorities without being subject to the general rules for the award of public procurement contracts –** In house – Internal management structure – Conditions – The public authority must exercise over a distinct entity a control similar to that which it exercises over its own departments – The distinct entity must carry out the essential part of its activities with the public authority or authorities which control it. [Directive 2004/18/EC, articles 1(2) and 1(9)]

The EU Procurement Directive does not preclude a body of rules which enables a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

70. Judgment of 14 June 2007, Case C-6/05, Medipac-Kazantzidis

- **Factual context** : see paragraphs 21 to 27 of the judgment.

- **Free movement of goods - Principle of equal treatment and obligation of transparency –** Hospital purchase of medical devices bearing the CE marking – Protective measures – Public supply contract – Contract falling below the threshold of application of the EU procurement [Directive 2004/18/EC, article 2]

Regarding the applicability of the EU Procurement Directive, it is common ground that it applies only to contracts the value of which is equal to or greater than the threshold laid down in that directive. The file shows that the value of the contract at issue in the main proceedings is lower than the threshold of application laid down in the EU Procurement Directive.

According to settled case-law, even if the value of a contract which is the subject-matter of an invitation to tender does not attain the threshold of application of the directives by which the Community legislature has regulated the field of public procurement, and the contract in question therefore does not fall within the scope of application of those directives, contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Community law, such as the principle of equal treatment and the resulting obligation of transparency .

71. Judgment of 18 July 2007, Case C-382/05, European Commission/Italy

- **Factual context** : see paragraphs 10 to 17 of the judgment.

- **Public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive.** [Directive 2004/18/EC, article 1(2) and 17]

Where an awarding authority of a Member State initiates the procedure for the conclusion of agreements concerning the use of that part of municipal waste produced in the municipalities of a region of that Member State remaining after the collection of selected material, and concludes those agreements without following the procedures laid down by the EU procurement Directive, and, in particular, without publishing the appropriate contract notice in the Official Journal of the European Union, that Member State fails to fulfil its obligations under that directive.

The abovementioned agreements, which provide, in particular, for the payment by the awarding authority to the operator of a royalty the amount of which is fixed in euros per tonne of waste transferred by the municipalities concerned to that operator do not establish a method of remuneration consisting in the right to exploit the services in question for payment and involving the assumption by the operator of the risk connected with operating them. Such agreements must therefore be considered to be public service contracts subject to the EU procurement Directive and not service concessions outside the scope of that directive, their conclusion being possible only in accordance with the provisions of that directive.

72. Judgment of 13 September 2007, Case C-260/04, European Commission/Italy

- **Factual context** : see paragraphs 8 to 11 of the judgment.

- **Freedom of establishment and freedom to provide services – Public service concessions –** Renewal of 329 horse-race betting licences without inviting competing bids – Requirements of publication and transparency – Discrimination on grounds of nationality. [Directive 2004/18/EC, articles 2 and 17]

Public authorities concluding public service concession contracts are bound to comply with the fundamental rules of the Treaty, especially Articles 49 and 56 TFEU, and the prohibition of discrimination on grounds of nationality in particular, as being a specific expression of the general principle of equal treatment. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.

It follows that a Member State which renews licences for horse-race betting operations without inviting any competing bids fails to fulfil its obligations under Articles 49 and 56 TFEU and, in particular, infringes the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

The renewal of such licences without putting them out to tender cannot be justified by the need to discourage the development of clandestine activities for collecting and allocating bets, since it is not an appropriate means of attaining that objective and goes beyond what is necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.

In addition, grounds of an economic nature, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.

73. Judgment of 13 November 2007, Case C-507/03, European Commission/Ireland

- **Factual context** : see paragraphs 9 to 13 of the judgment.

- **Award of public contracts – Common market fundamental freedoms.** [Directive 2004/18/EC, articles 2 and 21]

For the services coming within the ambit of Annex II B to EU Procurement Directive, and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services

are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services.

The award of public contracts beneath the thresholds of the EU procurement Directive remains subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services. It follows that the advertising arrangement introduced by the EU procurement Directive for contracts relating to services coming within the ambit of Annex II B cannot be interpreted as precluding application of the principles resulting from Articles 49 and 56 TFEU, in the event that such contracts nevertheless are of certain cross-border interest.

74. Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk

- **Factual context** : see paragraphs 23 to 29 of the judgment.

- **Public service contracts – Contracting authorities** – Bodies governed by public law – Condition that the activity of the institution be 'financed, for the most part, by the State'. [Directive 2004/18/EC, article 1(9)]

The first condition of the third indent of the second subparagraph of Article 1(9) of the EU procurement Directive must be interpreted as meaning that there is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main proceedings.

The first condition of the third indent of the second subparagraph of Article 1(9) of the EU procurement Directive must be interpreted as meaning that, that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of 'financing … by the State' does not require that there be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings.

75. Judgment of 18 December 2007, Case C-532/03, European Commission/Ireland

- **Factual context** : see paragraphs 7 to 13 of the judgment.

- **Public procurement – Common market fundamental freedoms –** Emergency ambulance services [Articles 49 and 56 TFEU]

Without prejudice to the obligation of the Member States to facilitate the achievement of the Commission's tasks, which consist in particular in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied, in an action for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.

Thus, in an action for a declaration that for one public body, without prior advertising, to provide another with emergency ambulance services is contrary to freedom of establishment and the freedom to provide services, it is for the Commission to place before the Court the information needed to enable the Court to establish that a public contract has been awarded, given that the possibility that the public body concerned provides the services in question in the exercise of its own powers cannot be excluded. In that regard, the mere fact that, as between two public bodies, funding arrangements exist in respect of emergency ambulance services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty.

76. Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi

- **Factual context** : see paragraphs 11 to 15 of the judgment.

- **Economic operators –** National provisions which exclude candidates or tenderers from submitting a tender solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons. [Directive 2004/18/EC, article 4]

The EU procurement Directive precludes national provisions, such as those at issue in the main proceedings, which exclude candidates or tenderers entitled under the law of the Member State concerned to provide the service in question, including those composed of groups of service providers, from submitting a tender, in a procedure for the award of a public service contract with a value greater than the threshold for application of the EU procurement Directive, solely on the ground that those candidates or tenderers do not have a legal form corresponding to a specific category of legal persons, namely that of a company with share capital. It is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in accordance with the requirements of Community law and, in so far as such an interpretation is not possible, to disapply any provision of national law which is contrary to those requirements.

77. Judgment of 24 January 2008, Case C-532/06, Lianakis

- **Factual context** : see paragraphs 9 to 20 of the judgment.

- **Criteria which may be accepted as 'criteria for qualitative selection' or 'award criteria' - Principle of equal treatment of economic operators and obligation of transparency** – Economically most advantageous tender – Compliance with the award criteria set out in the contract documents or contract notice – Subsequent determination of weighting factors and sub-criteria in respect of the award criteria referred to in the contract documents or contract notice [Directive 2004/18/EC, articles 2, 44 and 53]

In a tendering procedure, a contracting authority is precluded from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment and their ability to perform the contract by the anticipated deadline. While the EU procurement directive does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules. The suitability of tenderers is to be checked in accordance with the criteria of economic and financial standing and of technical capability referred to in the EU procurement directive, whereas the award of contracts is to be based on the criteria set out in EU procurement directive, namely, the lowest price or the economically most advantageous tender.

Read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, the EU procurement directive precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice. The EU procurement directive requires that potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention.

78. Judgment of 21 February 2008, case C-412/04, European Commission/Italy

- **Factual context** : see paragraphs 10 to 31 of the judgment.

- **Public works, supply and service contracts – Transparency – Equal treatment –** Contracts excluded from the scope of those directives on account of their value – Determination according to the main purpose of the contract – Mixed works, supply and service contracts – Supply or service contracts including ancillary works. [Directive 2004/18/EC, articles 1(2), 2 and 9(5)]

A Member State which makes mixed works, supply and service contracts and supply or service contracts which include ancillary works if the works represent more than 50% of the total value of the relevant contract subject to the national rules on public works contracts fails to fulfill its obligations under the EU Procurement Directive.

Where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which articles of the EU Procurement Directive Community are to be applied in principle.

The Community legislature expressly made a policy choice to exclude contracts under a certain threshold from the advertising regime which it introduced and therefore did not impose any specific obligation with respect to them. Where it is established that such a contract is of certain cross-border interest, the award, in the absence of any transparency, of that contract to an undertaking located in the same Member State as the contracting authority amounts to a difference in treatment to the detriment of undertakings which might be interested in the contract but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU.

79. Judgment of 3 April 2008, case C-346/06, Dirk Rüffert

- **Factual context** : see paragraphs 10 to 16 of the judgment.

- **Freedom to provide services** – Restrictions – Posting of workers in the context of the provision of services – Procedures for the award of public works contracts – Social protection of workers. [Article 56 TFEU]

A Member State is not entitled to impose on undertakings established in other Member States, a rate of pay provided for by a collective agreement in force at the place where the services concerned are performed and not declared to be of general application, by requiring, by a measure of a legislative nature, the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement.

80. Judgment of 8 April 2008, case C-337/05, European Commission/Italy

- **Factual context** : see paragraphs 10 to 14 of the judgment.

- **Public supply contracts – Award of public contracts without prior publication of a notice** – Absence of competitive tendering – Agusta and Agusta Bell helicopters. [Directive 2004/18/EC, articles 10, 14 and 31]

The negotiated procedure is exceptional in nature and may be applied only in cases which are set out in an exhaustive list. To that end, the EU Procurement Directive exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed. Derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in connection with public contracts

must be interpreted strictly. To prevent the EU Procurement Directive being deprived of its effectiveness, the Member States cannot, therefore, provide for the use of the negotiated procedure in cases not provided for by that directive, or add new conditions to the cases expressly provided for by the directive in question which make that procedure easier to use. In addition, the burden of proving the existence of exceptional circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances.

As regards the legitimate requirements of national interest foreseen in Article 346 TFEU and Article 14 of the EU Procurement Directive, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes. Therefore, the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.

81. Judgment of 10 April 2008, case C-393/06, Ing. Aigner

- **Factual context** : see paragraphs 15 to 22 of the judgment.

- **Body governed by public law – Contracting authority -** Contracting entity pursuing activities falling in part within the field of application of Directive 2004/17/EC and in part within that of Directive 2004/18/EC. [Directive 2004/18/EC, articles 1(2), 1(9) and 2]

A ‘body governed by public law’ is any body which, first, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. Those three conditions are cumulative.

An entity established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings in a local authority area by means of the use of energy produced by the destruction of waste, which has legal personality and of which the local authority wholly owns the share capital and monitors its economic and financial management, meets the two latter conditions laid down by those directives.

With regard to the first condition, it cannot be disputed that such an entity was established specifically to meet needs in the general interest. To provide heating for an

urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest..

In order to ascertain whether the needs met by the entity in question have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the entity concerned was established and the conditions under which it exercises its activity. In that regard, it is common ground that the pursuit of profit did not underlie its establishment. With regard, subsequently, to the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, having regard to the functional interpretation of the concept of a 'body governed by public law', of the sector for which that entity was created, that is to say, the supply of district heating by means of the use of energy produced by the burning of waste.

All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.

82. Judgment of 15 May 2008, joined cases C-147/06 and C-148/06, SECAP and Santorso

- **Factual context** : see paragraphs 9 to 17 of the judgment.

- **Community law – Principles – Equal treatment – Discrimination on grounds of nationality –** Contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest. [Directive 2004/18/EC, articles 2 and 55]

The fundamental rules of the Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold set by the EU Procurement Directive, which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers

concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which abnormally low tenders were automatically excluded on account of there being an unduly large number of tenders, which might oblige the contracting authorities to examine on an inter partes basis such a high number of bids that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project.

83. Judgment of 19 June 2008, C-454/06, pressetext Nachrichtenagentur

- **Factual context** : see paragraphs 8 to 27 of the judgment.

- **Procedures for the award of public service contracts – Award of a contract** – Meaning – Amendments to the provisions of a public contract during the currency of the contract. [Directive 2004/18/EC, article 28]

The terms ‘awarding’ and ‘awarded’, used in the EU procurement Directive must be interpreted as not covering a situation where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations.

Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of the EU procurement Directive when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted.

84. Judgment of 17 July 2008, C-347/06, ASM Brescia

- **Factual context** : see paragraphs 16 to 20 of the judgment.

- **Common market fundamental freedoms –** Concession for a public gas-distribution service – Early cessation at the end of a transitional period – Public service concession granted without a competitive tendering procedure – Principles of the protection of legitimate expectations and legal certainty. [Directive 2004/18/EC, article 2]

Articles 49 and 56 TFEU do not preclude legislation of a Member State to implement the common rules for the internal market in natural gas by means of the early cessation, at the end of a transitional period, of concessions for the distribution of natural gas

granted without a competitive tendering procedure, from providing for the extension, on certain conditions, of the length of that transitional period, provided that such an extension can be regarded as being necessary to enable the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

Notwithstanding the fact that such a public service concession is outside the scope of the directives on the different categories of public contracts, public authorities are nonetheless bound, when they envisage granting such a concession, to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the grounds of nationality, in particular. More particularly, since such a concession is of a certain cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU.

Such a difference in treatment can however be justified by the necessity of complying with the principle of legal certainty, which forms part of the Community legal order and is binding on every national authority responsible for implementing Community law. Since Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30 requires existing concessions for the distribution of gas to be called in question only in cases of long-standing concessions not expiring for decades which were granted at a time when the Court had not yet held that contracts with a cross-border interest might be subject to duties of transparency arising from primary law, the principle of legal certainty, which requires, particularly, that rules of law be clear, precise and predictable in their effects, not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

85. Judgment of 2 October 2008, case C-157/06, European Commission/Italy

- **Factual context** : see paragraphs 9 to 12 of the judgment.

- **Procedures for the award of public supply contracts** – Light helicopters for the police and the national fire service – Award of public contracts without prior publication of a notice – Derogations from common rules – Restrictive interpretation – Protection of the essential interests of a Member State’s security. [Directive 2004/18/EC, articles 10, 14 and 31]

A Member State has failed to fulfil its obligations under the EU procurement Directive, where it has adopted national legislation authorising a derogation from the Community rules on public supply contracts in respect of the purchase of light helicopters for the use of police forces and the national fire service, without any of the conditions capable of justifying that derogation having been satisfied.

As regards the legitimate requirements of national interest foreseen by Article 346 TFEU, any Member State may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials, provided, however, that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. Since it is not disputed that the national legislation applies to helicopters which are clearly for civilian use whereas their military use is only potential, Article 346 TFEU, to which Article 10 of the EU procurement Directive refers, cannot properly be invoked by the Member State concerned to justify national legislation authorising recourse to the negotiated procedure for the purchase of those helicopters.

Furthermore, resort to Article 10 of the EU procurement Directive in respect of the purchase of the helicopters in question appears disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production in so far as the Member State concerned has not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by that directive. It follows that the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 10 of the EU procurement Directive actually exist.

86. Judgment of 13 November 2008, case C-324/07, Coditel Brabant

- **Factual context** : see paragraphs 8 to 22 of the judgment.

- **Public procurement – Tendering procedures – Public service concessions** – Concession for the operation of a municipal cable television network – Awarded by a municipality to an inter-municipal cooperative society – Obligation of transparency – Conditions – Whether the control exercised by the concession-granting authority over the concessionaire is similar to that exercised over its own departments. [Directive 2004/18/EC, articles 2 and 17]

Articles 49 and 56 TFEU, the principles of equal treatment and of non-discrimination on grounds of nationality and the concomitant obligation of transparency do not preclude a public authority from awarding, without calling for competition, a public service concession to an inter-municipal cooperative society of which all the members are public authorities, where those public authorities exercise over that cooperative society control similar to that exercised over their own departments and where that society carries out the essential part of its activities with those public authorities.

Subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal cooperative society in question, in circumstances such as those of the case before the referring court, where decisions regarding the activities of an inter-municipal cooperative society owned exclusively by public authorities are taken by bodies, created under the statutes of that society, which are composed of representatives of the affiliated public authorities, the control exercised over those decisions by the public authorities may be regarded as enabling those authorities to exercise over the cooperative society control similar to that exercised over their own departments.

Where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.

87. Judgment of 16 December 2008, case C-213/07, Michaniki

- **Factual context** : see paragraphs 12 to 26 of the judgment.

- **Public works contracts** – Grounds for excluding participation in a contract – National measures establishing an incompatibility between the public works sector and that of the media. [Directive 2004/18/EC, articles 2 and 45 to 52]

The EU procurement Directive must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that directive does not preclude a Member State from providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main

shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.

88. Judgment of 19 May 2009, case C-538/07, Assitur

- **Factual context** : see paragraphs 9 to 18 of the judgment.

- **Public service contracts –** National legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract [Directive 2004/18/EC, articles 2 and 45]

The public procurement directive must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective.

Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.

89. Judgment of 9 June 2009, case C-480/06, European Commission/Germany

- **Factual context** : see paragraphs 4 to 11 of the judgment.

- **Contracting authorities -** No formal European tendering procedure for the award of waste treatment services – Cooperation between local authorities [Directive 2004/18/EC, article 1(9)]

It must be observed, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in the public procurement directive, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

90. Judgment of 11 June 2009, case C-300/07, Hans & Christophorus Oymanns

- **Factual context** : see paragraphs 26 to 39 of the judgment.

- **Public supply contracts and public service contracts –Bodies governed by public law – Contracting authorities** – Invitation to tender – Statutory sickness insurance funds – Manufacture and supply of orthopaedic footwear individually tailored to patients' needs – Detailed advice provided to patients [Directive 2004/18/EC, article 1(2) and 1(9)]

The public procurement directive must be interpreted as meaning that there is financing, for the most part, by the State when the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members, which are imposed, calculated and collected according to rules of public law such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of the application the rules in that directive.

When a mixed public contract concerns both products and services, the criterion to be applied in order to determine whether the contract in question is a supply contract or a service contract is the respective value of the products and services covered by the contract. Where the products supplied are individually manufactured and tailored to the needs of each customer and where each customer must receive individual advice on the use of the products, the manufacture of those products must be classified in the 'supply' part of the said contract for the purposes of calculating the value of each part thereof.

91. Judgment of 10 September 2009, case C-573/07, Sea

- **Factual context** : see paragraphs 20 to 30 of the judgment.

- **Public procurement – Award procedures –** Contract relating to a service for the collection, transport and disposal of urban waste – Awarded without any call for tenders – Awarded to a company limited by shares whose capital is wholly owned by public bodies but under whose statutes a private capital holding is possible

It is not contrary to Articles **49 and 56 TFEU**, the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it.

Without prejudice to the determination by the court making the reference of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exer-

cise over their own departments in circumstances such as those of the case in the main proceedings, when:

– that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit, and

– through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions.

92. Judgment of 10 September 2009, case C-206/08, Eurawasser

- **Factual context** : see paragraphs 11 to 26 of the judgment.

- **Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Service concession** – Definition – Public service for the distribution of drinking water and the treatment of sewage – Transfer to the supplier of the risk connected with operating the service in question [Directive 2004/18/EC, article 17]

In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a 'service concession' within the meaning of the public procurement directive, where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.

93. Judgment of 15 October 2009, case C-196/08, Acoset

- **Factual context** : see paragraphs 16 to 28 of the judgment.

- **Award of public contracts – Award of water service to a semi-private company – Competitive procedure** – Appointment of the private partner responsible for operating the service – Award made without regard to the rules governing the award of public contracts [Articles 49 and 56 TFEU]

Articles 49 and 56 TFEU do not preclude the direct award of a public service which entails the prior execution of certain works, such as that at issue in the main proceedings, to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles

of free competition, transparency and equal treatment laid down by the EC Treaty with regard to concessions.

94. Judgment of 15 October 2009, case C-138/08, Hochtief and Linde

- **Factual context** : see paragraphs 13 to 18 of the judgment.

- **Procedures for the award of public works contracts – Negotiated procedures with publication of a contract notice** – Obligation to admit a minimum number of suitable candidates – Obligation to ensure genuine competition

The public procurement directive must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract.

The public procurement directive must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in that directive.

95. Judgment of 12 November 2009, case C-199/07, Commission/Greece

- **Factual context** : see paragraphs 11 to 17 of the judgment.

- **Contract notice – Qualitative selection and award criteria** – Consultancy project – Criteria for automatic exclusion

Greece has failed to fulfil its obligations under the public procurement directive by reason, firstly, of the exclusion, by virtue of a contract notice, of foreign consultancy firms or consultants who had submitted an expression of interest in the tendering procedures in the six months preceding the date of their expression of interest in the current competition and who had declared qualifications corresponding to certificate categories different from those now required and, secondly, of the failure to distinguish in that notice between qualitative selection criteria and award criteria for the contract in question.

96. Judgment of 10 December 2009, case C-299/08, Commission/France

- **Factual context** : see paragraphs 10 to 12 of the judgment.

- **Procedures for the award of public contracts** – National legislation providing for a single procedure for the award of the contract defining needs and of the ensuing marché d'exécution – Compatibility with that directive? No

By adopting and keeping in force national provisions, inasmuch as those provisions lay down a procedure for the award of marchés de definition (public contracts for designing

the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a marché d'exécution (a public works, supply or service contract) to one of the holders of the initial marchés de définition by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under the public procurement directive.

97. Judgment of 23 December 2009, case C-305/08, CoNISMa

- **Factual context** : see paragraphs 14 to 24 of the judgment.

- **Public service contracts – Concepts of 'contractor', 'supplier' and 'service provider' – Concept of 'economic operator'** – Universities and research institutes – Group ('consorzio') of universities and public authorities – Where the primary object under the statutes is non-profit-making – Admission to a procedure for the award of a public contract**.** [Directive 2004/18/EC, articles 1(8) and 4]

The provisions of the public procurement directive, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract.

The public procurement directive must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

98. Judgment of 23 December 2009, case C-376/08, Serrantoni and Consorzio stabile edili

- **Factual context** : see paragraphs 13 to 19 of the judgment.

- **Public works contracts –Principle of equal treatment – Groups of undertakings –** Prohibition on competing participation in the same tendering procedure by a 'consorzio stabile' ('permanent consortium') and one of its member companies). [Directive 2004/18/EC, articles 2 and 4]

Community law must be interpreted as precluding national legislation, such at that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in the public procurement directive, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with

the consortium’s tender in the context of the same procedure, even if the consortium’s tender was not submitted on behalf and in the interests of those companies.

Appendix XIII: Tender documents. An auditor's view([7])

An audit of the tender documents should confirm that:

- there are proper procedures/methods of procurement.
- the procurement process has been subject to competition and if not, whether the reasons for not using competitive tendering are justified.
- the scale and complexity of the procurement project is achievable.
- the procurement team was involved from an early enough stage.
- the suitability of the procurement procedures and type of contract used
- the period of execution of the contract is logical and sensible
- the Contracting Authority's interests are adequately protected (perhaps through liquidated damages)
- the supply of the required goods/services/works are through clear and explicit full descriptions of workmanship, materials and quality.
- the specification was clearly presented to the supplier/provider/contractor
- early warning indicators are in place to identify underperformance from supplier/provider/contractor
- specification is not too specific by pinpointing or mentioning patents or trademarks but gives fair opportunity to all.
- the criteria for evaluation/award are explicit and logical.
- clear procedures are in place for reporting and decision making and whether these are adhered to
- explicit and clear procedures are in place for taking over and approval of supplies/services/works.
- appropriate controls are in place to ensure propriety and regularity.

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[7] See the National Audit Office publication "*Getting Value for Money from Procurement. How auditors can help*".

Appendix XIV : Price and quality coefficients in the evaluation of tenders

The two envelope method

The two envelope method describes a procedure where tenderers are requested to submit proposals in two parts, one containing the technical and capacity details and the other containing the tender sum.

Usually the tender documents provide that only the financial proposals of those tenderers who attained a minimum technical score, in all criteria, are opened.

Procurement processes carried out with the two envelope method (technical [**T**] and financial [**F**] proposals) aim at finding the Most Economically Advantageous Tender, when the Contracting Authority (CA) wishes to award a tender with the “best value for money”.

This method is usually followed for the procurement of services, equipment or design and build (turn key) projects.

When an award is to be made on the basis of the Most Economically Advantageous Tender, the CA is obliged to state in the tender documents, all the technical criteria which will be taken into consideration in the evaluation of the tenders.

To avoid the subjective and arbitrary use of technical criteria, it is widely accepted that a mathematical formula, such as or very similar to, the one given below is established, specified in the tender documents and used to calculate the combined markings of the financial and technical proposals for each tender (Weighted Average Score):

$$\text{Weighted Average Score} = A.\frac{T}{Tmax} + B.\frac{Fmin}{F}$$

where:

T = Score of Technical Proposal

Tmax= Score of Best Technical Proposal

F = Tender Sum

Fmin = Lowest Tender Sum

A = Quality coefficient (technical weighting factor)

B = Price coefficient (financial weighting factor)

$A + B = 100$

Selection of an unjustifiably expensive tender can be avoided if the Contracting Authority includes suitable tender provisions such as:

(a) The inclusion of a clause which forbids the submission of tenders beyond a maximum fixed sum, which is usually between 100 – 120%, of the genuine pre-estimated contract cost (ceiling). This method is usually adopted in Services Contracts.

(b) By defining the proportions of the quality to price coefficients in such a way, so as to exclude the selection of an excessively expensive tender as compared to another which is to acceptable quality but of a much lower price. This method should be adopted in the case of Supply Contracts or Turn – Key Contracts.

The technical and financial weighting factors (A and B) prescribed in the above formula, reflect **how much more** the contracting Authority is willing to pay in order to obtain better quality and consequently select a more expensive tender. So, the exact amount which the Contracting Authority will pay for each percentage point of a technically better tender is controlled by the proportion of the technical to financial weighting factors.

As a general rule however, the tender documents usually provide that a technical proposal is acceptable (and will therefore proceed with the opening of the envelope containing the financial part of the tender) only if the tenderer attains a minimum mark (usually set at 70%).

The examples shown in Fig. 1 to 6 and Table 1 (see further on), were calculated with a lowest technical score of 70%. Had a different lowest score been used, the corresponding percentage price differences would have been slightly different for the lower ratios (20:80, 30:70) and markedly different for the higher ratios (70:30, 80:20).

It is stressed that there is still a price advantage for even the lower ratios such as 20:80 or 30:70. This is clearly shown in Table 1 where for example, for a ratio of 30:70 and difference of 20% in the Technical Score, there is 10,5% price advantage for the higher marked tender.

Worth noting (see fig. 6) is the much steeper increase in the % Price Difference as the ratio of A:B increases from Δ=5% to Δ=25%.

Example 1:

Applying the formula for two tenders – both with a technical mark above 70% - having a difference of say 20 marks in the technical score (e.g. 95% and 75%), then the following

prevail:

For a ratio 20:80 the C.A. may pay up to 6% more

For a ratio 30:70 the C.A. may pay up to 10% more

For a ratio 40:60 the C.A. may pay up to 16% more

For a ratio 50:50 the C.A. may pay up to 27% more

For a ratio 60:40 the C.A. may pay up to 46% more

For a ratio 70:30 the C.A. may pay up to 96% more

For a ratio 80:20 the C.A. may pay up to 533% more

Consequently if the Contracting Authority is willing to pay up to 30% extra for the qualitative difference between two acceptable tenders then it must exclude the ratios 60:40, 70:30 and 80:20.

Example 2:

Tenderer A:	**Tenderer B:**
$T_A = 70$	$T_B = 85$
$F_A = 100.000€$	$F_B = ?$

If the technical to financial coefficients (A:B) prescribed in the terder documents, is 60:40 and since the difference in the Technical Scores is 15, then the corresponding percentage price difference (see Table 1 and Fig. 3) is 36%. This means that tenderer B would be the successful bidder, if his tender is lower than €136.000.

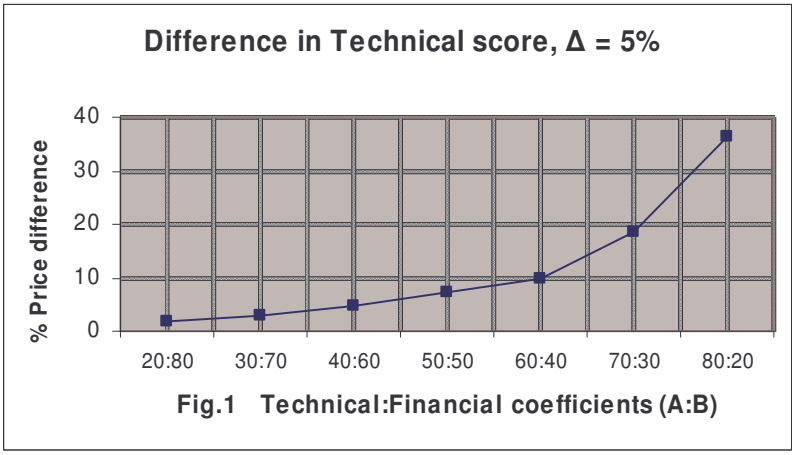

Fig.1 Technical:Financial coefficients (A:B)

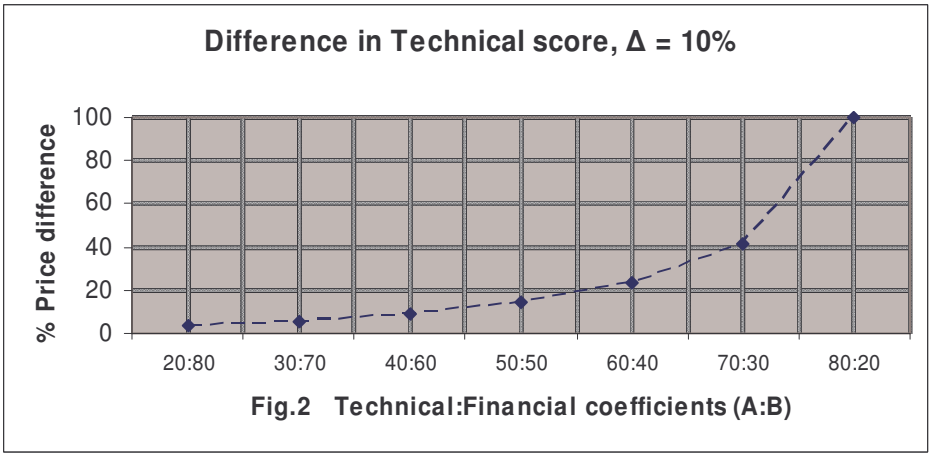

Fig.2 Technical:Financial coefficients (A:B)

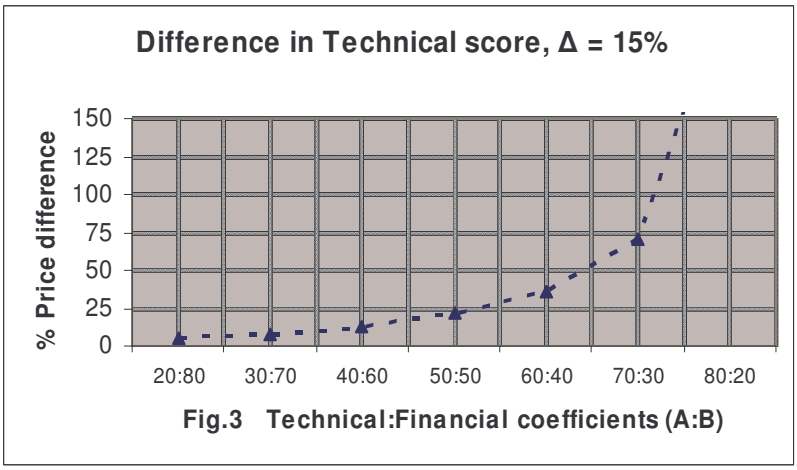

Fig.3 Technical:Financial coefficients (A:B)

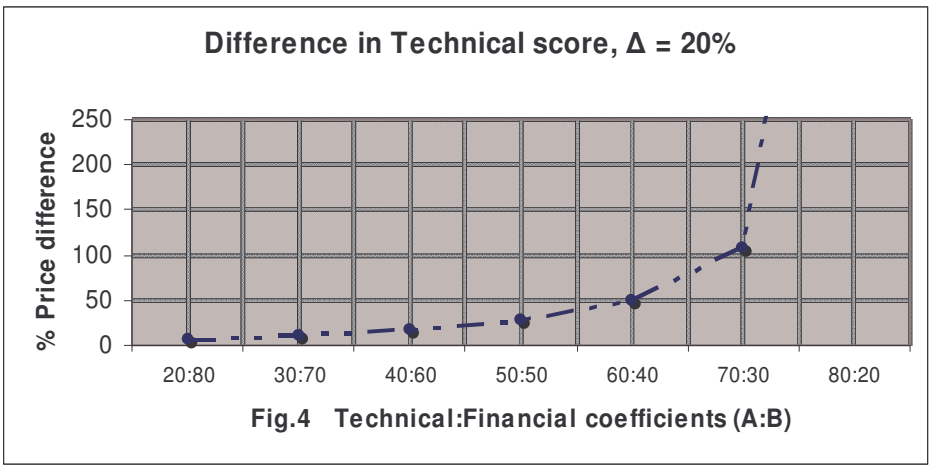

Fig.4 Technical:Financial coefficients (A:B)

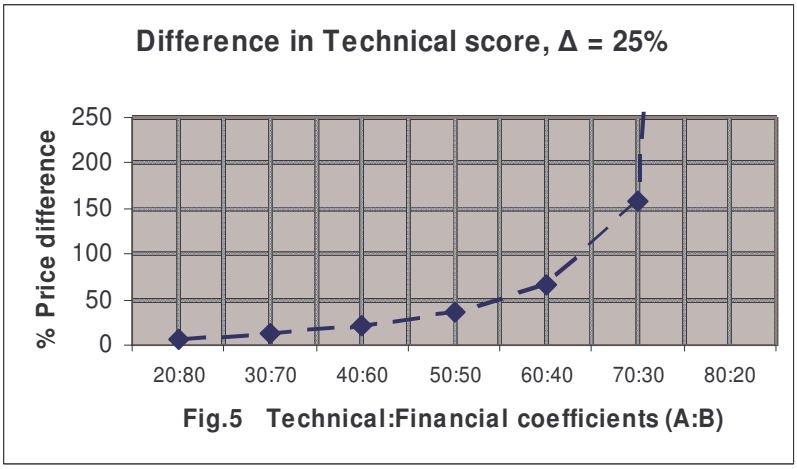

Fig.5 Technical:Financial coefficients (A:B)

TABLE 1
(values corresponding to Fig. 1 to 6)

Technical:Financial coefficients (A:B)	% Price difference				
	for Δ=5%	for Δ=10%	for Δ=15%	for Δ=20%	for Δ=25%
20:80	1,7	3,2	4,6	5,9	7
30:70	2,9	5,7	8,2	10,5	12,7
40:60	4,7	9,1	13,3	17,4	21,3
50:50	7,1	14,3	21,4	28,6	35,7
60:40	9,7	23,1	36	50	65,2
70:30	18,4	41,2	70	107,8	159,1
80:20	36,4	100	240,1	800	2000

NB: 1. Δ = Difference in Technical score
2. All above examples assume a tender with a lowest Technical score of 70%

Working Group on Public Procurement

Supreme Audit Institutions Summaries of Procurement Studies

Court of Audit Belgium

Summary Title	**Language**
1) Bus line services : cost price and contract award to operators	English
2) Contract marketing and promotion expenditure	English
3) Framework contracts: The Federal Central Buying Office's operation (abbreviated in FOR/CMS) examined in terms of sound management and legality	English
4) Execution of economic compensations associated with the purchase of specific military equipment	English
5) Control of Public Contracts covering the Road Transport Infrastructure in Brussels	English
6) Construction of the « Deurganckdock » (Antwerp container terminal complex)	English
7) Damage compensations charged on the budget of the Flemish infrastructure fund	English
8) Introduction of double entry accounting at the Ministry of the Flemish Community	English
9) The Outsourcing of the Data processing function at the Ministry of the Flemish Community	English
10) The North Wastewater Treatment Plant in Brussels. Award and funding of the concession contract.	English
11) Roads, motorways and waterways maintenance leases	French
12) Final payment on some large-scale public works contracts	French
13) The "Ilot Ecluse" building construction works (public works contract)	French
14) Complying with public procurement regulation	French
15) Public service contracts providing mainly intellectual services	French

Summary 1

BUS LINE SERVICES : COST PRICE AND CONTRACT AWARD TO OPERATORS

Owner: Belgian Court of Audit. Full report in Dutch is available at:
http://www.rekenhof.be/docs/Reports/2005/2005_03_Onderzoek_%20geregeld_vervoer.pdf
Type of audit: compliance
Subject area: generic goods and services
Sector: Flemish public transport company VVM-De Lijn of the Flemish Region

Scope

The Flemish Parliament requested the Court to examine the Flemish public transport company VVM-De Lijn's method of cost price calculation. The Court has also checked whether VVM was using this cost price method to compare between each other the prices of the contracts concluded with operators at the end of 2002. In the last few years VVM has made headway in working out a usable system to calculate cost prices notwithstanding a few remaining shortcomings. However, this system came a bit too late to play a significant part when it went to renew the lease contracts tendered in September 2002. The renewal process went off smoothly, but the resulting cost price was 8% above estimate. Also of note is a certain amalgamation of market players.

Main issues and findings

Audit

Since 1997 the Flemish Parliament had requested a comparison audit of the cost price of the bus services under VVM's direct management and the cost price for subcontracted line services. Such a comparison could only be achieved if VVM had first introduced adequate double-entry accounting and computer information systems and worked out a calculation cost method. In 2003 VVM finally developed a usable system, which the Flemish Parliament wanted the Court of Audit to examine.

Problems of infancy

The Court of Audit has ascertained that the new information systems provide the basic information needed for an adequate cost price calculation as well as detailed information regarding the distances covered in kilometres, the number of kilometres on a per route basis, the average hourly wages, the fuel consumption, the maintenance and repair time, etc. However, some problems remain. Sometimes the calculation is not uniform and up-to-date guidelines are not available for certain system components. The method focuses mainly on comparing cost prices with the operators and the Court has found it suitable for this purpose. But it also believes VVM should examine whether a number of direct and fixed operating costs are (not) taken into account, such as fixed costs linked to maintenance centres, workshops and depots.

Subcontracting process

Following a test phase in autumn 2002, the cost calculation system was made operative from January 2003 ; this was a bit too late for the final evaluation of the tenders submitted by candidate operators for the execution of 79 lots. Tenders had already been submitted to the board on 30 September 2002 so that a comparison between the tender prices and the internal cost price of transport services operated by the VVM itself had proved impossible to make.

Outdated cost price reference

As VVM intended to use the price criterion to assess the tenders, it calculated a specific reference cost price per procurement, which was an estimate based on known parameters. The various components of the reference cost price came from a formula which the Court had found outdated, unreliable and not transparent in a previous audit. Eventually in 2003 VVM made do with an 8% rise in tender prices compared to January 2001.

Respect of competition rules

In September 2002 VVM awarded the 79 contracts after market consultation by negotiated procedure with the publication of a system of qualification. In its capacity of public utility company VVM was allowed to use this mode of procurement. The way VVM managed the system of qualification can be considered as satisfactory. Competition was not restricted. Besides, contracts were awarded without any notable problems.

Criteria Weighting

The evaluation procedure was not completely finalized beforehand though. In the absence of specific specifications otherwise, a 50-50-weighting of the criteria for price and quality would have been the normal rule but the evaluation committee applied an 84-16 relationship. Verification was hampered by the lack of detailed accounts of negotiations or awardings. Apart from a few details, the bids appear to have been evaluated and compared properly.

Amalgamation of market players

As the aim was to prevent an amalgamation of market players, the tender specified that a single market player could not be awarded more than 5% of the lots. Although VVM formally complied with the 5% rule, the Court of Audit could notice a certain amalgamation of market players, due to the fact that several operators were owned by the same shareholders.

Cost price

The ultimate price increase was another 8% above estimate, partly as a result of the specifications stipulated. However, it can also be ascribed to budget constraints, so that these last few years the price increases claimed by operators could not be granted.

The minister's response

The Flemish Minister of Mobility informed the Court on 20 December 2004 that she found the Court’s analysis detailed and well documented, that VVM would heed its recommendations and had already introduced several improvements.

End of Summary 1

Summary 2

CONTRACT MARKETING AND PROMOTION EXPENDITURE

Owner: Belgian Court of Audit. Full report in Dutch is available at:
http://www.rekenhof.be/docs/Reports/2003/augustus_2003_toerisme_vlaanderen.pdf
Type of audit: compliance
Subject area: services
Sector: Flemish public institution “Toerisme Vlaanderen” of the Flemish Region

Scope

The Belgian Court of Audit has noticed that the Flemish public institution "Toerisme Vlaanderen" has been operating in a legal vacuum since the end of 1998 because the Flemish Government has failed to enforce the organic decree. The Court of Audit has focused its examination on the marketing and promotion expenditure spent by "Toerisme Vlaanderen". It has noticed numerous violations of the law and an extreme legal vagueness and uncertainty governing its contractual relations with service providers and partners. The internal control was totally ineffectual. Consequently, the Court of Audit has concluded that urgent measures needed to be taken.

Main issues and findings

Legality

As far as legality is concerned, all procedures used by "Toerisme Vlaanderen"- (TVL) for the award of marketing and promotion contracts were liable for comments. In the case of limited tendering procedures, the establishment and the verification of the awarding criteria are subject to criticism. The negotiated procedure with notice did not always take place within the conditions defined by the law and the contracts for which the negotiated procedure with publication of a notice was used were in fact awarded along the lines of a limited tendering procedure.

European publication of a notice

TVL failed to apply - or applied incorrectly - the enunciative contract notice as provided in the European publication rules, with the result that the two-tier procedure of the limited tendering was undermined. It also misinterpreted the application of the rules governing publication as far as the amount stated for the contract is concerned.

Action outside its authority

The TVL did not comply with the duty of reasoned statement as it should and the files showed several formal shortcomings. Moreover, the files also revealed frequent instances of violations of the regulation concerning the delegation of powers. Unauthorised staff members took decisions in nearly all files connected with the award and the contract execution and the previous senior official exceeded more often than not the authorisation he was conferred.

Advertising campaigns

The supporting documents contained in the files under examination concerning the advertising campaigns 2000 (Belgium and Germany) did not allow to check whether the invoiced services provided were in agreement with the services to be provided by contract. The reporting of the advertising campaigns 2000 (The Netherlands and Germany)

to the management board did not allow a clear-cut cost allocation and the budgets adopted by the management board and the detailed budget plans as notified to the advertising offices were not always in agreement. With regard to the advertising campaign Germany 2000, a decision of the management board on the spending of the remaining budget was never implemented and with regard to the Belgium campaign 2000, there was a gap of five million BEF between the latest budget decision taken by the management board and the resulting contracts concluded with the advertising office.

Internal control

The divisions of the unit Marketing and Promotion suffer from a serious lack of organisational directives and procedural descriptions. This partly explains the numerous infringements of the law. Furthermore, there is a lack of separation of duties and both the previous senior official and the heads of divisions seemed to systematically act beyond their authority. The control on the transactions is not enough formalised and is sometimes even not implemented. No division at all has a robust recording system of the transactions. The division Accounting pays the invoices but does not perform any control on the transactions.

Management

The previous senior official failed to develop procedures and systems to regulate the organisation of his divisions and the supervision of the budget implementation as well as the reporting to the management board. As to the management board, it did not always act in consistency with its own decisions and often failed to enquire about the deficient implementation of its own practical decisions or the deficient reporting thereof.

Promise

In response to the report, TVL mentioned that it has already taken corrective measures to remedy several shortcomings partly or entirely. It would also have recently introduced a range of procedures involving standard forms, which could offer a step towards a solution to the points at issue.

End of Summary 2

Summary 3

FRAMEWORK CONTRACTS: THE FEDERAL CENTRAL BUYING OFFICE'S OPERATION (ABBREVIATED IN FOR/CMS) EXAMINED IN TERMS OF SOUND MANAGEMENT AND LEGALITY

Owner: Belgian Court of Audit Full report is available in French at:
http://www.rekenhof.be/docs/Reports/2005/2005_11_Les_contrats_cadres.pdf
Type of audit: compliance
Subject area: the transdepartmental framework contracts office
Sector: Belgian Federal Government

Scope

A Court's audit of a government body, the transdepartmental framework contracts office (FOR/CMS office), within the Federal public department (FOD/SPF) "Staff and organisation" showed that this office operates professionally and correctly according to the law, but that its structure is such that it hinders an innovation strategy. This results in government missing cost reduction opportunities.

Main issues and foundings

Government manages to save a lot of costs by passing bulked orders through framework contracts under which lower prices are guaranteed for larger volumes and costs are lower as one single purchase procedure is needed. In mid 2002 the FAB/BFA, until then responsible for concluding framework contracts, was replaced by the FOR/CMS office or transdepartmental framework contracts office. This reorganisation provided a good opportunity for the Court to examine whether FOR/CMS was operating according to the law and efficiently as well as analyse under what arrangements it was operating.

The audit showed that FOR/CMS operated in a professional way and correctly according to the law. It had a detailed business plan, aimed towards a customer-based approach, collaborated well with other bodies and had few disputes with suppliers. The major finding of the audit, however, was that government had to opt for a clear-cut strategy. So far FOR/CMS has only been working with products that its predecessor, the FAB/BFA, already had all available. New promising markets were hardly explored. So, Government can either choose to stick to this basic package (but thereby missing cost reduction opportunities) or favour an innovation strategy under which it would focus on proactive collaboration to promote new framework contracts or existing framework contracts provided it took account of a decentralized buying function and on the understanding that the final responsibility rests with FOD/SPF's and public institutions.

The lack of innovation is compounded by two factors. Every profitable framework contract constitutes a source of revenue for Government more than a cost, but as things stand now, FOR/CMS has no indicator to make this revenue tangible enough. The cost is thus well-known but the economical benefits achieved or potentially to be achieved are not visible. This holds the risk that strategic decisions take too little account of the cost recovery benefit gained from this service. More detailed information about the economic added value gained is thus strategically important. When it comes to allocating budgetary resources, the head of the FOD/SPD Staff and Organisation to which FOR/CMS is responsible is confronted with the problem that additional resources for FOR/CMS inevitably entail less resources FOR/CMS other services within the FOD/SPD. The cost for FOR/CMS is entirely borne by the FOD/SPD Staff and Organisation whereas the revenue generated (purchase cost reduction) benefits the entire federal Government.

As a result, little incentive is provided to invest in the further growth of FOR/CMS whereas such investment would be a benefit in terms of cost saving for the entire federal Government.
In his reply the minister in charge a.o. of the FOD/SPF involved did not tackle this conclusion.
The audit showed further that product know how and knowledge management could still be further improved if an engineer were engaged and procedures described in manuals so as to make up for staff turn-overs. Further marketing oriented actions could be conducted if the FOR/CMS had an insight into the sales figures per customer on a systematic basis. The coordination committee set up at the time of the reorganisation, the so-called network coordination, should operate in a more transparent way. As things stand now, whether a framework contract is necessary or not does not appear clearly, public institutions are not enough involved and the ministry of Defence does not take part in the coordination process.

End of Summary 3

Summary 4

EXECUTION OF ECONOMIC COMPENSATIONS ASSOCIATED WITH THE PURCHASE OF SPECIFIC MILITARY EQUIPMENT

Owner: Belgian Court of Audit Full report is available in French at:
http://www.rekenhof.be/docs/Reports/2005/2005_07_Compensations_Economiques.pdf
Type of audit: compliance
Subject area: military purchases
Sector: Belgian Federal Government

Scope

The Court performed an audit at the Government department responsible for economy, small and medium companies, self-employed and energy in relation to the execution of economic compensations associated with the purchase of military material. It found that the administration of files and the control of the execution of the economic compensations had shown signs of improvement over the years. However, it noted a number of shortcomings.

Main issues and foundings

Economic compensations can be defined as the contractual obligation imposed to a supplier of military material to place orders for material or services with Belgian enterprises worth a specific amount. Since the early eighties, common practice has been to insert economic clauses in the major military programme contracts.

The Court examined whether the obligations arising from these compensation agreements were enforced in accordance with the regulatory and contractual provisions; it also checked whether relevant control had been put in place in an effective way. The audit did not focus either on the procedure for the award of specific military contracts or on the policy relating to economic compensations. The audit revealed that on the whole file administration and the control of the execution of economic compensations had improved since the new regulation took effect in 1997. Previously, file administration was complicated by a lack of clear regulation and, above all, a lack of contracts in due and proper form (those contracts often did not include penalty clauses). Current contracts were drawn up in a more complete and standardized way and each compensation operation is now subject to an inspection report.

Nevertheless, shortcomings were again noted in more recent files. Sometimes, orders placed were accepted as being compensation operations whereas all contractual requirements had not been analysed in the inspection reports (such as the cause and effect link between the economic obligation and the order placed, the highly technological nature of the order and the creation of a volume of new business to Belgian industry. These shortcomings are inter alia due to the fact that the inspection services were not provided concrete directives for control and working methods. Similarly, penalties imposed in case obligations were not abided by were not always implemented as provided in the contract.

Other items for improvement related to contract drawing up, calculation of Belgium's share in the compensation operation, control of payments, the grounds for accepting or rejecting an order as being a compensation, the delegation of powers to take decisions granted to the director general, the modalities for the release of the bank guarantee (on economic compensations) and the collaboration between the relevant services.
The minister for Economy agreed the Court's recommendations following the audit performance and stated that he would see to it that they would be implemented as soon as practicable.
during the implementation ; this overrides all claims made at the time of the

contract awarding that the principle of opening to competition and of equal treatment of the bidders would be complied with.

End of Summary 4

Summary 5

CONTROL OF PUBLIC CONTRACTS COVERING THE ROAD TRANSPORT INFRASTRUCTURE IN BRUSSELS

Owner: Belgian Court of Audit. Full report in French is available at:
http://www.rekenhof.be/docs/Reports/2003/mai_2003_infrastr_routieres_brxl.pdf

Type of audit: compliance
Subject area: generic goods and services, public works
Sector: Brussels Regional Government, road transport infrastructure

Scope

Following an audit on the awarding of public contracts for the road transport infrastructure in Brussels, managed by the regional administration, the Belgian Court of Audit has expressed two basic remarks concerning the use of the « stock » contract technique and the existence of major discrepancies between the services performed in practice and the forecast determined at the time of the award of these public contracts.

Main issues and findings

The "stock" contract technique

The public sector prefers to use the «stock» contract technique, which is not explicitly provided for in laws and regulations and does not give an accurate idea of what the contract covers or state with certainty what services are to be provided. This technique, which stems from the idea that needs cannot always be quantified at the time a contract procedure is launched allows the public department concerned to do without an accurate and realistic estimate of its needs. The estimate of cost is in some way a list of unit prices from which the administration chooses the headings it wants to see carried out as and when they need them. The Government department has thus chosen a building contractor to whom the contract has been awarded and who will receive order vouchers as and when needs have to be met. The issue is whether it is possible to set a fair price notwithstanding how large the quantities to be ordered are and without prior knowledge of the terms. Besides, the unclear definition of the basic components of the contract is also likely to question the validity of the contract award through opening to competition.

The Belgian Court of Auditors is aware of the advantages of the « stock » contract for decisions relating to roads in an urban setting and involving several public authorities and under the constraint of a growing demand for «mobility». It, however, is not of the opinion that by systematising unplanned, ill-defined and loosely enforced contracts, a Government department adequately takes up the challenge. Even if the «stock» contract technique allows for a quick decision, it departs from the objectives sought after in laws and regulations, which see the use of public contracts as an instrument of economic policy designed to uphold a web of efficient small and medium-sized companies.

The implementation of the contracts : major discrepancies with regard to the service to be provided when the contracts were awarded

There are major discrepancies between the services actually provided and the services to be provided as at the time of the contracts. The existence of a major discrepancy between the contract awarded and implemented resulted in depriving competitors of the opportunity to bid for the modifications introduced during the implementation ; this overrides all claims made at the time of the contract awarding that the principle of opening to competition and of equal treatment of the bidders would be complied with.

End or Summary 5

Summary 6

CONSTRUCTION OF THE « DEURGANCKDOCK » (ANTWERP CONTAINER TERMINAL COMPLEX)

Owner: Belgian Court of Audit. Full report in Dutch is available at:
http://www.rekenhof.be/docs/Reports/2005/2005_16_Deurganckdok.pdf
Type of audit: compliance
Subject area: generic goods and services, public works
Sector: Flemish Region, infrastructure

Scope

The Court of Audit examined the Deurganckdock project from the perspective of the cost price of this infrastructure project and the flaws in its preparation and implementation. The Court's examination also aimed at issuing recommendations intended for future infrastructure projects. It showed that the cost price at the end of 2004 was 39% higher than estimated, largely due to the general upward price trend. The project preparation and implementation was good but implementation was largely adversely affected by developments in the field of environmental legislation, town planning and funding. Moreover, the Flemish Government introduced several modifications in the project without assessing the resulting consequences. The Court stressed the need for putting in place an overall risk management system for large-scale infrastructure projects.The learning effects of the Deurganckdock project should play an optimal role to this effect.

Main issues and findings

Project progress
Under After undertaking in-depth preparation the Flemish Government decided in 1998 to fund the container tidal port in the Waasland harbour. The works, however, stalled for over a year (from March 2001 to April 2002) as a result of suspended regional plan modifications. The Flemish Parliament was obliged to approve a validation decree to remove the deadlock.

Cost price
At the end of year 2004 the cost price of the project had amounted to about 600 million EUR, that is 39% more than estimated. Several cost items (such as VAT and expected price adjustments) were not provided for in the budgetary planning. A major part of the cost increase resulted thus from the general price increase. Besides, the Courts' examination highlighted several flaws in the project preparation and implementation process, leading to additional costs incurred.

Preparation
The project preparation was given serious consideration according to the ideas prevailing in the nineties. The initial cost-benefit analysis was based on favourable adjacent conditions. During the implementation stage, however, the standards imposed in the field of environmental regulations, town planning and funding changed drastically. Moreover, the Flemish Government took a series of new policy decisions. Failing an overall system of risk analysis the impact of these adjustments on the return on investment was never studied.

Project management
The communication between the various departments concerned with respect to the issuance of urban permits and other permits did not happen in a structured way. This led to town planning problems, so that works were subsequently brought to a halt. Eventually the situation was unlocked after the validation decree was adopted and a coordination project organisation was put in place to solve basic flaws.

Moreover various project modifications introduced by the Flemish Government adversely affected an optimal phasing of the works, which in turn gave rise among others to temporary capacity shortage or excess of dregded material. Adjusting measures and
additional subprojects, such as the construction of a dyke in the “Doeldock” added to the
cost by a substantial amount. Although the Flemish Region subsidized the quay wall works by 60% it did not introduce any new audit procedures to audit the lawful and efficient use of subsidies since the transfer of the construction site supervision.

Problems at the construction stage
Initially very few compensatory measures for the protection of natural habitats and of wild fauna and flora were provided for the construction of the Deurganckdock. An extensive compensatory plan was introduced only after the European Commission expressed complaints and the State Council issued a judgment. But a serious checking system to verify the compliance with European regulations was not in place. Dredging and related works were executed under a 1972 amicable agreement based on cost prices fixed without taking competition into account. The Flemish Region did not renegotiate this agreement when the opportunity arose with the building of the Deurganckdock or at least secure an effective price control and the possibility of checking
the cost prices.

Damage claims
As works were at a standstill, several contractors filed damage claims. The follow-up of these claim files was found to be liable for improvement. It was also ascertained that if a more resolute approach had been adopted considerable amounts of interest on late payment and several years of judicial proceedings could have been saved.

Information supply
Although the Deurganckdock was an expensive and very risky project, the Flemish Government did not send any progress report to the Flemish Parliament so far nor did the Flemish Parliament receive any notification about the modified execution planning or the cost excesses.

Reply from the minister
The Flemish minister for Public works answered that the project modifications could not be taken into consideration when the cost-benefit analysis was made. He underscored the fact that his department did not underestimate several aspects of the funding and was able since then to have the amount of the damage claims reduced.

End of Summary 6

Summary 7

DAMAGE COMPENSATIONS CHARGED ON THE BUDGET OF THE FLEMISH INFRASTRUCTURE FUND

Owner: Belgian Court of Audit. Full report in Dutch is available at:
http://www.rekenhof.be/docs/Reports/2003/nov_2003_schadedossiers_ten_laste_van_het_vlaams_infrastructuurfonds.pdf
Type of audit: compliance
Subject area: generic goods and services, public works
Sector: Flemish Region, infrastructure

Scope

The Court of Audit has examined the damage compensations that the road and waterways administrations charged on the budget of the Flemish infrastructure fund in 2000 and 2001. It has found that numerous damage claims are subsequent to shortcomings in the preparation of the contracts. Moreover, there is also often mismanagement of the damage cases as such. The administrations often wait un-necessarily long before implementing judgments or reaching an out-of-court settlement. The Court has also doubts about how certain claims or settlements amounts were assessed. Finally, the administrations do not always use all legal means available and do not yet systematically make a list of the claims, so that they have little insight into the financial consequences.

Main issues and findings

Audit
Each year, the budget of the Flemish infrastructure fund sustains high levels of damage claims with regard to motorways, harbours and waterways. Therefore, the Court has per-formed a systems-based audit of this damage compensations in 2002. In the years 2000 and 2001, the road infrastructure and traffic administration, the supporting studies and public contracts administration and the water infrastructure and marine affairs administration, three administrations reporting to the Department of Environment and Infrastructure, entered 155 damage compensation claims in their accounts.

Careless preparation
The failure to obtain the required building permits or follow the application procedure to obtain permits are often the cause of huge damage compensation amounts. For the construction of the Deurganck Dock, for example, this caused damages that the administration concerned already estimated at 34,9 million EUR at the end of 2002. The Court has also established that various other damages were subsequent to careless preparation and a deficient preliminary study of the contract.

Port of Zeebrugge
Legal proceedings drag on for too long. The court judgment condemning the Flemish Region for failure to continue the fulfilment of a part contract for the Port of Zeebrugge was passed on 8 November 2001, i.e. ten years after the writ of summons was issued. Mean-while, the damage amount demanded increased from 16.9 million EUR to about 36,6 million EUR. The Flemish Region's lawyer was also to blame because he delayed filing an appeal and thus failed to use the opportunity to stop the interest from accruing.

Undue hesitation
Procrastination is also often a sore spot in the administration as it waits quite a long time before enforcing a final judgment, with the result that late payment penalties are to be paid when they could be avoided. For

a large number of damages, a long time elapsed between the date the claim was introduced and the date on which the out-of-court settlement was reached; this again resulted in significant amounts of penalties to be paid. Furthermore, the awarding authority often failed to regularly work out a settlement for all damage amounts that were already established and unquestionably owed.

End of Summary 7

Summary 8

INTRODUCTION OF DOUBLE ENTRY ACCOUNTING AT THE MINISTRY OF THE FLEMISH COMMUNITY

Owner: Belgian Court of Audit. Full report in Dutch is available at:
http://www.rekenhof.be/docs/Reports/2003/nov_2003_mvg.pdf
Type of audit: compliance
Subject area: generic services
Sector: Flemish Community, Finance

Scope

The Belgian Court of Audit sent a report to the Flemish Parliament in which it assessed the introduction of a double entry accounting at the Ministry of the Flemish Community. It welcomed the pioneering role played by the Flemish Government with this project among public authorities, but it also criticized the careless preparation and the deficient project implementation and follow-up. The new accounting system, the cost of which has already reached 30,3 million EUR, that is nearly six times as much as the price estimate, shows shortcomings that go beyond the usual teething problems to be reasonably expected from such projects. In the meantime, the administration has already done away with many shortcomings, but the quality of the accounting system is still liable for basic criticism.

Main issues and findings

Pioneering role

In May of this year, the Federal Parliament laid down general rules on the Community and Region budgets and accounting. The Flemish Government has, however, not awaited this new federal regulation to be introduced and has established a double entry accounting out of its own initiative. The Ministry of the Flemish Community (MVG) had already under-taken the preparatory work in 1996. In early 1999 it subcontracted the computing side of the project and, at the same time, selected a new accounting software. The initial starting date of the new accounting system was to be 1st January 2001 but it had to be postponed several times because of various problems. Even after it was effectively introduced on 1st October 2001, there was still a need for plenty of adjustments.

Audit

The Court examined whether the double entry accounting at the MVG was introduced in a legal and efficient way within the constraints of the budget proposal. It assessed the quality of the preparatory work and the project management and examined whether the new system could cater to the need for a functional accounting and a reliable rendering of the accounts.

Preparatory work

The basic criticism was levelled at the preparation of the project of double entry accounting: no plan stating basis assumptions, objectives, content, risks, costs, profit and planning had been approved by the Flemish Government. Alternative solutions were not examined and the project has been incorporated into the IT-outsourcing without any further analysis.

Unclear project requirements

The expected result was vaguely described and the requirement plat-form for the new accounting system was incomplete and inadequate. It was thus unclear what reports had to be produced. The MVG's contribution itself was not specified and the contracts contained no adequate measurement method. As a result, the contractor could provoke intricate discussions and shirk result commitments. Moreover, there was no 'escape system' in case the new accounting system failed to be introduced in time.

Negotiation procedure
The ministry awarded significant consultancy contracts as part of the project without abiding by the rule on competition and confined itself to a negotiated procedure. No adequate price enquiry had preceded the awarding of these consultancy contracts. Several commitments were fixed only after the contract had been largely executed. While the project was carried out the MVG did not call upon the specialised section responsible for the legal supporting arrangements of public contracts.

Project organisation
The project organisation structure did not operate properly. Only in the latest stage were the tasks and responsibilities of the various project groups clearly described. The Flemish Government took a range of essential decisions in an early stage but did not refer the matter to these groups and during the analysis stage the project steering group was not even convened.

Project implementation
The Ministry had to face a staff shortage to implement the project. Be-cause of a high job turnover, it had to do without much expertise. Be-sides, the project leader did not have sufficient powers to command a consensus from the decision-making bodies or to effectively mobilize the collaborators who had supposedly been set to this task in the various departments.

Tight budget
The original budget was undervalued. The MVG started the project without a clear insight into its financial impact and without a specific, overall budget for the project. The real cost price of the project went up in the meantime and amounted to 30, 3 million EUR, as against the original estimate of 5, 2 million EUR. The cost evaluations were drawn up by external consultants. The MVG had itself too little expertise to scrutinize these budgets.

Tight time planning
The original deadline, that is 1st January 2001, was premature. Because of time constraint and insufficient expertise, the MVG accepted the functional analysis file and the developed system pro-posed without any further comment in spite of numerous uncertainties. Afterwards it had to threaten to sue the service provider not less than three times. The MVG did not even have its own comprehensive, central project file.

System flaws
According to the Court, the new accounting system, by and large, meets most general directives governing a financial system designed for public authorities, but shows essential shortcomings, among others in the field of a strict management of the budget appropriations or reporting thereof. Many adjustments were necessary to make sure that reporting obligations were in line with the present legislation.

General account
The general account for the year 2001, which had to be derived from the accounting, was submitted late to the Court due to problems linked to the accounting system. The first Court's audits showed that budget implementation data were missing or were unsure. Moreover this submission took place at a time when the MVG had not yet introduced all corrections in the accounting system. The reports about the operations of the accounting officers were not available on time and were not entirely correct either. Moreover, the audit on the changes of assets was also extremely difficult to perform in the new system.

The minister's response
The Flemish Finance minister replied that the audit contained precious recommendations, which will be useful to prepare the implementation of the new Flemish accounting decree, which is being drawn up. In

the future, one accountable minister will be responsible and this should rule out an implicit decision-making, as was the case for this project.

End of Summary 8

Summary 9

THE OUTSOURCING OF THE DATA PROCESSING FUNCTION AT THE MINISTRY OF THE FLEMISH COMMUNITY

Owner: Belgian Court of Audit. Full report in Dutch is available at:
http://www.rekenhof.be/docs/Reports/2003/februari_2003_outsourcing_informaticafunctie.pdf
Type of audit: compliance
Subject area: generic services
Sector: Flemish Community, outsourcing of the data processing function

Scope

In February 1999, the Flemish Community signed a contract with an IT service provider concerning the outsourcing of the data processing function at the Ministry of the Flemish Community. This contract worth over 5,5 thousand million BEF was spread over five years. The Belgian Court of Audit performed an audit on this contract and its implementation. It noted that the Flemish Government did not first hold a debate on the core activities involved although this had been requested by the Flemish Parliament. Moreover, preparatory work proved flawed because it ignored opinions expressed and failed to collect any basic data, so that the contract as drawn up in vague terms and was hard to implement. It subsequently resulted in numerous amendments and also caused enormous additional costs.

Main issues and findings

Legality audit
On 23 February 1999, the Flemish Community signed a contract with an IT service provider concerning the outsourcing of the data processing function at the Ministry of the Flemish Community. The Court of Audit examined its regularity in respect of the decision-making procedure, the awarding procedure, the outsourcing contract itself and its implementation up to January 2001. It forwarded its findings to the Flemish Civil Service minister on 24 September 2002, who sent his reply on 21 November 2002.

Debate on core activities
The Court of Audit first noted that the Flemish Government decided to outsource the data processing function from the ministry of the Flemish Community without any prior holding of a debate on core activities as requested by the Flemish Parliament, which should have clarified what functions would be eligible for outsourcing.

Opinions
Moreover, the Flemish Government ignored the unfavourable report of the Finance Inspector and the difficulties pinpointed beforehand by an assisting consultant. The preparatory work for the contract was in general flawed. It failed to gather essential data such as inventories of ongoing IT contracts and of hardware and software equipment available at the ministry.

Vaguely termed contract
This resulted in a relatively vaguely termed contract leaving many issues unresolved. These aspects had to be specified all the way through a discussion between the parties irrespective of any opening to competition. This resulted in enormous additional costs. The contract was therefore hard to implement and suffered long delays. The cost of the transitional stage would eventually exceed by at least 127 million BEF the figure provided in the contract. The IT service provider's initial claim amounted to as much as 400 million BEF additional costs.

Implementation
Although a commitment of results was primarily part of the contract, the contracting party did not fulfil - or delayed to fulfil - most of its commitments (service level aspects), usually because of the ineffectual response of the contracting authorities. Sometimes, action by the ministry was not taken.

Recommendations
The Court of Audit finds it therefore necessary to better prepare large contracts of that type and ensure a strict compliance with the laws concerning public procurement in the future.

The minister's reply
The Flemish Civil Service Minister is of the opinion that contacts with other actors in the IT sector show that in spite of its shortcomings, this contract was better and more comprehensive than most existing outsourcing contracts. According to him, the preparatory work was impaired because the action needed, such as a comprehensive inventory of the IT assets, could not be carried out at the time. The minister promised to devote maximum care to the preparation of the new ICT contract for which the procedure is already now underway. The minister admitted that the IT service provider, in spite of strict contract provisions and penalties, actually failed to achieve the expected service provision level. He, however, added that price corrections were according to him always enforced. The only measure left the ministry could have taken was a contract termination but this would have been counterproductive for the ministry.

End of Summary 9

Summary 10

THE NORTH WASTEWATER TREATMENT PLANT IN BRUSSELS. AWARD AND FUNDING OF THE CONCESSION CONTRACT

Owner: Belgian Court of Audit. Full report in French is available at:
http://www.rekenhof.be/docs/Reports/2003/oct_2003_station_depuration_nord.pdf
Type of audit: compliance
Subject area: generic goods and services, public works

Sector: Brussels Regional Government, the North wastewater treatment plant in Brussels

Scope

The concession contract under investigation covers the design, the construction and the operation of the wastewater treatment plant located in the northern part of Brussels and is one of the largest plants of this kind in Europe. This contract is exceptional both in its awarding procedure (which provides a possibility of modifying the original tender during the negotiation process) and its cost (about one thousand million euro to be paid in 20 annuities from 2007, the
first year of operation).

Main issues and findings

Contract award

The Court of Auditors found that the awarding procedure applied to this contract did not contain any irregularity. The analysis of the tender was carried out in a correct way and the awarding decision conforms with the laws concerning public contracts and the regulations covering the administrative and budgetary control. The selection of the concessionary was based on a relevant reasoning. More particularly, the risk induced by the mud treatment process, which is a strategic component in selecting a concessionary was assessed in all seriousness. The Court, however, noticed a lack of formal consolidated tenders, more specially from the tenderer selected. A consolidated tender, however, should have been necessary due to the successive modifications approved during the negotiations. This lack of update and implementation into one single document might give rise to difficulties when it comes to exactly identifying the concessionary's obligations in the course of the 25 year long contract implementation (5 years for the construction and 20 years for the operation).

Contra ct funding

The payment scheme for the annuities is partly in the hands of a newly established body governed by public law the object of which is to build up reserves (which have now already been formed up to an amount of 79.69 million euro) aimed at decreasing the burden of the forthcoming expenditure. But the build up of reserves is not necessary to pay the annuities provided the assumptions made by the Government are met, that is an unchanged budgetary commitment and foregoing the need of new heavy investments in collecting and treating wastewater from 2005 till 2026.

Subsequent to the award, the content of the concession contract was modified to allow the early acquisition of the water collector of the left bank, the construction of which was part of the contract. This change, which involves a first payment of about 63 million euro net of V.A.T. in 2006, brought about a decrease in the total annuity cost. It does not adversely affect the equality of treatment among tenderers nor the rights of possible other potential candidates.

End of Summary 10

Summary 11
ROADS, MOTORWAYS AND WATERWAYS MAINTENANCE LEASES

Owner: Belgian Court of Audit
Full report is available in French, pages 80-83 at:
http://www.rekenhof.be/docs/Reports/AnnualReports/160e_15e_c_obs_r_w.pdf

Full title in French:
Baux d'entretien des routes, autoroutes et voies hydrauliques.

Type of audit: compliance
Subject area: public works maintenance
Sector: Walloon Region

Scope and main issues and foundings:

La Cour des comptes a procédé à un examen des modalités générales de passation, d'exécution et de reconduction des principaux types de baux d'entretien ordinaire des routes, autoroutes et voies hydrauliques. Elle a relevé une série d'infractions à la réglementation des marchés publics (mauvaise qualification des marchés, non-respect de délégations de pouvoirs, absence de cahier spécial des charges) .Elle a également réalisé une analyse comparative des différents services concernés, qui a mis en lumière un certain nombre de déficiences dans leur organisation.

La Cour a contrôlé, au cours de la période 1999-2001, les modalités générales de passation, d'exécution et de reconduction des principaux types de baux d'entretien général des routes et autoroutes, canaux, barrages et cours d'eau, d'entretien des plantations et des espaces verts, ainsi que de maintien de la propreté le long de ces mêmes voies de communication. Pour la Direction générale des autoroutes et des routes trois cent trente-cinq marchés ont été contrôlés, pour un montant global de quelque 62 millions d'euros. Quarante-quatre marchés relevant de la Direction générale des voies hydrauliques ont également été contrôlés, pour un montant global de 7,8 millions d'euros.

End of Summary 11

Summary 12

FINAL PAYMENT ON SOME LARGE-SCALE PUBLIC WORKS CONTRACTS

Owner: Belgian Court of Audit
Full report is available in French, pages 33-35 at:
http://www.rekenhof.be/docs/Reports/AnnualReports/157e_12e_c_obs_r_w.pdf

Full title in French:
Les décomptes dans certains marchés publics de travaux

Type of audit: compliance
Subject area: large-scale public works
Sector: Walloon Region

Scope and main issues and foundings:

La Cour a analysé un large échantillon de marchés de travaux concernant les voies hydrauliques de la Région, où des modifications apportées au projet initial ont donné lieu à l'établissement de décomptes, afin d'examiner si ces modifications n'ont pas entravé le jeu normal de la concurrence. Ses observations transmises au ministre compétent ont visé la part des travaux exécutés à prix convenus dans le total des travaux exécutés, la proportion des prestations supplémentaires par rapport aux travaux initialement prévus, le manque de transparence des situations comptables produites à l'appui des diverses liquidations (lesquelles ne reflètent pas nécessairement le montant réel des décomptes), les imprécisions et erreurs contenues dans certains documents d'adjudication et la longueur excessive des délais d'approbation des décomptes comportant des prix convenus.

End of Summary 12

Summary 13

THE "ILOT ECLUSE" BUILDING CONSTRUCTION WORKS (PUBLIC WORKS CONTRACT)

Owner: Belgian Court of Audit
Full report is available in French, pages 66-68 at:
http://www.rekenhof.be/docs/Reports/AnnualReports/159e_14e_c_obs_r_w.pdf

Full title in French:
La construction de l'immeuble Ilot Ecluse, à Charleroi (marché public de promotion de travaux)

Type of audit: compliance
Subject area: public works procurements
Sector: Walloon Region

Scope and main issues and foundings:

Le contrôle des conditions de passation et d'exécutrion de ce premier marché public de promotion de travaux conclu selon la réglementation des marchés publics entrée en vigueur le 1er mai 1997 a donné lieu à diverses observations portant sur l'objet du contrat, le mode de passation, le non-respect de certaines règles de publication, l'absence de sélection qualitative et le non-respect de quelques autres dispositions.

End of Summary 13

Summary 14

COMPLYING WITH PUBLIC PROCUREMENT REGULATION

Owner: Belgian Court of Audit
Full report is available in French, pages 16-31 at:
http://www.rekenhof.be/docs/Reports/AnnualReports/158e_13e_c_obs_r_w.pdf

Full title in French:
Le respect de la réglementation relative aux marchés publics
Type of audit: compliance
Subject area: respect of regulation
Sector: Walloon Region

Scope and main issues and foundings:

L'examen des conditions de passation et d'exécution des marchés publics de travaux, de fournitures et de services conclus sous l'empire de la nouvelle réglementation entrée en vigueur le 1er mai 1997 a mis en évidence diverses irrégularités touchant l'application de la sélection qualitative, la passation des marchés, la problématique des marchés de services, ainsi que le renouvellement des contrats.

End of Summary 14

Summary 15

PUBLIC SERVICE CONTRACTS PROVIDING MAINLY INTELLECTUAL SERVICES

Owner: Belgian Court of Audit
Full report is available in French, pages 62-73 at:
http://www.rekenhof.be/docs/Reports/AnnualReports/160e_15e_c_obs_r_w.pdf

Full title in French:
Les marchés publics de services comportant à titre principal des prestations intellectuelles.

Type of audit: compliance
Subject area: intellectual services procurements
Sector: Walloon Region

Scope and main issues and foundings:

La Cour a procédé à l'analyse, au niveau des conditions tant de passation que d'exécution, de quelque huit cents marchés publics de services comportant à titre principal des prestations intellectuelles, conclus entre 1999 et 2001 par les services du Ministère de la Région wallonne et du Ministère de l'Equipement et des Transports , et dont le montant estimé atteint le seuil d'applicabilité du cahier général des charges. Les résultats de cette analyse ont été communiqués à tous les membres du Gouvernement wallon.

End of Summary 15

Audit Office of the Republic of Cyprus

Summary Title	**Language**
1) Audit Report Number 1 Provision of Consultancy Services for the Sewerage Conveyance and Treatment of the Greater Nicosia Area.	English
2) Audit Report Number 2 Provision of Services.	English
3) Audit Report Number 3 IT procurement	English

Summary 1

AUDIT OFFICE OF THE REPUBLIC OF CYPRUS

REPORT ON AUDIT NO. 1

SITE: www.audit.gov.cy

Para 4.127.6 of 2000 Annual Report

Para 4.129.65 of 2001 Annual Report

Para 4. 136.7(a) of 2002 Annual Report

Type of audit: ex-ante audit and later, on the request of the Public Accounts Committee of the House of Representatives following a complaint by tenderer B (Lowest Tenderer).

Subject Area: Provision of Consultancy Services for the Sewerage Conveyance and Treatment of the Greater Nicosia Area.

Sector: Public Corporation (Sewerage Board)

Scope and main issues: In October 2000, the Sewerage Board of Nicosia asked for tenders for the project described above in "subject area". Estimated CY£3,5 m. (€6,1 m.).

After the tender documents were prepared and prior to the date for the submission of tenders, the Sewerage Board sent to the Audit Office (AO) the documents for comments (stipulated in the Board's Regulations). The AO raised the following main points/recommendations:

- The technical evaluation criteria should carry weighting factors (coefficients), to satisfy the "Best Evaluated Tender" method adopted and also to avoid subjectivity during evaluation.
- To reduce the Advance to be given to the successful tenderer (considered excessively high).
- To change the method of tender pricing from a percentage on the value of the work, to one where the tender amount prevails from the pricing of the man-months and the type of personnel to be employed, as presented in a Bill of Quantities.

A two stage procedure was to be adopted for the Evaluation of the tenders, with the Technical part evaluated first and only those tenders which passed this stage proceeded to the opening of the financial part of their tender. The Best Evaluated Tender was to be the tender with the highest score in a predefined formula.

Twelve tenders were received and these were evaluated by a five-member Evaluation Committee set up for this purpose. According to the Committee's evaluation report, 6 of the 12 tenders were rejected on technical reasons.

On the request of the Tender Committee of the Sewerage Board the AO gave the recommendations given in Findings I, below.

The Sewerage Board chose not to adopt the stipulations and provisions in the tender documents to select the Best Evaluated Tender (Tenderer A). Instead, it decided to award the tender to the lowest tenderer (Tenderer B) on the proviso that they will retrospectively satisfy the points on which their tender was failing. It was also decided, that if Tenderer B did not accept these "conditions", the job would be offered to the second lowest tenderer (Tenderer C).

The Evaluation Committee then deliberated with tenderer B, but negotiations were inconclusive and did not satisfy basic tender conditions. The Board decided to reject Tender B and proceeded with deliberations with Tenderer C successfully, as this tenderer accepted all the terms and conditions.

Tenderers A and B submitted a recourse to the Supreme Court, which they won and instigated proceedings in the Civil Courts for Compensation.

Eventually, a sum of CY£447.250 (€783.000) was paid as an out of court settlement.

Findings:

I. On request of Tender Committee of Sewerage Board, the AO commented (Main Points):

(a) The marked disparity in the marking of the five members of the Evaluating Committee. We recommended decision to be made on basis of average marks of five members for each criterion or sub-criterion.

(b) It is acceptable to use sub-criteria not specifically mentioned in the Tender Documents as long as these constitute components of the pre-described criteria.

(c) The validity or not of the tenderer who included a condition that his financial bid is based on CY£60.000.000 project value considered as a minimum fee, subject to negotiation.

This condition renders this bid vague and therefore non-compliant, since a constituent part of the tender sum is unknown.

II. Following a complaint by tenderer B to the Public Accounts Committee of House of Representatives and referral of the Complaint to the Auditor General , we reported to the Chairman of the Committee:

(a) On the basis of the Technical evaluation, Tenders B and C did not comply with predetermined evaluation criteria and should had been rejected. Tenderer A achieved the highest score and was the Best Evaluated Tender. In spite of this, Sewerage Board considered Tenders B and C as valid and eventually both submitted improved Tenders.

(b) It is questionable whether improved tenders submitted by B and C were only clarifications or additional, supplementary and complementary information to make their tenders compliant.

We concluded that they complemented/varied original tenders on basic matters.

(c) Following the clarifications/alterations by Tenderer B, there were points which did not satisfy the Evaluation Committee. The Board did not go back for further clarifications but awarded to Tenderer C.

(d) The Board wrongly allowed all the tenderers to study and submit comments on the Evaluating Committee's Report, then asked the Committee to place itself on these comments.

(e) One of the reasons for the rejection of Tender B, was non-compliance with high Professional Liability Insurance asked from the Tenderers (£35 m.)Tenderer C (successful tenderer), at least 6 months into the contract, had not provided such an insurance.Had the contract been awarded to the Best Evaluated Tender, the possibility of a successful recourse to Courts by any company which failed to secure the contract, would have been minimal.

End of Summary 1

Summary 2

Report available on: www.cao.audit.gov.cy 2002 Annual Report para 4.129.5

Type of audit: ex-ante audit and also on the request of the Public Accounts Committee of the House of Representatives.

Subject Area: Provision of Services.

Sector: Public Corporations.

Scope and main Issues:

Court decision for the selection of advertising firm for the years 2000-2001. Following a request by the Parliamentary Public Accounts Committee, and the submission to my Office, of written reports by unsuccessful tenderers, a special investigation was carried out by my Office, for the purpose of the evaluation of the procedure followed by the Cyprus Tourism Organisation, until the final selection of the advertising firm, which was made, on 5.10.99, by the Board of Management. From the above special investigation, deviations from the appropriate procedures were observed, regarding the publication, delivery, keeping, opening, compliance with terms and substantiation of tender evaluation. The Board of Management of the Organisation, requested the legal advisers to study my report and to express their opinion, as to whether the tender was correctly assigned to the advertising firm.

The legal advisers expressed the view that the tender award should not however be revoked. With regard to the lawsuits filed by the unsuccessful tenderers, the legal advisers expressed the opinion that the court should be left to decide, as to whether the award of tender was properly made and was in agreement with tender specifications. In view of the above the Board of Management decided on 9.12.99 for the non-revocation of tender.

The Supreme Court, decided on 31.12.2001, for the annulment of the decision of the Organisation to award the tender to the specific advertising firm, for the world advertising campaign, for the years 2000-2001, on the grounds that the procedures governing the submission and evaluation of tenders were not followed.

Following the above decision of the Supreme Court, two recourses were filed against the Organisation by the successful tenderers, under which the payment of compensations amounting to over £1.350.000 were claimed. The Organisation decided to continue the cooperation with above advertising firm until 30.4.2002, date of expiration of the agreement, after taking into consideration the above court decision and the legal advice, that the agreement between the Organisation and the advertising firm constitutes a contractual relation, which was not cancelled under the above decision.

Findings:

Serious deviations from appropriate standard procedures regarding the invitation, receipt, keeping, opening, verification of compliance with the terms and substantiation of the evaluation of tenders.

End of Summary 2

Summary 3

Type of audit: Performance (Value for money)

Subject area: IT procurement

Sector: all central government departments

Scope and main Issues:

The Computer Master Plan of Government Service was prepared in 1987 and according to the initial programme this should had been completed within 10 years. Due to the great delay and increase in the cost and also the problems observed in the implementation of the Plan, the Audit Office decided for the above performance audit, which was carried out during the first six months of 2002.

The international experience on the development of computer plans, as disclosed in the relative reports, is considered painful with many problems, due to the unknown environment of rapid development of technology and the very specialised knowledge required for the computerisation sector.

Findings:

It is deduced that Cyprus is not considered an exception from the international experience, as similar problems and weaknesses have been identified, the most significant of which are briefly stated below:

- There was a great delay in the commencement and implementation of the strategic projects of the plan and increase in the cost, with adverse effect on the economic and efficient operation of Public Service, and on the quality of services rendered to the public. Weaknesses were also observed in the support of the Plan by the services under computerisation, the training of users, the prompt and efficient operation and support of programmes, the evaluation of projects, and in the assignment of operational support to the suppliers of computerised systems at non competitive prices.
- The most serious delays and other problems relating to the management of the Plan are attributed to the fact that the Management Team was not established and operated. Moreover, the programme for the training of staff was not implemented.

The follow up of the Plan by the Executive Council for Computerisation and the processing of implementation of the strategic targets approved by the Council of Ministers were not as expected. The Executive Council did not investigate the deviations from the approved targets and did not consult with the parties involved.

Recommendations and Implementation:

The Executive Council discussed the observations and recommendations which were included in my report, and in March 2003, decided to take measures for the improvement of procedures which are followed for the implementation of the Computer Master Plan, the most important of which are the following.

- The more efficient operation of the Executive Council.
- The strengthening of the Management Team of the Programme with experienced specialists.
- The evaluation of the projects for the targets set.
- The training of staff involved in the Plan.

- The undertaking of the operational support of the systems by Government, and the gradual replacement of the staff of suppliers by government employees.

End of Summary 3

Supreme Audit Office, Czech Republic

Summary Title	**Language**
1) Funds spent on acquiring of the Czech Statistical Office headquarters	English
2) State Budget funds provided for investment to the industrial zones	English
3) State Budget funds and the management of the state property under the authority of the Ministry of Transport	English

Summary 1
Supreme Audit Office, Czech Republic (NKU)

Report Title:

"**Funds spent on acquiring of the Czech Statistical Office headquarters"**

Publishing:

Reduced English version of final report is available at http://www.nku.cz (Press Releases April 2005)

Type of audit:

Both regularity and performance audit

Subject area:

Public investment procurement – over the limit EU
– special category of purchase (provided by developers)

Sector:
Central Government department - the Czech Statistical Office

Aim of audit:

To examine the provision, drawing and usage of the funds earmarked for the preparation and construction of the Czech Statistical Office (hereafter "CSO") headquarters

Scope and main issues:

The audit of NKU was focused mainly on:
- the preparatory phase of the investment project, on drawing up of documentation with evaluation of best-suited alternative for decision and on justifying of urgent need for building a new headquarters
- the form of public tender, the price and funding from the State Budget
- the building phase by developer

Findings:

The CSO failed to provide the Czech government with objective documents to serve as a basis for the decision on the need to build a new seat of headquarters. The CSO did not respect the binding prescribed procedure set for investment programme administrators. The CSO failed to prove that the State Budget funds were spent efficiently and economically.

Recommendations:

The possibility of state property acquiring in the form of a development contract (purchase) as yet non-existent makes it imperative that a methodology be drawn up to define categorically how programme administrators and participants should proceed when acquiring property in this way.

End of Summary 1

Summary 2
Supreme Audit Office, Czech Republic (NKU)

Report Title:

"State Budget funds provided for investment to the industrial zones"

Publishing:

Supreme Audit Office, Czech Republic. The reduced report is available at: http://www.nku.cz (press releases 2004)

Type of audit:

Performance audit

Subject area:

Investment - accreditation of industrial zones, industry - the Ministry of Industry and Trade (MIT), the Agency for the support of business and investment - Czech Invest

Sector:
Central Government department - the Ministry of Industry and Trade

Aim of audit:

The aim of the audit was to examine the management of the State Budget funds provided for investment to the industrial zones including the assessment of the declared benefits and measures adopted in relation to the results of the SAO auditing operation, which was published in 2002.

Scope and main issues:

The audited period covered the years 1998 to 2003 – audit of the assessment of the declared benefits of the programme of support for the development of industrial zones and the transfer of land from municipalities to investors, and the years 2002 and 2003 – audit of the implementation of a programme of support for the development of industrial zones and evaluation of measures adopted in response to the results of the SAO auditing operation in 2002.

Findings concerning the public procurement:

In the implementation of a tender for the provision of training as part of the programme „Accreditation of Industrial Zones" Czech Invest did not act transparently when Czech Invest did not credibly demonstrate the evaluation of the received bids and selected the bidder with the highest bid price and stated the standard of tutor as the deciding criteria without checking that the tutors actually performed this training.

Recommendations:
The Programme should concentrate on the support of the industrial zones for which a strategic investor is secured in advance.

End of Summary 2

Summary 3
Report Title:

"State Budget funds and the management of the state property under the authority of the Ministry of Transport"

Publishing:

The reduced report is available at: http://www.nku.cz (press releases 2005)

Type of audit:

Performance and regularity audit

Subject area:

The management of the state property - transport (the Ministry of Transport)

Sector:
Central Government department - the Ministry of Transport

Aim of audit:

The aim of the audit was to examine selected expenditures and the management of the state property under the authority of the Ministry of Transport.

Scope and main issues:

The audit was focused on the financial resources and the state property management in connection with own activities of the Ministry of Transport and their organizational units.

Findings:

It was found out some cases of circumvention the Public Tender Act, especially deficiencies in ordering of public tenders, insufficient determining of the objectives, insufficiently prepared and carried out procurement procedure.

End of Summary 3

The National Audit Office, Denmark

Summary Title	Language
1) Untitled	English

Summary 1

Type of audit: Performance (value for money)

Subject area: Procurement of consultancy services

Sector: The Ministry of Foreign Affairs

Scope and main issues:
In 2000 the National Audit Office of Denmark carried out a performance audit examination in order to establish whether the Danish Ministry of Foreign Affairs' set of rules for procuring consultancy services was sufficient and appropriate. It was assessed whether the Ministry of Foreign Affairs was able to document that consultancy services were being procured in the most advantageous way (in and outside competition), and whether the Ministry of Foreign Affairs administration ensures competence to act by means of independence and impartiality when choosing consultants. It was also examined whether the Ministry of Foreign Affairs' management launched the necessary analyses before procuring consultancy services and whether the Ministry of Foreign Affairs had an overall management of the use of consultants.

Findings:
The audit showed that the Danish Ministry of Foreign Affairs' set of rules for procuring consultancy services was sufficient and appropriate, but that improvements could be obtained in the area of documentation of the procurement process. On the overall level, the Ministry of Foreign Affairs also needed to carry out further analysis of the need for and the use of consultancy services.

End of Summary 1

State Audit Office, Estonia

Summary Title	**Language**
1) Organisation of public procurement related to road repair (2004)	English
2) Management of public procurement at the Ministry of Interior and its governing area (2002)	English
3) Management of procurement at the Ministry of the Environment (2002)	English
4) Procurement of maintenance services (2005)	English
5) Procurement management in the field of IT systems, software products and software services (2004)	English

Summary 1

Report title: ORGANISATION OF PUBLIC PROCUREMENT RELATED TO ROAD REPAIR (2004)

Owner: State Audit Office (SAO), Estonia. Full report in Estonian available at: http://www.riigikontroll.ee . Summary in English at: http://www.riigikontroll.ee/?lang=en
Type of Audit: performance
Subject area: procurement of road repair works
Sector: Ministry of Economic Affairs and Communications (MEAC) and Road Administration

Scope and main issues: The State Audit Office audited the activities of the MEAC and the Road Administration in conducting the procurement related to road repair works. The objective was to establish whether in case of properly conducted road project the road repaired would remain in good condition – when suitably maintained – as long as specified in the project. The intention also was to explain whether the organisation of invitation to a competitive tender offered the road construction companies serious competition that could assure the state, acting as a contracting entity, profitable terms and conditions.

Main Findings: A number of mistakes hag been made as roads were planned, in some cases the project was designed in such a way that the road surface could not survive for long. This had been also facilitated by the guidelines given by the Road Administration – while attempting to repair as many road kilometre as possible within a period as short as possible, the Administration had foregone several works which were inevitable for the maintenance of the good condition of the road surface for the required period.

Recommendations: In the guidelines for road planning the MEA should, in addition to issues related to the construction of new roads, set out requirements arising from the specific features of road repair work. The Ministry should have substantial competence to assess the tasks given to road construction system planners and undertake expert analysis. The Director General of the Competition Board should decide whether the initiation of additional investigation is required to explain whether agreements being in contradiction with the Competition Act have been accompanying the group agreements concluded to participate in the invitation to competitive tender financed from the funds of the European Union

End of Summary 1

Summary 2

Report title: MANAGEMENT OF PUBLIC PROCUREMENT AT THE MINISTRY OF INTERIOR AND ITS GOVERNING AREA (2002)

Owner: State Audit Office (SAO), Estonia. Full report in Estonian available at: http://www.riigikontroll.ee . Summary in English available on request, please contact: info@riigikontroll.ee
Type of Audit: compliance
Subject area: legality of the management of public procurement
Sector: Ministry of Internal Affairs and its governing area

Scope and main issues: The SAO audited procurement management in the Ministry of Internal Affairs, the Police Board, the Border Guard Administration and the Rescue Board in order to find out whether these agencies take adequate measures to manage the main risks related to public procurement. Furthermore, the audit aimed to give an overview of the implementation of the new Public Procurement Act. Therefore the audit covered mainly the public procurements carried out by the audited agencies between April 1, 2001 and December 31, 2001.

Main findings: In the opinion of the State Audit Office, the Minister of Internal Affairs has not paid sufficient attention to the management of public procurement risks in its governing area. The State Audit Office identified significant shortcomings in the planning and financing of procurements. Numerous shortcomings were identified in the preparation and preservation of documentation reflecting the public procurement procedure, as well as in the forwarding of information about procurements to the State Register of Public Procurements.

Recommendations: The Ministry of Interior should establish general guidelines for the conduction of procurements in the ministry and its area of government, establishing a system for the preparation of annual procurement plans and a procedure for their approval; requiring clear division of the tasks and obligations connected with procurements; defining aspects of the management of procurements to be controlled by specific officials of the ministry, incl. the internal audit service, before and after each procurement. The Ministry should create a system of control in order to avoid the conclusion of procurement contracts without financial coverage.

End of Summary 2

Summary 3

Report title: MANAGEMENT OF PROCUREMENT AT THE MINISTRY OF THE ENVIRONMENT (2002)

Owner: State Audit Office (SAO), Estonia. Full report in Estonian available at: http://www.riigikontroll.ee . Summary in English available on request, please contact: info@riigikontroll.ee
Subject area: procurement of environmental services
Sector: ministry of the environment

Scope and main issues: The SAO undertook an audit of a selection of procurement activities carried out by the Ministry of the Environment beginning from entry into force of the improved Procurement Act on 1 April 2002 until the third quarter of 2002. The audit was focussed on the measures taken by the Ministry to manage the risks regarding procurement of environmental services.

Main findings: The guidelines in force at the time of the audit specifying the organisation of public procurement of the Ministry of the Environment failed to regulate a number of essential activities leaving the obligations and responsibility of officials unclear. The requirement provided by law that the organisation of procurement activities should be based on generally understandable criteria, as well as the requirement to refrain from creating a situation that may raise doubts about the impartiality of officials and the objectivity of handling issues had not always been taken into account. The exclusion of possible tenderers was not identified, however, on several occasions mistakes were observed regarding the selection of the type of the tendering procedure. In a number of cases the expenses were not sufficiently justified. The financing practice leaves the responsibility line vague.

Recommendations: To review and update the guidelines specifying the organisation of public procurement of the Ministry of the Environment in order to facilitate procurement activities. To make use of expert assistance for the better formulation of procurement conditions and the evaluation of the quality of services. The existing practice of financing needs to be reviewed.

End of Summary 3

Summary 4

Report title: PROCUREMENT OF MAINTENANCE SERVICES (2005)

Owner: State Audit Office (SAO), Estonia. Full report in Estonian available at: http://www.riigikontroll.ee . Summary in English at: http://www.riigikontroll.ee/?lang=en
Type of Audit: compliance
Subject area: procurement of maintenance services
Sector: government and agencies

Scope and main issues: The majority of facilities where government employees work are owned by the Government or the state-owned company Riigi Kinnisvara. The SAO examined the maintenance management in these facilities aiming to ascertain the criteria under which the government agencies decide whether to maintain facilities with their own staff or to buy the service. And, if contracted, how the procurement terms and conditions were worded in the competitive bidding announcement and proposed contracts. The objective was to find out whether the decisions made by the agencies were rational, based on economic calculations and whether this particular field required additional regulation. Issues relating to clean-up were dealt in more detail.

Main findings: The Ministries, including the Ministry of Finance, do not consider general issues regarding the operation and maintenance of state-owned facilities on the national scale their area of responsibility. As a rule, government agencies do not outsource management services – management is carried out with own resources. The principles set out in the Estonian standard "Activities to guarantee the maintenance of facilities" are either unknown or if known, the prevailing attitude is that it is not appropriate for government agencies. Only a few employees have professional qualifications of a property or maintenance manager. Many essential management procedures are simply not carried out. The requisite maintenance of facilities is not always ensured.

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As regards the procurement of cleaning services the government has not specified the minimum acceptable standards for the maintenance of office spaces. Each government agency relies on its own experience and management practices in establishing the terms and conditions and quality requirements for the procurement of cleaning services. There is often no overview of the costs relating to the upkeep of facilities and accounting for and reporting of costs does not allow comparison with similar expenditures made by other agencies or private sector

Recommendations:

The Minstry of Finance should develop quality requirements for the general maintenance of offices and guidelines for the implemenation of the private sector standard in government agencies as well as provide guidelines to government agencies on the calculation of costs related to the maintenance of real property and for the introduction of a corresponding reporting system to make costs comparable in terms of agencies and of similar costs incurred in the public sector.

End of Summary 4

Summary 5

Report title: PROCUREMENT MANAGEMENT IN THE FIELD OF IT SYSTEMS, SOFTWARE PRODUCTS AND SOFTWARE SERVICES (2004)

Owner: State Audit Office (SAO), Estonia. Full report in Estonian available at: http://www.riigikontroll.ee . Summary in English at: http://www.riigikontroll.ee/?lang=en
Type of Audit: compliance
Subject area: IT systems, software products and software services
Sector: Ministries of the Environment, Ministry of Economic Affairs and Communications and Ministry of Agriculture

Scope and main issues: The audit examined activities related to the management of procurements, which concern the field of IT systems, IT services and software products and which had been contested in the Public Procurement Office. The purpose of the SAO audit was to find out whether and why the Ministries had made mistakes in formulating the terms and conditions (qualification criteria for tenderers and technical conditions) of public tenders for IT systems and software services, which have caused delays in the receipt of the required items by public departments.

Main findings: None of the audited Ministries had a long-term plan for information system development and no specific action plan had been drawn up for the preparation and implementation of any of the examined procurement projects. The Ministries had not adopted general rules (list of procedures and standards) for the acquisition of software and IT services. , As a rule, they were not able to prepare properly the technical conditions of such procurements without external specialists. Contestations have arisen from the assessment of the technical competence of tenderers on whether the tenderers are technically competent to provide the procured items with the required quality and within the time limits. The decision-makers must be familiar with the specifics of the procurement item and be able to compare tenders. These requirements have not always been respected in full.

Recommendations: The Ministers should, in planning the procurement of IT systems, software products and software services, refer to the development plan for the long-term (at least three-year) procurement plans co-ordinated with the competent structural units of the Ministry and accepted by the Ministry's management. They should also prepare and approve the procurement implementation plan in the procurement preparation phase to specify the timeframe for specific activities, the entities responsible, the general co-ordinators and the financing scheme as well as assess the likely risks and envisage measures for risk management. The Minister of Economic Affairs and Communications should take a position on whether it is necessary and practicable to require, by a legal instrument adopted by the competent authority, the public departments to involve the Government Information Systems Development Centre in the preparation of procurement of IT systems, software products and software services. The principle of project-based financing of IT development activities in order to allow long-term planning of major (more complex, more important for the government) IT activities (and procurements) and thus create better conditions for their proper preparation should be laid down.

End of Summary 5

European Court of Auditors

Summary Title	**Language**
1) Court of Auditors – Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEC – C 181 – Volume 46 31 July 2003)	English
2) Court of Auditors – Annual Report concerning the financial year 2000 para (OJEC page 318-328, 15-12-2001)	English

Summary 1

Court of Auditors – Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEC – C 181 – Volume 46 31 July 2003)

http://www.eca.eu.int/audit_reports/special_reports/docs/2003/rs08_03en.pdf

Type of audit: Compliance audit

Subject area: Infrastructure work

Sector: The European Development Fund (EDF)

Scope and main issues:

The objective of the Court's audit was to examine the performance of infrastructure work financed by the EDF, with the aim of carrying out a sound analysis of the problems encountered during the performance of the work in order to remedy them. Most of the contracts audited concerned road construction or repair

Findings:

Shortcomings and errors in the design and implementation studies were the source of many of the implementation problems found, and the absence of any quality control of these studies meant that too many contracts were based on partly incorrect or unrealistic terms and conditions. As a result, changes were made during implementation affecting the scope, nature and duration of the works, as well as their cost, even their sustainability. In many cases the necessary changes were neither decided nor formalised with the requisite rigour. This added to the difficulty of preventing and containing disputes and claims that accompanied implementation. In some cases insufficient monitoring of divergences between contracts and results allowed contractors to escape their responsibilities or to ignore the conditions that resulted from competitive tendering.

Many of the implementation problems encountered recurred from one contract and one country to another, but the accumulation of experience did not result in build-up of sectoral expertise that could be applied for the benefit of all public works contracts.

Recommendations:

The European Union and the ACP States must improve supervision of the implementation of works contracts financed by the EDF and, in particular, must reduce the extent of the divergences that were found between contracts and their actual implementation. It would therefore be appropriate for the Commission to reinforce the support that it provides to ACP countries at the stage where contracts are being drawn up, and subsequently at the stage where their execution is being monitored. In order to do that, it should:

(a) provide a more definite framework for the studies that form the basis on which contracts are concluded,
(b) place more emphasis on the justification for any changes made while works are in progress, and should attach greater importance to the repercussions of such changes on the cost and quality of the works,

(c) reorganise its departments so as to provide the delegations and ACP countries with back up and sectoral expertise commensurate with the management responsibilities which it is transferring to the delegations as part of decentralisation.

End of Summary 1

Summary 2

Court of Auditors – Annual Report concerning the financial year 2000 para (OJEC page 318-328, 15-12-2001)

http://www.eca.eu.int/audit_reports/annual_reports/docs/2000/ra00_1_en.pdf

Type of audit: Financial audit

Subject area: Procurement procedures

Sector: The EU Institutions purchase of services, supplies and works.

Scope and main issues:

The Court examined the design and operation of the controls over procurement procedures used by the institutions to purchase services, supplies and works.

This included:

1. a review of the controls in place at the institutions for ensuring compliance with the relevant articles of the Financial Regulation, the implementing measures and the public procurement directives in the purchasing of all services, supplies and works;

2. an examination of the procurement procedures associated with the payments in an intensified sample of transactions at the institutions

Findings:

In general, the procurement procedures applied by the institutions were legal and regular. Infringements, where they occurred, resulted, in the main, from the lack of experience/expertise in the domain of tendering for particular services, and pressures on departments to adopt administratively convenient solutions, e.g. exemptions from tendering on 'technical grounds' to facilitate the commitment of funds before the year end.

Recommendations:

Institutions need to introduce a system of preventive measures, such as training authorising officers in procurement procedures and developing checklists, to complement the roles the ACPC and Financial Control currently play if compliance with the directives is to be improved further. Internal control systems reviews and compliance testing by the internal auditors will also be important in the future, due to the planned abolition of the ACPC and Financial Control.

Institutions should focus, in particular, on controlling the following risk areas in order to improve compliance with the Financial Regulation and directives on procurement:

1. the late identification and incorrect valuation of purchasing needs;

2. the use of negotiated procedures without fully demonstrating that goods and services could only be provided by one particular contractor or supplier.

End of Summary 2

The State Audit Office Finland

Summary Title	**Language**
1) Statistics Finland's service procurements	English
2) The Defence administration’s procurement activities - Supply procurement	English
3) The Finnish state's payment traffic procurement	English
4) The procurement and commercial use of multipurpose icebreakers	English
5) The procurement of public transport services	English
6) Universities procurement activities	English
7) Use of expert services by the defence administration	English
8) Procurements of system work and ADP consulting services by the tax administration	English

Summary 1
Report title: Statistics Finland's service procurements

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/3731_582003Statistics.pdf

Type of audit: performance

Subject area: service procurements

Sector: Statistics

Summary:
This audit concerns Statistics Finland's service procurements in three categories: printing services, recording services and expert services. The audit did not evaluate the appropriateness of procurements, but compliance with rules of procedure and due form. The main question was whether procurements complied with regulations. The purpose of regulations concerning public procurements is to ensure that public procurements are open and non-discriminatory and to increase competition in public-sector procurements. The ultimate objective is lower costs.

Statistics Finland did not put service procurements out to tender adequately. Of the seventeen procurements which were audited, only five were put out to tender. Service procurement at Statistics Finland as a whole needs to be brought in line with legislation. Since most of the audited procurements were not put out to tender, all the documents required under the Public Procurement Act were not prepared. Losing bidders were not informed by mail or in some other certifiable manner. The documentation of the procurement process should be improved.

Procurement documents should be recorded and filed so that every stage of the procurement process can be checked later on. Regardless of value, procurements must be announced or else a sufficient number of bids must be requested in relation to the size of the procurement. Oral requests for bids should be avoided and exceptionally any oral request for a bid should be confirmed in writing. Notification procedures and
related guidelines should be brought in line with legislation.

Since low value and urgency were most often cited as reasons for not putting procurements out to tender, Statistics Finland's procurement guidelines should specify a threshold and define urgency. The threshold should be included in procurement rules, taking into account the special features of different types of procurements.

Bids should also be handled in a non-discriminatory way. The procurement unit has a duty to compare bids in writing before a procurement decision is made. A previous supplier should not be given preference automatically.

In repeated service procurements, the frequency of procurements should be considered, keeping in mind tendering costs and other factors. Attention should also be paid to the special features of contracts concerning service procurements.

End of Summary 1

Summary 2
Report title: THE DEFENCE ADMINISTRATION'S PROCUREMENT ACTIVITIES - Supply procurement

Owner: National Audit Office, Finland. Full report is available at: http://www.vtv.fi/chapter_images/3833_022001The_defence_administrations_procurement_activities.pdf

Type of audit: performance

Subject area: supply procurement

Sector: Defence

Summary:
The State Audit Office of Finland conducted an audit of the defence administration's supply procurement. This includes vehicles, transport agreements, soldiers' clothing, food, furniture, computer equipment, health-care supplies, medicine etc.
The purpose of the audit was to support, evaluate and monitor the progress of a project set up by the Defence Forces to simplify supply procurement. The viewpoint of the audit is the possibility to use funds more effectively and to cut costs by developing the organization and procedures of supply procurement. The audit of the defence administration's procurement activities has already led to development work in the administrative sector.

The Defence Forces should provide more detailed guidelines for the planning of units' and establishments' supply procurement. The commercial preparation of units' procurement should also be entrusted to full-time procurement personnel with commercial training. The Defence Forces should direct the organization of units' supply procurement more effectively.

The process of procuring garrison vehicles was observed to take an excessively long time. The Defence Forces should change guidelines so that cars and vans which do not require structural changes or the installation of additional equipment can be ordered by units directly from the supplier. As a result of this arrangement the Defence Materiel Establishment could focus its resources on making procurements which are technically more difficult.

The Defence Forces should conclude a framework agreement for computer workstations and should regularly take advantage of the expertise of the Defence Forces' Information Technology Establishment in this type of procurement. The Defence Forces should also investigate the feasibility of leasing computer workstations in the future.

End of Summary 2

Summary 3
Report title: The Finnish state's payment traffic procurement

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/3721_452003SStates_payment_traffic_procurement.pdf

Type of audit: performance

Subject area: service procurement

Sector: central Government

Summary:
The audit focused on compliance with principles and statutory requirements concerning tendering for public service procurements. It also focused on how the financial objectives for payment traffic procurement were explained and chosen and how well they were achieved with the selected solution. The audit also considers whether costs resulting from long-term contracts can be paid from budget funds without authorization.

The procurement of the Finnish state's payment traffic exceeds the threshold and must be put out to tender at the EU level. According to the State Budget Act, the state's payment traffic must be managed economically and with an eye to security. According to the main principles in procurement regulations, a procurement unit must make procurements as economically as possible. Other key principles are the principle of equality and non-discrimination, the obligation to put procurements out to tender and the principle of transparency.

Decision-making concerning the relative weights of the selection criteria themselves (financial and quality factors) was not detailed in documents. Whenever overall economy is used as a gauge, officials should specify the weights of selection criteria before bids are opened, if the weight structure of evaluation criteria has not been presented in requests for bids.

Tendering and the procurement process complied with regulations concerning contracts exceeding the threshold. Tendering also complied with regulations concerning EU procurements, except that the procurement notice and requests for bids with their strict conditions may have kept the number of bidders below the minimum which is normally required under the limited procedure. To ensure real competition a sufficient number of bidders in relation to the nature and size of the procurement should be invited - at least five. Consideration should also be given to setting staggered limits according to the nature of the service procurement or other procurement.

Regulations concerning the state budget should be amended so that they spell out when agencies and other units can without budget authorization make commitments and contracts whose validity exceeds the period covered by the appropriation.

End of Summary 3

Summary 4
Report title: The procurement and commercial use of multipurpose icebreakers

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/3616_432003The_procurement_and_commercial_use_of_multipurpose_icebreakers.pdf

Type of audit: performance

Subject area: supply procurement

Sector:

Summary:
The first key question in the audit was whether it has been more economical for the state to procure multipurpose icebreakers rather than traditional icebreakers. The audit indicates that the answer is yes, although the difference between these alternatives has not been very large so far.

The second key question in the audit was whether the choice between traditional and multipurpose icebreakers was based on proper studies. The audit indicates that the answer is clearly no.

The third key question in the audit is whether the most economical multipurpose icebreakers have been selected. The first multipurpose icebreaker had the lowest procurement price. The second was procured on the basis of an option, in which case there is no need to request tenders under procurement rules. Since another reliable and competent supplier had asked for tenders to be invited, in the opinion of the State Audit Office, the Finnish Maritime Administration acted contrary to good practice in not informing decision-makers of the second supplier's willingness to submit a bid. Consequently the most economical option for the state was not selected.

Furthermore, suppliers were not treated equally since the other bidder was not informed of the significance of up-front payments in payment terms. The audit also indicated that certain aspects of contracts have not been observed and that this has resulted in economic damage for the state.

In the opinion of the State Audit Office, engaging in production and commercial activities through a government agency causes certain problems. Consequently the Finnish Maritime Administration's production and commercial activities should be separated from the agency's official tasks.

End of Summary 4

Summary 5
Report title: THE PROCUREMENT OF PUBLIC TRANSPORT SERVICES

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/3609_602003_The_procurement_of_public_transport_services.pdf

Type of audit: performance

Subject area: service procurement

Sector: Transport

Summary:
The term public transport refers to line services, purchased services and other regular passenger services which are available to the public. The state has traditionally supported public transport and its development through appropriations in the state budget.

The audit sought answers to the following questions concerning the procurement of public transport services:
- Were procurements organized and directed in a clear and comprehensive way?
- Did procurements comply with regulations?
- How could effectiveness and efficiency be improved in procurements?
- How is compliance with procurement contracts monitored?
The audit also examined the budgeting and application of funds and the effectiveness of cooperation among different parties in the procurement of transport services.

The audit indicated that terms concerning purchased services and purchasing principles were of a general nature and open to interpretation. This has in practice allowed considerable variation in the services purchased by different state provincial offices. The state provincial offices did not have approved service-level objectives to support the planning of purchased services, although development studies regarding this matter have been completed.

In the opinion of the State Audit Office, terms concerning purchased services and purchasing principles should be spelled out as soon as possible. Attention should also be focused on the economy of purchased services, for example by setting passenger thresholds for supported services. The audit indicated that procurements complied with regulations quite well. Minor deficiencies in procedures were observed with regard to the fair treatment of bidders and the administration of procurement documents, among other things.

On the basis of the audit it would appear that the competition situation for purchased services is not very good. New ways should be sought to improve the competition situation, for example by developing the content of purchased services and diversifying services.

The audit indicated that monitoring of the procurement of purchased services was meagre and sporadic. Breaches of contract which came to light in the audit suggest that deviations occur at least to some extent in all purchased services.

End of Summary 5

Summary 6
Report title: UNIVERSITIES' PROCUREMENT ACTIVITIES

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/3651_322002en.pdf

Type of audit: performance

Subject area: supply and service procurement

Sector: Education

Summary:
This audit focused on compliance with procurement legislation as well as the direction and organization of procurements. The audit covered four universities: the Helsinki School of Economics and Business Administration, the Turku School of Economics, the University of Joensuu and the University of Vaasa.

At the universities covered by the audit, decision-making and responsibility for procurements exceeding a set amount and for certain types of procurements such as computer, telephone and real-estate services have been centralized. Different university units decide on other procurements within the framework of their annual funds. This means that dozens of university units also act as procurement units, which requires that a large number of university personnel have extensive knowledge regarding procurement legislation, the procurement document process and procurement procedures.

In the opinion of the State Audit Office, this decentralized organization is one reason for the shortcomings which have been observed in universities' procurement activities. The universities should adopt means to reduce shortcomings resulting from the decentralized organization. According to observations, compliance with procurement regulations was deficient at all the universities covered by the audit. In many cases procurements were not put out to tender or else tender procedures were not in line with regulations. Likewise documents required in the procurement process were not prepared or were deficient in content. The grounds for failing to invite tenders were not always documented. University documents are also subject to record and archive obligations. In the case of procurement documents these obligations were generally neglected.

The universities make procurements from many different suppliers and in small lots. Consequently tendering, billing and other process costs are higher than if procurements were centralized. In the opinion of the State Audit Office, possibilities to rationalize the universities' procurements in order to lower process costs should be investigated. The objective of development plans for procurement activities is to increase the strategic management of procurements and procurement cooperation in administrative sectors so as to rationalize procurement activities and achieve procurement volumes. The Ministry of Education's administrative sector lacks this type of management. At the ministry's suggestion, a certain amount of procurement cooperation has begun within universities. Universities in the same area have also engaged in procurement cooperation. In the opinion of the State Audit Office, universities' procurement cooperation can be increased to improve and take advantage of procurement expertise, make better use of resources and obtain volume benefits.

End of Summary 6

Summary 7
Report title: USE OF EXPERT SERVICES BY THE DEFENCE ADMINISTRATION

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/5075_962005.pdf

Type of audit: performance

Subject area: service procurement

Sector: Defence

Summary:
The audit theme was prompted by the observation that a considerable share of expert and research services are procured without being put out to tender. The goal with the audit was to find out whether State funds had been used appropriately in the procurement of expert and research services and whether legislation on procurements is being complied with in these procurements.

With respect to specific procurements, the features examined were the commercial implementation of the procurement and whether it had been put out to tender. Another observation made in the audit was that expert services are procured as needed without making comparative calculations of the costs of procuring them relative to the costs of own activities. On the basis of the audit, the State Audit Office took the view that the Defence Administration should issue guidelines setting forth when work should be outsourced and when it should be done within an office as an official task.

In addition, the State Audit Office emphasises that the Defence Administration must ensure that the legislative provisions on procurements are complied with when expert and research services are procured and that this is done also when these services are purchased from persons who have retired from the Defence Forces.

End of Summary 7

Summary 8
Report title: Procurements of system work and ADP consulting services by the tax administration

Owner: National Audit Office, Finland. Full report is available at:
http://www.vtv.fi/chapter_images/3613_492003Tax_administration.pdf

Type of audit: performance

Subject area: service procurement

Sector: Tax

Summary:
The main goal of this audit was to determine whether procurements of system work and ADP consulting services by the tax administration complied with existing regulations. The audit focused on guidelines concerning procurements, procurement planning and the implementation of procurements in the tax administration in general as well as three individual procurement processes.

Not all procurements of system work and ADP consulting services by the tax administration were put out to tender at all or according to procurement legislation. Long-term service contracts should
also be put out to tender from time to time, for example when contract terms are revised. Reasons why the negotiation procedure has been used or why a procurement other than one of small value has not been put out to tender should be indicated in procurement documents.

Procurement processes should be documented and procurement documents should be archived so that all the stages of the procurement process can be verified later on. This would also facilitate the
monitoring of procurement planning, the progress of the procurement process and cost-effectiveness and ensure that the reporting required by legislation is performed. Procurement legislation should be revised with regard to in-house procurements from connected firms so that procedural regulations cover procurements in the entire public sector.

End of Summary 8

Bundesrechnungshof

Summary Title	Language
1) Annual Report 2004 on federal financial management	English

Summary 1
Report Title: Annual Report 2004 on federal financial management, Part II,
Item 3 ”Inadequate application of procurement law“, ,
Item 17 “Invitations to tender for public works are not in line with EC procurement law“,
Item 18 “Invitations to tender issued by the Federal Office for Building and Regional Planning do not comply with EC procurement law” and
Item 42 “Infringements of procurement law in the accommodation of government offices“.

Owner: Bundesrechnungshof, Federal Republic of Germany. Full report is available at: <http://www.bundesrechnungshof.de/veroeffentlichung/bemerkungen_2004>

Type of audit: Performance and regularity audit.

Subject area: miscellaneous

Sector: Federal departments and Federal Employment Agency

Scope and major issues
The Bundesrechnungshof’s audit work in 2003 included cross-boundary examinations into public contract awarding by federal governments and agencies with special regard to EC procurement law. The separate audit exercises addressed the procurement of various kinds of goods and services.

Findings
In a large number of cases, the Bundesrechnungshof found that federal departments and agencies infringed procurement law. In detail, the infringements concern non-compliance with the duties of:
- a neutral and non-discriminatory specification of the goods and services required,
- a fair and objective examination and evaluation of the tenders submitted and
- the comprehensive documentation of procurement procedures.

Furthermore, the Bundesrechnungshof has identified a trend towards improperly restricting competition.

The Bundesrechnungshof found that infringements were frequently caused by the departments’ and agencies’ lacking awareness of central procurement principles e.g. seeking best value for money and competitive tendering.

Recommendations
The Bundesrechnungshof urged the Federal department having overall responsibility for fundamental issues of procurement law to undertake stronger efforts to ensure compliance with procurement law.

End of Summary 1

State Audit Office, Hungary

Summary Title	**Language**
1) Summary of the Audit on the Operation of the Hungarian Defense Forces Public Procurement System projects	English
2) Summaries of the reports on the activity of the State Audit Office in 2002-2004	English

Summary 1

Report Title: ***Summary of the Audit on the Operation of the Hungarian Defense Forces Public Procurement System projects***
Owner: State Audit Office (SAO), Hungary
The report is available at: http://www.asz.hu/ASZ/www.nsf/AMain?Openframeset
Type of audit: performance
Subject area: military equipments
Sector: Hungarian Defense Forces (Ministry of Defense)

Scope and main issues
In 2004, the SAO carried out a performance audit to examine the operation of the public procurement system of the Hungarian Defense Forces. The performance audit method was applied in order to assess if the legal background, the ministerial regulation of public procurement, the operational system of the military logistics ensured the implementation of fundamental public procurement principles as well as the assessment of the effectiveness of the procurements in the period of restructuring the military forces.
In order to carry out this system-oriented audit and with keeping the above objective in mind, some individual procurement measures of the Ministry of Defense and Hungarian Defense Forces institutions engaged in procuring military equipment were selected for the site audit. The experiences gained from the performance audit give an overview only of the regularity of the examined procurement measures.

Findings
Due to the SAO's former recommendations and since the regulation system was established, the defence procurement scheme (regarding those exempted from the public procedures) of the Ministry of Defense has undergone a development. However, the regulation system still included some duplications, overlaps and still missed some detailed regulations. The public procurements were generally carried out in accordance with the statutory and other legal provisions. However, the inaccurate interpretation of legal provisions led sometimes to the application of procedures not corresponding to the provisions themselves. On the basis of the internal regulations covering the whole area of financial management, the Ministry of Defense found it essential in general, to enforce the requirements, considerations of economy at each of its entities with autonomous financial management, but it failed to set specific requirements. In case of public procurements neither were there economy-approach requirements set on the entities and their respective scopes of activity.

Recommendations
The SAO's recommendations were the setting of economy-based requirements, the supervision and checks of the procurement measures' implementation and the efficiency of defense planning. The Ministry of Defense accepted these recommendations.

End of Summary 1

Summary 2

Report Title: ***Summaries of the reports on the activity of the State Audit Office in 2002-2004***

Owner: State Audit Office (SAO), Hungary

The report is available at: http://www.asz.hu/ASZ/www.nsf/AMain?Openframeset

Type of audit: basically compliance audits
Subject area: procurements subject to the law
Sector: the sub-systems of public financial management; state property; organisations operating outside the area of public finance, financial management of political parties, audit experiences on some high-priority areas.

Scope and main issues
The SAO gives an account, in the form of an annual report, of its activities performed, without the intention of completeness, in the previous year to the Parliament every spring.

In the reports of the years 2002-2004, full-scope and in-depth information on the main issues, experiences and utilisation of the audit activity were provided. The annual reports usually present the most important findings, among others on public procurements, of the audits performed.

In the appendix of the reports, the most important experiences of the individual audits, completed in 2002-2004, are summarised. Each summary, where relevant, highlights those cases where managing the procurements were illegal. These summaries also include the relevant recommendations.

End of Summary 2

Office of the Comptroller and Auditor General - Ireland

Summary Title	Language
(1) Development of an ICT Human Resource Management System	English
(2) Primary Routes Improvement Programme	English
(3) Waste Management in Hospitals	English
(4) Purchasing of Tyres by An Garda Siochana (Police Force)	English
(5) Interview Recording Systems	English

Report Title: Development of Human Resource Management System for the Health Service (PPARS)

Owner: Office of the Comptroller and Auditor General, Ireland. Full report is available at: http://www.audgen.gov.ie/viewdoc [Value for Money Report No.51]

Type of Audit: Performance (Value for Money)

Subject area: Management of a major ICT project incorporating human resource management, payroll and related systems.

Sector: Health

Scope and Main Issues:

In 2005, the Office undertook a performance audit to assess the twin goals of a human resource management system which were to implement dynamic, devolved HR management and facilitate the production of key information across the health sector. The examination was undertaken against a background of considerable time slippage, cost escalation and reduced functionality, culminating in the project being suspended in order to determine the best way forward. The initial estimated cost of the project was in the order of €9m. The total cost incurred at that time the project was suspended was €131m.

Findings:

A number of issues associated with the arrangements for and management of PPARS procurement came to light in the course of our examination, including the following:

- In a project of such complexity and uncertainty it would have been prudent to assess the feasibility of the overall programme through the controlled and monitored implementation of a pilot project.
- Commissioning protocols should be in place.
- Contracts should be based either on defined specifications or managed in a way that focuses on milestones, deadlines and deliverables.
- High value contracts with consultants on large IT projects should incorporate provisions whereby each party shares the rewards and the risks.
- Lessons learned from this project should be assimilated into future management and governance arrangements.
- Industry ICT and project management expertise should be developed within the public sector to enable agencies to have access to expert resources.

The concluding chapter of the report outlines the main elements of good practice in relation to the management of major ICT projects.

Report Title: Primary Routes Improvement Programme

Owner: Office of the Comptroller and Auditor General, Ireland. Full report is available at: http://www.audgen.gov.ie/viewdoc [Special Report No.6]

Type of Audit: Performance (Value for Money)

Subject area: Proposed Investment of €5.6 billion on Roads Improvement Programme

Sector: Transport

Scope and Main Issues:

The national Development Plan, launched in November 1999, proposed investment of €5.6 billion on national road improvements during the period 2000 – 2006. By 2002, the estimated cost of the planned works had risen to almost €16 billion. The audit set out to examine the causes of the escalation in the cost of the planned works and review the estimation process which underpinned the costing of the programme. In addition, the audit examines the arrangements in place for the procurement of national road improvement projects and reviews key aspects of the overall management of the roads improvement programme.

Findings:

Over 40% of the total escalation in the reported cost was due to price movements and a quarter of this was due to underestimation of prices at the beginning of the programme.

A further 16% of the increase was due to a systematic failure to cost certain elements of schemes at the planning stage. In addition, the programme itself grew due to changes in the scope of projects and new works, accounting for 20% of the increase. The balance of the cost escalation was due to project specific increases and increases in the cost of projects with non-standard features.

The was a lack of costing expertise in the State body and there was a need for greater alignment between the funding provision and planned measures so that overall achievement could be monitored and measured.

The traditional procurement method employed involved the retention of most risks by the State and paying for them to the extent that they occurred and were measured.

Report Title: Waste Management in Hospitals

Owner: Office of the Comptroller and Auditor General, Ireland. Full report is available at: http://www.audgen.gov.ie/viewdoc [Value for Money Report No.49]

Type of Audit: Performance (Value for Money)

Subject area: Cost-effective ways to treat and dispose of hospital waste

Sector: Health

Scope and Main Issues:

Potentially hazardous waste material arising from healthcare related activities requires special management and the use of costly handling and disposal arrangements to avoid causing infection or injury to those who come into contact with it. Following the closure of individual hospital incinerators due to their failure to comply with increasing environmental standards, the Office undertook a performance audit to assess the impact of the tighter regulations governing waste handling and disposal in publicly funded hospitals.

The examination was carried out to identify:

- The output of waste in publicly funded hospitals in Ireland, and the type of waste produced
- The costs associated with the collection, handling, treatment and disposal of such waste
- Good practice in the management of waste in publicly funded hospitals.

Findings

Analysis found that none of the hospitals visited had adopted a clear set of relevant and comprehensive targets for waste management performance and, given the variations in cost comparisons across the hospital sector, there was scope for savings in the procurement and use of special colour-coded containers and refuse bags used in the collection and transportation of risk waste.

There is scope for hospitals to reduce the amounts of waste produced.

The level of recycling was low.

Cost differentials underline the importance of ensuring a good segregation of waste, so that only waste that needs to be treated as risk waste gets into that disposal stream.

Report Title: Purchasing of Tyres by the Garda Síochána (Police Force)

Owner: Office of the Comptroller and Auditor General, Ireland. Full report is available at: http://www.audgen.gov.ie/viewdoc [Value for Money Report No.40]

Type of Audit: Performance (Value for Money)

Subject area: Procurement of tyres for a transport fleet

Sector: Justice - Police

Scope and Main Issues:

The Transport Section of the Police Force has overall responsibility for the management and maintenance of the vehicle fleet. In 1993 it entered into an arrangement with a supplier whereby most police vehicles would, when required, be brought to nearby depot operated by the supplier to have tyres replaced and other related services carried out. The arrangement continued following a further tender competition in 1997. Following media allegations in 2001 that senior police members involved in purchasing the vehicle fleet had been entertained on recreational trips abroad by the supplier in question, the Office undertook a performance audit on the purchasing of tyres to establish:

- If, in the period 1998-2000, there was a loss of economy in the purchase of tyres by the police force and if so, how great was the loss
- If the tendering and procurement procedures for tyres accorded with best practice
- The level of control over payment for tyres.

Findings

The cost of tyres purchased in the period 1998 to 2000 was over €2m. Often the more expensive brands of tyres were purchased and more than the tender price was paid for some extra items and related services. It was estimated that the total overpayment on all goods and services was around 10% of the total paid to the supplier.

Crucial aspects of the tender evaluation appear to have been misleading and management appear to have consider the submissions without spotting deficiencies.

Management and control systems in relation to tyre purchasing were completely inadequate. The police force ceded control of key aspects of the supply of tyres to the supplier and allowed themselves, in crucial respects, to become captive to the supplier.

Report Title: Garda Interview Recording Systems

Owner: Office of the Comptroller and Auditor General, Ireland. Full report is available at: http://www.audgen.gov.ie/viewdoc [Special Report No 5]

Type of Audit: Performance (Value for Money)

Subject area: Procurement of recording equipment for use in police interview rooms.

Sector: Justice - Police Force

Scope and Main Issues:

Facilities to record evidence taken by police were installed in 220 interview rooms in police stations across the country. The equipment, which was purchased in 2001, consists of audiovisual recording equipment using VHS. The audit examined whether the process for the identification and acquisition of the equipment represented good public procurement practice and whether the acquisition of the equipment complied with public procurement law.

Findings:

There had been breaches of the public procurement laws but these breaches were not material in that they would not affect the ultimate contract award decision.

Pilot testing was undertaken on the basis of a single equipment solution and the relative merits of more modern DVD systems may not have been evaluated in sufficient detail. Certain pilot stage acquisitions were not the subject of competitive tendering.

The lessons learned include

- The importance of ensuring that a definition of requirements is framed in a manner that maximises the number of technology and equipment solutions offered by tenderers
- The need to ensure that the terms and conditions in tender documents support the procuring organisation in its quest for the best offer and, conversely, do not risk ruling out the acceptable bids by the inclusion of unnecessary terms
- The desirability of having an independent expert on the evaluation team.

Court of Audit, Portugal

Summary Title	**Language**
1) Concomitant Audit over the execution of a construction job to improve a local road	English
2) Audit over a Port-Maritime Institute	English
3) Audit over a Rail Transport Institute	English
4) Audit of Euro 2004, 1st stage	English
5) Audit of EXPO`98	English
6) Audit of Centralised Public Tenders in the Health sector	English
7) Audit of a public-owned company	English

Summary 1
Report Title: Concomitant Audit over the execution of a construction job to improve a local road

Owner: *Tribunal de Contas*, Portugal.
http://www.tcontas.pt/pt/actos/rel_auditoria/2004/audit-dgtc-rel008-2004-1s.shtm

Type of audit: Compliance

Subject area: Execution of public works

Sector: Local Public Administration

Scope and main issues:
In 2004, the *Tribunal de Contas* carried out a concomitant audit over the execution of a construction job contract to improve a local road, with the objective of verifying whether the work underway was compatible with the one that had initially been planned and whose contract received a seal of approval from the Court.

Findings
Analysis of all the documentation and clarifications presented by the audited body revealed that prevailing norms had not been observed in the following aspects:

- There had been an alteration of the object of the construction job placed to public tender;
- The implementation of the construction job was different from that which had been placed to tender and, for the one implemented, no tender procedure had been opened;
- No written contract had been drawn up for the work in progress;
- There had been failure to comply with the deadlines specified for implementation of the works.

Recommendations
No specific recommendations were made given the nature of the action.
Financial responsibilities were indicated and the respective process was submitted to the Public Prosecution Service.

End of Summary 1

Summary 2
Report Title: Audit over a Port-Maritime Institute

Owner: *Tribunal de Contas*, Portugal
http://www.tcontas.pt/pt/actos/rel_auditoria/2003/rel002-2003.shtm

Type of Audit: Compliance

Subject Area: Contracts for public works

Sector: Indirect public administration responsible for the port and maritime sector

Scope and main issues:

The objective was to determine whether the pre-contractual procedures developed by the Institute and the construction job contracts that had been signed, complied with applicable legislation.
On the date that the auditing initiative commenced, a global reform of the port sector was underway, implying the reformulation of the institute's management models and instruments. As a result, analysis was made of the Institute's interaction with other organisations in the sector, in particular in terms of the distribution of attributions and powers related to the awarding of port-maritime works.

Findings:

Analysis of the 28 construction job contracts (port-maritime and terrestrial construction works) revealed that there had been failure to comply with regulatory norms for the procedures prior to signature of the said contracts, in the following aspects:

- Introduction of relevant alterations into the base documents of the tender, during the time period established for presentation of bids;
- Divergences between the various tender documents in relation to the execution deadlines for the construction job;
- In tender procedures subject to invitation it was not possible to ascertain, due to lack of due grounds, the criteria used for selection of the entities invited to present bids;
- Requirement were established, within the framework of the construction jobs, to supply means and materials intended to guarantee the exercise of inspection of the works, including cars, mobile phones and computing equipment;
- Sub-factors related to the bidder's economic, financial and technical capacity had been included in the parameters related to bid appraisal criteria;
- Failure to indicate the weighting (%) of the sub-factors that constituted the various factors used to establish the bid appraisal criterion;
- Failure to provide due grounds for the awardings made;
- Direct commissions were made without existence of the respective legally required pre-requisites;
- Complementary works to the construction job based on unforeseen circumstances which are not permitted by law.

End of Summary 2

Summary 3
Report Title: Audit over a Rail Transport Institute

Owner: *Tribunal de Contas*, Portugal
http://www.tcontas.pt/pt/actos/rel_auditoria/2004/audit-dgtc-rel012-2004-1.s.shtm

Type of audit: Compliance

Subject Area: Contracts for the acquisition of goods and services

Sector: Indirect public administration responsible for the rail sector

Scope and main issues:

The objective was to determine whether the pre-contractual procedures undertaken complied with applicable legislation.

Findings:

Analysis conducted of the procedures related to the acquisition of goods and services revealed that there had been failure to comply with several regulatory norms for the procedures prior to the said acquisitions, in the following aspects:

- Failure to draw up an estimate of the probable costs of the desired goods or services;
- Absence of tender specifications, tender programmes or equivalent documents;
- Failure to draw up a written invitation to the entities selected to present bids;
- Direct commissions were made in situations that are not permitted by law;
- Illegal admission of bidders and bids;
- Failure to carry out a prior hearing or deficient grounds given for the decision to dispense with such a procedure;
- Absence of any reference to the criterion governing the award or use of vague or incorrect awarding criteria;
- Insufficient statement of grounds for the awardings made;
- Use of complementary contracts based on facts that were not legally admissible.

Recommendations:

- Prior to or simultaneously with the prior decision/deliberation to contract goods and services, calculation should be made of the approximate cost of the goods/services that it is aimed to acquire;
- The written elements included in the pre-contractual procedures should include a set of norms that regulate, in a clear and concise manner, the various formalities that must be respected by the said procedures;
- Greater attention should be paid to requesting qualifications documents for the purposes of admission of bidders and greater rigour in the verification of validity of these documents should be used;
- The awarding criterion and the underlying factors to be used should be previously established, quantified and disclosed in the documents included within the pre-contractual procedure that has been set into motion;
- The classification and listing of the bids stated within the *Analysis Reports* must comply with the pre-defined adjudication criteria and indicate which specific elements thereof have been

subject to weighting in the framework of each of the factors that are integrated within the aforementioned criterion;

- In contracts that are preceded by direct commission within the framework of exceptional norms, verification of compliance with the legal and de facto pre-requisites set therein must comply with the actual situation, which thus requires greater rigour in the analysis made and the subsequent grounds established for the decision taken.

End of Summary 3

Summary 4

Report Title: Audit of Euro 2004, 1st stage

Owner: *Tribunal de Contas*, Portugal.

http://www.tcontas.pt/pt/actos/rel_auditoria/2004/audit-dgtc-rel19-2004

Type of audit: Performance

Subject area: Public works construction jobs and projects

Sector: Local municipal councils and entities within the State and Local business sector.

Scope and main issues:

The 1st stage of the audit analysed the design/construction of the essential infrastructures for holding Euro 2004, in particular, the stadiums, car parks and road and rail access, and also the promotion, organisation and commercial exploitation of the event.

Findings:

- The public promoters attained their key objective to conclude the stadiums within the schedule foreseen by UEFA - 6 months prior to organisation of the event itself. However, although the stadiums were completed within schedule there was a considerable delay in the completion of road and rail access.
- The choice of architectural plans and associated detailed specifications were generally made without public tender, within the framework of a special law for this purpose, and the sole criterion used was the prestige and technical recognition of the architect, without any comparative analysis of the economic and technical merit of the bids.
- In most cases the project-planners were not required to provide any project insurance that would guarantee coverage of any expenses resulting from project errors, omissions and deficiencies, nor were contractual mechanisms created in order to establish liabilities for the project-planners.
- Several of the geological and geo-technical studies were insufficient and thus hindered implementation of the construction jobs.
- Various construction jobs were launched in a regime of price series, notwithstanding the fact that the public promoters did not have sufficient technical teams in order to conduct the daily controls required for this modality.
- Excess amounts were recorded in the final cost of the construction jobs due to the failure to provide the respective plots of land in due time, project errors, omissions and deficiencies, alterations intended to achieve improvements in the finishing materials, safety requirements defined after the adjudications were made, weak co-ordination of the architectural and structural plans and the plans for the technical installations, absence of construction job managers, inspection deficiencies, revision of prices associated to extension of the implementation deadlines and additional costs due to shortening of implementation deadlines.

End of Summary 4

Summary 5
Report Title: Audit of EXPO`98

Owner: *Tribunal de Contas*, Portugal.
http://www.tcontas.pt/pt/actos/rel_auditoria/2000/audit-dgtc-rel43-2000

Type of audit: Performance

Subject area: Evaluation of the execution of the Project from the perspective of its effectiveness, efficiency, cost control and transparency.

Sector: State business sector

Scope and main issues:

Analysis of execution of the EXPO`98 project, in relation to the organisation, structure, management and financial control, implementation of the construction job and construction areas, operations, *promark*, acquisition of computing equipment and accommodation, exhibition and real-estate revenues for the period between 1993 and 1998.

Findings:

In relation to the construction jobs carried out:

- The cost of the construction jobs analysed presented a global deviation of 87.5% in relation to the initial estimated cost, due to additional works, premiums and excess costs paid in order to comply with the deadlines set for conclusion of the works.
- In most of the awarding procedures adopted, the legal regime applying to public works was not observed.
- In the public tenders launched by the various operational areas, the guidelines issued were not always observed, in relation to contracting principles, to compliance with European Directives and to details of the contracts signed with the European Investment Bank (EIB).
- The awarding procedures adopted by most areas did not always confer transparency to the choices made, nor did they allow suitable functioning of market rules in order to make it possible to obtain the most economically-favourable bids.
- The delays in the presentation of projects, caused by failure to define the objectives desired and/or by a delay in their design and preparation by the respective architects, meant that the majority of the construction jobs were implemented on the basis of draft projects or preliminary studies in a regime of price series which did not make it possible to make a suitable global estimate of the inherent costs.
- Systematic alterations and revisions of the project in the execution stage of the works, led to delays and higher costs.

End of Summary 5

Summary 6
Report Title: Audit of Centralised Public Tenders in the Health sector

Owner: *Tribunal de Contas*, Portugal.
http://www.tcontas.pt/pt/actos/rel_auditoria/2001/audit-dgtc-rel56-2001

Type of audit: Performance

Subject area: Centralisation of public purchases

Sector: Central Public Administration and Hospitals

Scope and main issues:

The overall objective of the audit was to evaluate the cost-effectiveness and efficiency of the National Health Service's system for the acquisition of goods, via centralised public tenders. Given the defined objective, the audit was guided by a comparative analysis of the centralised public tenders, de-centralised public tenders implemented by 2 Hospitals that did not adhere and the specific procedures carried out by 8 adhering Hospitals.

Findings:

- The State did not attain the objectives that had been established for the centralisation of tenders, in particular in terms of obtaining globally more favourable purchasing conditions and reduction in the procedural times for public tenders for the acquisition of goods and services within the framework of the Ministry of Health.
- Because there was no obligation to adhere to the centralised public tenders in order to acquire materials for clinical consumption, several hospitals chose not to adhere to the respective public tenders, justifying this decision on the basis of technical, economic and time-related factors.
- Despite the fact that the centralised tenders included a high number of a type of products from the same family, they were unable to cover the technical requirements of some of the hospitals.
- Comparative analysis of the procedures of the selected public tenders made it possible to conclude that, in general terms, the audited hospitals were able, via individual procedures, to obtain more advantageous price conditions than those verified in the centralised tenders, even in situations where the chosen supplier was the same.
- The acquisitions made via individual procedures in 1999 and 2000 by the selected hospitals represented cost savings of 12.3% of the total charges included within the sample, in comparison with the level of charges that would have been incurred by these acquisitions if they had been made at the prices of the centralised tenders.
- The delivery deadline contains obtained by the Ministry were no faster than the individual tenders, in any of the selected products.
- Application of selection criteria and the grounds underlying the awarding proposals in the hospitals' tenders proved to be insufficient in relation to legal requirements.

Recommendations:

Recommendations were made in order to achieve greater agility within the procedures and to take advantage of the centralisation of acquisitions in order to obtain more favourable conditions, countering the risk of not achieving any rationalisation benefits whatsoever.

End of Summary 6

Summary 7
Report Title: Audit of a public-owned company

Owner: *Tribunal de Contas*, Portugal.
http://www.tcontas.pt/pt/actos/rel_auditoria/2004/audit-dgtc-rel25-2004

Type of audit: Performance

Subject area: Activities of a public-owned company

Sector: State business sector

Scope and main issues:

The audit aimed to analyse the business activity of the company, whose mission was to design, plan, promote, implement and operate all the initiatives encompassed within the event Porto – European Capital of Culture 2001 or initiatives related to the event within the framework of urban renewal. The decision to undertake this audit was made by the *Tribunal de Contas*, following a request from the Government, expressly formulated by the Minister of Culture.

Findings:

- Several of the interventions carried out, due to implementation delays, were not used within the event for which they had been planned, in particular the *Casa da Música* (Music House).
- Porto 2001 invested € 4,6 M in excess of the original budget.
- The interventions (library, museums, auditoriums and other cultural buildings) suffered from an average implementation delay of 9 months. These delays were primarily caused by deficiencies within the projects, that obliged unforeseen works to be carried out, which also increased the inherent costs related to the auditing and control companies that intervened in these works.
- The highest financial deviation (over 12.5%) was incurred in relation to an auditorium, that also recorded the worst delay in physical execution (over 305%), given that the project "was not in a proper state to be implemented", which led the constructor to abandon the building works, and a consequent administrative seizure by the job owner.
- The urban renewal works, which ended with delays in excess of one year, interfered with the process of attracting people to the city and thus harmed the event rather than benefiting it.
- These works cost € 16.6 M more than the budget forecasts, even though 14% fewer works than those forecast were actually carried out in Oporto's Baixa zone.
- At the date of the audit, construction of the *Casa da Música* – announced as the landmark project of Porto, European Capital of Culture – suffered from a delay of over two and a half years and a forecast level of costs three times higher than the original estimate, thus demonstrating serious planning and project deficiencies.
- The procedures of the ideas tender for selection of the architect for the Casa da Música lacked transparency in relation to the publicising of bid evaluation and selection criteria, which failed to uphold the principles of competition, equality and stability of public tender rules.
- The attribution of a bonus to the architect and negotiations within the framework of the construction jobs did not uphold criteria of public interest, cost-effectiveness and efficiency.

- At the time of the audit, the company had not yet established an institutional model for commercial exploitation of the facility.

Recommendations:

Recommendations were made to the State, in its capacity as shareholder, and to the Company, in relation to conclusion of the works and rigour and transparency in the remaining procedures.

End of Summary 7

Supreme Audit Institution of the Slovak Republic

Summary Title	**Language**
1) Report on the results of the check of compliance with the act on public procurement by Slovenská pošta, š. p. Banská Bystrica	English

Summary 1

Report title: Report on the results of the check of compliance with the act on public procurement by Slovenská pošta, š. p. Banská Bystrica

Owner: Supreme Audit Institution of the Slovak Republic. Full wording of the report is available on the website of the Supreme Audit Institution of the Slovak Republic: www.nku.gov.sk.

Type of audit: compliance check

Subject of audit: Check of the compliance with the provisions of the act on public procurement, of the procedures followed by the contracting authority in the procurement of goods, work, services and performances, of the rightfulness of public procurement methods and procedures used in concluding contracts in 2003 and the first half of 2004.

Audit objectives and key issues: The objective of the audit was to check the implementation of the principles of competition and economy in the conclusion of contracts.

Audited body: Ministry of Transport, Posts and Telecommunications of the Slovak Republic - Slovenská pošta, š. p..

Slovenská pošta, š. p. (hereinafter referred in short to as "SP, š. p.") was established on 1 January 1993. The field of activities of SP, š. p. covered the operation of posts within the territory of the Slovak Republic. From 01 October 2004 SP, š. p. was transformed to a joint-stock company with a 100 % state property share.
In 2003 it was possible to consider SP, š. p. a contracting authority under Act No.: 263/1999 Coll. on public procurement until 31 December 2003. With effect from 1 January 2004 Act No.: 263/1999 Coll. was substituted by Act No.: *52312003* Coll. on public procurement. As a result of the Act substitution, SP, š. p. in 2004 no longer fulfilled the criteria based on which it would be possible to consider it a contracting authority.

Findings: Based on the audit performed it is possible to state that discrepancies were found mainly:
- in the area of file keeping on public procurement,
- in the area of following up of contract conclusions,
- in the area of accountancy.

Recommendations: In order to assure transparency and economy in incurring financial resources managed by Slovenská pošta, a. s., the Supreme Audit Institution of the Slovak Republic recommended the Public Procurement Office to initiate the transposition of the Directive 2004/1 7/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors of 31 March 2004 into the body of laws of the Slovak Republic without unreasonable delay.

Apart from the control audit mentioned above the Supreme Audit Institution of the Slovak Republic was systematically checking compliance with the Act on public procurement while performing checks in the area of public financial resources management and state property management.
The discrepancies detected in the area were as follows: In concluding contracts, the contracting authorities were not following the methods and procedures set under the Act. Apart from that, the Act was also violated by the fact that the contracting authorities did not provide the Public

Procurement Office with the list of public procurement subjects that they were supposed to contract during that calendar year using the over-limit public procurement method within the set timeframe, stating the presumed amount and prices. The contracting authorities did not always on request provide the European Commission with the report, or its part, that has been elaborated on every contract concluded based on the over-limit public procurement *method*.

End of Summary 1

Spanish Court of Audit

Summary Title	**Language**
1) Annual Audit Report of the Autonomous (Regional) and Local public sectors, financial year 1996. Item concerning "Public Procurement".	English
2) Audit Report on the contracts of assistance, consultancy and services awarded by the *Fundación para la Formación Contínua* (FORCEM), Foundation for Further Education, financial years 1996 to 1998.	English
3) Audit Report on the contracting awarded by the foundations incorporated under Act 15/1997, of April 25, on establishment of new ways of management of the National Health Service. Financial years 1999, 2000 and 2001.	English
4) Audit Report of the procurement awarded by the foundations of the State public sector set up by the *Instituto de Salud Carlos III*. Financial years 1999, 2000, 2001 and 2002	English
5) Audit Report of the Autonomous (Regional) and Local public sectors, financial year 1997. Item concerning "Public Procurement".	English
6) Audit Report on the acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System, corresponding to 1999 and 2000.	English
7) Audit Report on past or currently in force contracts awarded in 1999 and 2000 on the activities and services susceptible of generating revenues in a sample of public hospitals of the National Health System, with special reference to the contracts that have the realization of clinical tests as an object.	English
8) Audit Report of the procurement awarded during the financial year 2002 by the Entities of the State public sector subjected to the procurement procedures established in the TRLCAP ("Public Procurement of the Public Administrations Act").	English
9) Annual Report related to the Autonomous (Regional) and Local public sectors, financial year 1998. Item concerning "Public Procurement".	English
10) Audit Report of the Autonomous (regional) and Local public sectors, financial year 1999. Item concerning "Public Procurement".	English
11) Audit Report on the procurement subscribed by the State public sector during the financial years 1999, 2000 and 2001.	English

12) Audit Report of the procurement awarded by the Provincial Delegations, financial year 2002, regarding the services of Home Assistance.	English
13) Report on a selection of contracts of building works of the high-speed line Madrid-Barcelona formalised by the *Ente Gestor de Infraestructuras Ferroviarias (GIF)* -Agency of Rail Infrastructures (GIF)- in the years 1999 and 2000.	English
14) Audit Report on the file, storage, safekeeping or management of medical histories and on the past procurement or in force in 1999 and 2000 on this activity for a sample of public hospitals of the National Health System.	English
15) Audit Report of the autonomous (regional) and local public sectors. Financial year 2000. Item concerning “Public Procurement”.	English

Summary 1

Report Title: Annual Audit Report of the Autonomous (Regional) and Local public sectors, financial year 1996. Item concerning "Public Procurement".

Owner: Spanish Court of Audit. The report is not available in the website.

Type of Audit: Compliance audit.

Subject Area: All type of contracts.

Sector: Regional public sector

Scope and main issues:

That Report contains the result of the audit of the procurement awarded by the Autonomous Communities (Regional Governments) in financial year 1996.

The audit of the execution of the contracts awarded in this financial year whose execution term exceeds it has been limited just to the executed work, taking into account the documents remitted to the Court, and it does not include in many cases the end of them.

Findings and Recommendations:

- Some of the awarding was made through tender, with scarce use of competitive bidding, and therefore advantage of the possible falls characteristic of them was not taken.

- In the tenders a faulty ordination of the criteria of awarding, an assessment of the price of the offers carried out considering the average and not the lowest one, against the principle of economy that must preside over the management of the public funds; a lack of precision in the fixing of the limits to the alternatives that the bidders can offer and that, in many cases, the awards are based in faulty technical reports of assessment of the offers, have been sometimes observed.

- Some delays are observed in the execution of the contracts. This is not due to extensions granted, and there is no sign of the imposition of sanctions to the contractors. Such delays are based in a faulty preparation of the affected contracts. In turn, some complementary contracts have been detected that are in fact modifications of contracts, what supposed a considerable increase of the costs and the terms.

- In supply contracts, in some occasions, the need of the acquisitions for the operation of the public services has not been justified; and in those contracts of consultancy and assistance, their need has not been justified. In both types of contracts the negotiated procedure was used, without neither publicity nor minimum competition among companies, citing the existence of an only supplier or of being the object protected by

exclusive rights. However, the effective existence of some of these suppositions is not proved.

End of Summary 1

Summary 2

Report Title: Audit Report on the contracts of assistance, consultancy and services awarded by the *Fundación para la Formación Contínua* (FORCEM), Foundation for Further Education, financial years 1996 to 1998.

Owner: Spanish Court of Audit. Full report is available at: http://www.tcu.es/uploads/567%20Formación%20continua%20de%20trabajadores.pdf

Type of audit: Compliance Audit of the current regulatory scheme. An analysis of effectiveness as for the adaptation of the training provided to workers to the achievement of the pursued public interest has also been carried out.

Subject area: All the contracts awarded by the FORCEM during the years 1996 to 1998.

Sector: Non profit Foundation. The FORCEM is a private foundation of a charity-educational character constituted by companies association and trade unions that receives subsidies to develop its activities from the Spanish State Budget and funds from the European Social Fund.

Scope and main issues:

The contracts awarded by the FORCEM are not included in the area of the Procurements of the Public Administrations. They are subjected to the regulations of Private law, fundamentally the Civil Regulation, and to the regulatory scheme on Foundations.

As for recipient of public funds, the FORCEM is subjected to the regulatory scheme on concession of subsidies of the Spanish State and to the applicable Community regulatory scheme.

Findings:

The Report highlighted the following reach limitation: the FORCEM has lacked during the audited period of a registration of the contracts awarded. For that reason the Court of Audit had to draft a relationship of contracts from data shown in the accounting ledgers of expense accounts. These circumstances has prevented the Court of Audit to have the certainty that all the contracts have been identified and are well known.

- The FORCEM has lacked during the period analysed of procedural standards approved by its government organs, and therefore the procurement has had an erratic character as for its procedure. The direct consequence is that the FORCEM has used some public funds in a way contrary to the principles of economy and efficiency.

- Most of the awarded contracts were not formalized in writing.

- Publicity has not always existed in order to get an appropriate concurrence of offers.

Recommendations:

- Approval by the governing bodies of the FORCEM of a procurement procedure with third parties.

- Settle down of a registration of contracts in FORCEM as a form of improving their internal audit.

- Assurance about the fact that the contracts of FORCEM higher than a certain amount are carried out with publicity in the media.

- Convenience for the Government to consider the introduction of modifications in the current regulatory scheme of public grants in order to achieve that the big recipients of subventions and the entities collaborating in the administration of subventions, have to be subject while its contracting with third parties to a minimum covenant that allows to ensure the application of the principles of efficiency and economy.

End of Summary 2

Summary 3

Report Title: Audit Report on the contracting awarded by the foundations incorporated under Act 15/1997, of April 25, on establishment of new ways of management of the National Health Service. Financial years 1999, 2000 and 2001.

Owner: Spanish Court of Audit.
Available at: http://www.tcu.es/ uploads/618%20Fundaciones.pdf

Type of audit: Regularity and performance audit of the execution of the current legislation, of the internal procedures and of the efficiency of the management, by means of the analysis of the contracting awarded by the Foundations constituted by the INSALUD.

Subject area: All type of contracts.

Sector: Area of the Social Security and State Foundations.

Scope and main issues:

It extends to the verification of the performance approaches, of the internal standards of procedure, of the applicable regulatory scheme, as for the employment of the principles of publicity, concurrence, objectivity and transparency in the contracting. Also, the coordination and uniformity of the performance in contractual areas of the different Foundations has been verified, contrasting the degree of efficiency reached by them in their contractual activity and the possible existence of derived accounting responsibilities coming from the contractual management.

The temporary environment of this Report corresponds to the contracting awarded by the four Foundations of the INSALUD in 1999, 2000 and 2001. If the execution of the contracts has extended to later exercises, the audit has also extended insofar as possible until that executed in that moment the audit works have been concluded.

Findings:

- Unequal execution of the requirements of publicity and concurrence in the contracting.
- Same disparity of coordination approaches and uniformity in the contracting.

Recommendations:

- Due to the public character of the service that offers – health care -, the Foundations must guarantee the observance of the constitutional principles of efficiency and economy in the administration of public funds.
- Subjection of their activity to the principles of publicity and concurrence and, in turn, to the principles of objectivity and transparency.

- The adoption of the measures for adapting the legislation currently in force to the Community legislation on contracting and inclusion in its application area all type of entities that gather the legal requirements, both subjected to public law as to private law.
- Effectiveness of the execution of the requirements of publicity and concurrence.
- Respect to the principles of objectivity and transparency in the contracting procedures.
- Use of technical and administrative rules in the contractual performance.

End of Summary 3

Summary 4

Report Title: Audit Report of the procurement awarded by the foundations of the State public sector set up by the *Instituto de Salud Carlos III*. Financial years 1999, 2000, 2001 and 2002

Owner: Spanish Court of Audit. Full report is available at:

http://www.tcu.es/uploads/630%20Contratación%20Fundaciones.pdf

Type of audit: Regularity and compliance audit of the current regulatory scheme, the internal procedures and the efficiency of the management, by means of the analysis of the procurement awarded by the Foundations of the State Public sector set up by the *Instituto de Salud Carlos III*.

Subject area: All type of contracts.

Sector: Social security and State Foundations.

Scope and main issues:

The scope of the Audit extends to the verification of the performance approaches and the internal standards of procedure, delegation of functions and seizures, as well as the procedures and the execution of the regulatory scheme on procurement of the Foundations. In turn, the coordination and uniformity of the performance in the contractual matter of the different Foundations has been verified practicing comparisons among them.

The audit has reached the analysis of the efficiency of these Foundations in its contractual activity that includes terms, execution degree and execution of the contracts awarded in the following financial years: 1999, 2000, 2001 and 2002. For these financial years the possible existence of accounting responsibilities has been analysed.

Findings and Recommendations:

- The Foundations analysed, endowed with management autonomy, must abide in their performance the principles of efficiency and economy in the administration of the public funds.

- The Foundations audited must apply in their procurement the principles of publicity, concurrence and objectivity.

- The obligation of applying as regards procurement the prescriptions of the TRLCAP (Procurement Act) in those contracts that surpass the limits settled down by the Community Directive on public procurement, should be extended to the Foundations of the State Public sector

- The execution of the principles of efficiency and economy in the management of public funds as well as of the principles of publicity, competition and objectivity in their performance in procurement matters, have to be expressed in the publicity of their contracts, in the promotion of the concurrence in the presentation of offers, so that it is guaranteed the objectivity and the success of the awards.

End of Summary 4

Summary 5

Report Title: Audit Report of the Autonomous (Regional) and Local public sectors, financial year 1997. Item concerning “Public Procurement”.

Owner: Spanish Court of Audit. The report is not available in the web page.

Type of audit: Audit of economic-financial administration of the public sectors analysed, including the administrative procurement made by them.

Subject area: All type of contracts.

Sector: Autonomous Public Sector and Local Public Sector.

Scope and main issues:

This Report contains the results of the audit of the accounts and the economic-financial activity of the Autonomous (regional) and Local public sector corresponding to the financial year 1997.

The results of the Report have been conditioned by the configuration of the Regional public sector itself that presents a high degree of regulations and organizational heterogeneity, shown in the different accounting regime followed in the different Autonomous Communities (Regional Governments), some of which continued without applying the Chart of Public Accounting.

The exam of the administrative procurement, made directly on basis of section 39 of the Functioning Act of the Spanish Court of Audit, has been extended to 358 awarded contracts.

Findings:

- The deficiencies detected refer to the elaboration of the particular administrative clauses, especially in the fixation of the approaches of award of the contracts and in the assessment of the offers of the bidders.

- In the execution of the contracts, some delays and modifications are observed. They don't respond to justified causes, but to deficiencies in the preparation of the contracts affected.

End of Summary 5

Summary 6

Report Title: Audit Report on the acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System, corresponding to 1999 and 2000.

Owner: Spanish Court of Audit. Available at:
http://www.tcu.es/uploads/584%20Adquisición%20de%20medicamentos.pdf

Type of audit: Compliance with the legal regulations; efficiency and economy.

Subject area: acquisition of medications for hospitals.
Sector: National Health System.

Scope and main issues:
16 public hospitals belonging to the National Health System and depending on different public administrations have been selected. The contracts for acquisition of medications that were signed by them in the 1999 and 2000 financial years analysed, as well as those held in previous financial years that extended their execution to the years mentioned, have been analysed in order to be able to formulate an opinion and recommendations on: the verification that the procedures have been adjusted to the legislation; comparative analysis about the relative importance of each one of the used procedures; compliance with the approaches of efficiency and economy and the degree of implementation of an appropriate planning.

Findings:

a) General aspects:

- There wasn't a common policy of purchases and better purchase conditions as offered to other hospitals have not been looked for.

- The Inter-territorial Council of the National Health System has not fully exercised its coordination functions of joint planning and of establishment of general conditions of contracting. The different Public Administrations on which the hospitals depend on have not carried out formulas of voluntary coordination.

b) Regarding the procedure of acquisition:

- Acquisitions carried out outside the procedures settled down in the Law of Contracts of the Public Administrations have been detected in some occasions.

- The hospitals have sometimes used their own procedures of acquisition.

- Cases of division of the contracts to avoid the procedural requirements have been detected.

- The policy of acquisitions is based more in the short-term consumptions than in an annual planning.

c) On the prices and the purchase conditions:

- Around 30% of the total expenditure should be subject to real competition.

- Important differences have been observed in prices and conditions offered by the laboratories with independence of the volume of purchases.

- The variations of prices have been more important among hospitals than among medications, depending the saving more on the management capacity.

- In the medications subject to concurrence saving has been obtained when the acquisition has been carried out through competence and promoting publicity and competition.

d) On the operation of the services of pharmacy of the hospitals:

- The administration systems, the organisation and the operation are not always homogeneous.

- They have computer applications that facilitate the administration of purchases and the follow up of the consumptions, but not all have made an appropriate use of them.

- Different degrees of implementation of cost accounting and of imputation criteria, what produces lack of homogeneity to know the real cost.

e) On the administration of the expenditure:

- Some direct orders have been carried out without the appropriate covering of contracts.

- On certain occasions, faulty budgetary administration as consequence of the lack of planning.

- The hospitals that operates like autonomous legal entities have managed the payments in a more effective way.

Recommendations

- The Inter-territorial Council of the National Health System should assess the opportunity to agree the general conditions of planning, coordination, contracting, acquisition and supply.

- The hospitals should carry out the acquisitions according to the Law of Contracts of the Public Administrations. If statutorily they are subjected to private Law, they should respect the principles of concurrence and publicity.

- The medications possibly subject to the principle of competition should be acquired under the best conditions that the market offers and an appropriate policy of generic medicaments has to be established.

- The use of minor contracting procedures should be limited.

- The convenience of using the alternatives that the legislation offers (agreements or framework contracts) should be studied.

- Consolidation and development of systems to dispense mono-dose medicaments.

- Appropriate planning of the annual acquisitions.

End of Summary 6

Summary 7

Report Title: Audit Report on past or currently in force contracts awarded in 1999 and 2000 on the activities and services susceptible of generating revenues in a sample of public hospitals of the National Health System, with special reference to the contracts that have the realization of clinical tests as an object.

Owner: Spanish Court of Audit.

Full report is available at: http://www.tcu.es/uploads/620%20Hospitales.pdf

Type of audit: Regularity Audit of the contracting regulatory scheme and operational audit that is focussed in certain activities and services susceptible of generating revenues, with special attention to clinical tests.

Subject area: All type of contracts.

Sector: Area of the Social Security.

Scope and main issues:

This audit has been extended to verify the adaptation of the contracting of certain activities and services to the applicable regulatory scheme and the contracting of clinical tests to its regulations, being centred in the study of the necessary administrative authorizations and of the regime of economic compensations agreed. The audit had a clear horizontal approach that facilitates the comparative analysis in relation to the way of contracting used by different hospitals of the National System of Health belonging to different Public Administrations.

The timing of this Report corresponds to the procurement awarded in 1999 and 2000, and to the execution during such financial years of the contracts awarded in previous years.

Findings:

In some cases it has been observed:

- The analysed procurement of certain activities and services present a marked patrimonial character. It has been verified, in this respect, the absence of authorization allowing for the patrimonial disposition issued by the competent organ.

- Lack of homogeneity and coordination among Public Administrations of the contracting of the activities and services analysed. It has motivated in occasions an undue certificate and procedure.

- Practices contrary to the principle of fixed price of the contracts.
- Continuous validity of the contracts, extended by means of successive extensions, infringing the admitted legal maximum six –years term.

- Deficiencies and lack of openness in the awarding procedure and irregularities in the execution, as well as a not very diligent economic management of the clinical tests.

Recommendations:

- Adoption of uniform and homogeneous approaches in this contracting type.

- Establishment of a follow up and control system of the revenues and a system of payments calculated on the sales volume.

- Regulation of diverse questions as the free benefit of the meals service to the personnel, at the hospitals' expense, as a retribution in kind, generating insecurity.

- Introduction of contractual clauses that establish quality control systems on the management of the services rendered.

- Control of the revenues generated by the execution of clinical tests.

End of Summary 7

Summary 8

Report Title: Audit Report of the procurement awarded during the financial year 2002 by the Entities of the State public sector subjected to the procurement procedures established in the TRLCAP ("Public Procurement of the Public Administrations Act").

Owner: Spanish Court of Audit.

Full report is available at:
http://www.tcu.es/uploads/658%20Contratación%20SPE%202002%20.pdf

Type of audit: Compliance Audit of the current legislation that includes the description of the irregularities and the analysis of the deficiencies observed and of the consequences originated by them. When the reach of the verifications has allowed it, an analysis of efficiency and economy has been carried out.

Subject area: All type of contracts

Sector: All Central Government Departments. Entities belonging to the Social Security System. Other State public bodies to which Public Procurement Act is applicable.

Scope and main issues:

Public procurement is one of the areas that demand a higher volume of public resources, and it is the object of a specific regulation, both in its development procedures and its audit. In particular, the Act of Public Procurement of the Public Administrations (Legislative decree-law 2/2000, of June 16) establishes the legal framework for the different modalities. The legislation characteristic of the Court of Audit settles down in an explicit way its subjection to the audit activity, specifying the contracts subjected to a concrete audit. In execution of the legal provisions, besides examining the procurement awarded by the different entities and public sub-sectors in the framework of the special Reports, a concrete audit of the procurement awarded by the State public sector was carried out in a more systematic and more specific way and with a more general perspective.

The timing of this Report corresponds to the procurement awarded in 2002. If the execution has extended to later exercises, the audit has also been extended up to the moment of conclusion of the audit works.

Findings:

In some cases it has been observed:

- Lack of remission or incomplete or delayed remission of the relationship of contracts.
- Errors in the certificate.
- Unjustified divisions, with the consequent evasion of the law clause.
- Lack of enough justification of the procedure used, in particular in the cases of urgent procedure.

- Omission or lack of accreditation of some steps settled down in the regulatory scheme.

- Deficiencies in the writing of the projects and in the supervision, planning and control of its execution.

- Omissions while imposing penalizations in cases of delays due to the contractors.

Recommendations:

- To adopt of the appropriate measures to guarantee the shipment of the relationship of contracts to the Court of Audit in the terms expressed in the regulatory scheme.

- To develop the rigor in the preparatory phases, settling down in its case model forms of particular administrative clauses.

- Special attention to valuation of prices should be paid.

- To pay special attention to the follow to the execution, making effective the covenants and penalizations if it were the case.

- To apply the maximum rigor in the selection in the awarding methodology.

- To look after an appropriate certification of the contracts, especially in cases of consultancy and technical support and services.

End of Summary 8

Summary 9

Report Title: Annual Report related to the Autonomous (Regional) and Local public sectors, financial year 1998. Item concerning "Public Procurement".

Owner: Spanish Court of Audit. This report is not available in the web page.

Type of audit: Compliance audit.

Subject area: Contracts awarded by the regional public sector during financial year 1998.

Sector: Regional public sector.

Scope and main issues:

This Report contains the results of the audit of the accounts and the economic-financial activity of the regional public sector corresponding to financial year 1998.

Findings and Recommendations:

- A big quantity of the contracts have been awarded by means of tender. However, the awarding by means of competitive bid allows obtaining better prices for the Administration.

- The criteria of awarding, in some cases, are not expressed accurately.

- In the execution of the contracts frequent delays have been observed not due to the concession of justified extensions. There is no sign of the imposition to the contractors of the sanctions legally foreseen.

- In some files of supply contracts, the necessity of the corresponding acquisitions for the operation of the public services, as the regulations require, has not been justified.

- In some files of consultancy or assistance contracts, the particular inadequacies of the means owned by the contracting Administrations or the convenience of not increasing them to cover the necessities that were sought to satisfy have not been justified, nevertheless it works as a necessary previous condition for the awarding of those contracts.

End of Summary 9

Summary 10
Report Title: Audit Report of the Autonomous (regional) and Local public sectors, financial year 1999. Item concerning “Public Procurement”.

Owner: The Spanish Court of Audit. Full report is available at:
http://www.tcu.es/uploads/585%20Informe%20autonómico%20y%20local%201999.pdf

Type of audit: Audit of economic-financial administration of the analysed public sectors, including the administrative procurement made by them.

Subject area: All type of contracts.

Sector: Autonomous (Regional) public sector and Local public sector.

Scope and main issues:

This Report contains the synthesis of the most relevant aspects pointed out in the audits approved by the Spanish Court of Audit and by the Regional Audit Institutions, on the economic-financial activity of the autonomous sector in 1999 and of the Local Entities located in Autonomous Communities that didn't have constituted a Regional Audit Institution. It supplements the content of the Statement related to the General State Account of the year 1999.

Findings and Recommendations:

- Some of the awarding was made through tender, with scarce use of competitive bidding, and therefore advantage of the possible falls characteristic of them was not taken.

- Sometimes, the terms of awarding are not expressed in the Sheets of Clauses, what harms the transparency and objectivity principles in the public procurement. Some technical reports of assessment of the offers on which the awards are based present deficiencies, as the assessment of the prices of the offers in function of the average and not of the falls, what is contrary to the principle of economy in the administration of public funds.

- Sometimes delays not due to granting justified extensions are observed in the execution of the contracts; it is not stated the imposition to the contractors of the legally foreseen sanctions. In turn, modifications of projects of works in progress have been detected, without the existence of new non-susceptible necessities of forecast when the original projects were elaborated. In occasions, those ones contain units whose realization is absolutely necessary and inseparable of those initially projected, that in fact constitute modifications, though they are processed as complementary contracts.

End of Summary 10

Summary 11

Report Title: Audit Report on the procurement subscribed by the State public sector during the financial years 1999, 2000 and 2001.

Owner: The Spanish Court of Audit.

Full report is available at: http://www.tcu.es/uploads/623%20Contratacion.pdf

Type of audit: Compliance Audit of the current legislation that includes an analysis of efficiency and economy.

Subject area: All type of contracts.

Sector: General Administration of the State and its Autonomous Entities.

Scope and main issues:

The report includes besides the description of the irregularities, the analysis of the deficiencies observed and of the consequences originated by them. When the reach of the verifications has allowed it, an analysis of efficiency and economy has been carried out.

The timing of this Report corresponds to the procurement awarded in 1999, 2000 and 2001.

Findings: In some cases it has been observed:

- Lack of remission, incomplete or delayed remission of the relationship of contracts.
- Errors in the certificate.
- Unjustified divisions, with the consequent evasion of the law clause.
- Lack of enough justification of the procedure used, in particular in the case of urgent procedure.
- Omission or lack of accreditation of some steps settled down in the regulatory scheme.
- Deficiencies in the writing of the projects and in the supervision, planning and control of its execution.

Recommendations:

- To adopt the appropriate measures to guarantee the shipment of the relationship of contracts to the Court of Audit in the terms expressed in the regulatory scheme.
- To develop the rigor in the preparatory phases, settling down in its case model forms of particular administrative clauses.
- In application of the principles of efficiency and economy, the valuation of the price should be stressed.
- To pay special attention to the follow to the execution, making effective the guarantees and penalizations if it were the case.
- To apply the maximum rigor in the selection in the awarding methodology.
- To look after an appropriate certification of the contracts, especially in cases of consultancy and technical support and services.

End of Summary 11

Summary 12

Report Title: Audit Report of the procurement awarded by the Provincial Delegations, financial year 2002, regarding the services of Home Assistance.

Owner: Spanish Court of Audit. Full report is available at. http://www.tcu.es/uploads/662%20Diputaciones%20Prov%20Servicios%20Asistencia%20%20domiciliaria.pdf

Type of audit: Compliance of the regulatory scheme and verification of the efficiency.

Subject Area: Home Assistance and Remote Assistance.

Sector: Local authority (provincial delegations).

Scope and main issues:

Analysis of the benefit of Home Assistance Service to the elderly and dependant persons, consistent in attentions of domestic, social character, psychological and rehabilitative support to individuals or families that are in situations of special need, in order to promote, to maintain or to re-establish the individual's autonomy or family group in the habitual means of life.

Findings:

In some cases it has been observed:

- Important heterogeneity in the regional regulatory schemes, so that there are main general differences as for the establishment degree, content, qualification, costs, budgetary assignment and legal basis that provoke different degrees of satisfaction of the social necessities.

- The passed over of competencies of the Provincial Delegations as regards social services in favour of the regional administration, contravenes the principle of local autonomy and hinders the fulfilment of the principle of equality.

a) Contracts of Home Help:

    - Absence of legal development, what contravenes the general regulatory scheme of contracts, including regulations on rates.

    - It is not stated the existence of studies, reports or previous projects dedicated to quantify the objectives and aims and the form in which the service should be carried out. It makes it necessary in certain occasions to modify the contract to adapt it to the real necessities.

    - Faulty delimitation in the contracts of the legal, economic and administrative regime of the service.

    - Widespread non-existence of standard procedures to control the execution of the benefit, including the quality of it.

- Existence of important differences in prices among the different effective contracts.

b) Tele-assistance Agreements:

- Absence of reference to the provisions regulating the Agreements.

- Excessively complex procedures, what hinders its execution and stumps the ownership.

- Absence of regulations from the Provincial Delegations as for the service neither as for the public prices.

- Absence of procedures to verify the execution of the benefit and its quality.

Recommendations:

- With a previous character to the introduction of an indirect system of administration of the public service of home assistance, studies and reports directed to know the reality should be carried out.

- When it is considered necessary the participation of the users in the financing, the corresponding fiscal regulatory scheme of public prices should be approved.

- The participation of other Public Administrations must be documented by means of the appropriate agreement.

- Enough control procedures that allow verifying the execution should be introduced.

End of Summary 12

Summary 13

Report Title: Audit. Report on a selection of contracts of building works of the high-speed line Madrid-Barcelona formalised by the *Ente Gestor de Infraestructuras Ferroviarias (GIF)* -Agency of Rail Infrastructures (GIF)- in the years 1999 and 2000.

Owner: Spanish Court of Audit. Full report is available at: http://www.tcu.es/uploads/561%20GIF-AVE%201999-2000.pdf

Type of audit: Compliance Audit of the current regulatory scheme.

Subject area: Contracts for works higher than 100 million pesetas (600.000 €) and their modifications.

Sector: Ministry of Development. State Public sector.

Scope and main issues:

The scope of the audit is the 31 contracts of works awarded by the GIF during years 1999 and 2000 for the construction of the high-speed line Madrid-Barcelona. All the contracts are subjected to the Law of Contracts of the Public Administrations and financed with funds coming from the General Budget of the Spanish State and from European funds dedicated to this purpose.

It has been verified, in accordance with the foreseen objectives, the legality of the performances related to the formalization and the execution of the contracts: preparation, bid, award and formalization of the contracts; Obligations of the contracting party, the contractor's obligations, acceptance of the works, settlement of the contract and incidences taken place in the term of guarantee of the works.

Findings:

In some contracts it has been observed:

- Imprecision of the requirements of technical solvency that the Law settles down for awarding the contracts.

- Non-fulfilment of the National Historical Patrimony Act, as for the inclusion of budgetary appropriations dedicated to works of conservation of this Patrimony.

- Faulty preparatory performances. The necessary lands to execute the infrastructures were not available what gave rise to the reprieve of the beginning of the works with the rising delay in their execution.

- Lag time between the financing received by the GIF and the payment of the work certifications, what has originated high surpluses of liquid assets.

- Excessive modifications of the contracts, generally accompanied by agreements of extension of the execution time limit.

- The incidences in the execution of the works supposed the non-fulfilment of the dates foreseen for the reception and delivery of infrastructures.

Recommendations:

- Revision of the approaches of valuation for the awarding of the contracts so they are homogeneous and quantifiable.

- Improvements of the planning, preparation, award and execution of the contracts with the purpose of avoiding foregone delays.

- Performance in order to accomplish that stipulated by the legislation of the Historical Patrimony in relation to the public works.

- Measures tending to avoid high levels of liquid assets.

End of Summary 13

Summary 14

Report Title: Audit Report on the file, storage, safekeeping or management of medical histories and on the past procurement or in force in 1999 and 2000 on this activity for a sample of public hospitals of the National Health System.

Owner: Spanish Court of Audit.
Full report is available at:
http://www.tcu.es/uploads/589%20Contratación%20Historias%20Clínicas.pdf

Type of audit:
Compliance Audit in the area of public procurement and data of personal character protection. Organisation and activity of management of files in case of safekeeping them with their own means. Efficiency and economy in the procurement process.

Subject area:
28 hospitals linked to different Public Administrations.

Sector: National Health System

Scope and main issues:

Horizontal audit of all the contracts held or currently in force in 1999 and 2000, in all their phases. Analysis of the management, safekeeping, computerization and guarantees regarding the accessibility of the files of medical histories under the different management models (integral management of files totally subcontracted, integral management of files subcontracted, and mixed management).

Findings:

- The 14/1986 Act, of April 25, of General Health, stated formally with generic character the applicable regime to the medical histories but it didn't contain a systematic and sufficient regulation, what has produced that each hospital has developed its own internal regulations, giving rise to differences and asymmetries; in particular, in essential aspects as the definition of the concept of medical history, the determination of its ownership, the accesses allowed to the documentation or the regime of internal control.

- The objective foreseen by the 14/1986 Act of just one history per patient in each health area has not been reached.

- The audits of internal control have been practically non-existent.
- The typology of the procurement has been very diverse. The pattern of integral management through companies of specialized services has been the most efficient one.

Recommendations:

- The competent authorities should watch over that the management of medical histories is carried out with full guarantee of the right to privacy of the patients.

- The principle of just one medical history per patient should be put into practice.
- Audits or periodic tests of internal control should be carried out.

End of Summary 14

Summary 15

Report Title: Audit Report of the autonomous (regional) and local public sectors. Financial year 2000. Item concerning “Public Procurement”.

Owner: Spanish Court of Audit. Full report is available at:

http://www.tcu.es/uploads/625%20Sector%20%20Aut%20y%20Local%202000.pdf

Type of audit: Audit of economic-financial management of the analysed public sector, including the public procurement made by them.

Subject area: All type of contracts.

Sector: Autonomous (regional) public sector and Local public sector

Scope and main issues:
This Report contains the synthesis of the most relevant aspects pointed out in the audits approved by the Spanish Court of Audit and by the OCEX (Regional Audit Institutions), on the economic-financial activity of the regional sector in 2000 and of the Local Entities located in Autonomous Communities (Regions) that had not established a Regional Audit Institution. It supplements the content of the Statement related to the General State Account of the year 2000.

Findings and Recommendations:

In some cases it has been observed:

- Undue division of contracts whose amounts exceed that established in the regulations for the minor contracts, with the purpose of processing them as such, avoiding this way improperly the principles informing the public procurement and the controls and guarantees characteristic of the ordinary procedure for greater contracts.

- In the works processed through the exceptional procedure of emergency, the lack of justification of concurrence in the cases required by the regulations has been also observed.

- The award of the contracts was made mainly through competitive bids to the detriment of the tender, in spite of the fact that this one is conceived as the ordinary form of awarding public works.

- Other incidences detected in the audit refer to the lack of justification of the competitive bids, the inadequate determination of the approaches of awarding in the rules, the scarce assessment of the prices of the offers, the fact of not establishing the limits to the alternatives that can offer the bidders and the incorrect motivation of the awards through insufficient technical assessment reports.

- Delays in the execution of the contracts not based on the concession of extensions. Modifications of contracts take place that don't respond to new needs but to lack of foresight in the phase of preparatory actions. Complementary contracts that constitute authentic modifications of the initial ones have been detected.

- In the area of the Universities deficiencies in the internal control, lack of appropriate justification of the necessity of the supplies and faulty documentation of the consultancy, attendance and services contracts were also detected.

End of Summary 15

National Audit Office, United Kingdom

Summary Title	**Language**
1) Non-Competitive Procurement in the Ministry of Defence	English
2) Improving IT Procurement – Progress by the Office of Government Commerce in improving departments' capability to procure cost - effectively	English
3) Ministry of Defence: Major Projects Report 2004	English
4) Improving Public Services through better construction	English
5) Purchasing and Managing Software licences	English
6) Procurement of Vaccines by the Department of Health	English
7) Modernising Procurement in the Prison Service	English
8) Ministry of Defence: The Rapid Procurement of Capability to Support Operations	English
9) Improving IT Procurement: the impact of the Office of Government Commerce's initiatives on departments and suppliers in the delivery of Major IT-enabled projects	English

Summary 1
Report Title: *Non-Competitive Procurement in the Ministry of Defence*

Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/01-02/0102290.pdf

Type of audit: performance (value for money)

Subject area: Defence equipment procurement

Sector: Defence

Scope and main issues

It is a long standing principle of public procurement that effective competition between suppliers is likely to be the best means of achieving value for money. Experience shows, however, that it may not always be practicable or sensible to use competitive procurement. If an item is proprietary or an existing design requires modification but it involves intellectual property rights, using competitive is almost impossible.

In November 2001, the National Audit Office examined the procedures followed by the Ministry of Defence once it decides to procure goods or services non-competitively. It considered how well the Department put into practice its existing framework and whether the outcomes of non-competitive contracts are in line with agreed prices and timely delivery has been achieved. The scope of the study included:

- The framework and guidance for non-competitive procurements
- How the Department conducted non-competitive procurements
- The outcomes which the Department achieved from its non-competitive procurement

Findings

Our analysis found that the Ministry of Defence's non-competitive procurement performance was good with two-thirds of the contracts being delivered within the agreed timescales. However, the Department's should make more use of past experience to inform future practice.

End of Summary 1

Summary 2
Report Title*: Improving Procurement – Progress by the Office of Government Commerce in improving departments' capability to procure cost - effectively*

Owner: National Audit office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/03-04/0304361-i.pdf

Type of audit: Performance (Value for money)

Subject area: Department's Procurement

Sector: All central Government departments

Scope and main issues

This report assesses the impact that OGC has had since its inception in April 2000, to work with departments to improve their procurement capability and to secure better value for money. The examination was based on a comprehensive survey of 86 departments, agencies and the largest non-departmental public bodies responsible for just over £15 billion of total procurement spend; in-depth case studies of two departments – the Department for Work and Pensions and the Office of the Deputy Prime Minister and one agency – the Vehicle & Operator Services Agency. The report also makes reference to international comparisons and consultation with suppliers, the Chartered Institute of Purchasing and Supply and the Small Business Service.

Findings

The main findings were as follows:

- OGC Consultancy delivers services directly to departments and also offers assistance from experienced practitioners at all stages of the programme and project lifecycle, from strategy and scoping through to contracts and benefits management.

- OGC has also negotiated deals centrally on more favourable terms with a number of suppliers who are strategically important to government. The Memorandum of Understanding struck with Microsoft is estimated will save the public sector some £100 million.

- The OGC has tackled many of the shortcomings of the Gershon Report related to procurement arrangements in departments and Agencies. Gateway reviews now provide for detailed scrutiny of major procurement projects at critical stages in their development so that significant risks can be identified sufficiently early to be managed.

- The NAO survey suggests there is scope for clear communication to departments of the benefits which OGC's advice and guidance can offer, for example the market intelligence function provided by its Supplier Relations division.

End of Summary 2

Summary 3
Report Title**:** *Ministry of Defence: Major Projects Report 2004*

Owner: National Audit Office**,** UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/03-04/03041159_I.pdf

Types of audit: Performance (value for money)

Subject area: Defence equipment procurement

Sector: Defence

Scope and main issues

The Major Projects Report 2004 covers cost; time and performance; and, data for projects in the year ended 31st March 2004. The study examined 30 defence equipment projects; 10 projects were still in the assessment phase while the remaining 20 had received an investment decision to proceed. In this year's report, seven projects are new, three in the main phase of procurement and four in the assessment phase. In the future, procurement of Defence equipment will be influenced by the Defence White Paper and the outcome of the 2004 Spending review. Key issues highlighted in previous reports still remain in terms of the Department's success in continuously improving its procurement performance. The distinction between older legacy projects and newer projects is irrelevant in this regard.

The Department has belatedly grappled with issues of performance. Sir Peter Spencer, the Chief of Defence Procurement, completed his review of the performance of the Defence Procurement Agency in implementing Smart Acquisition in January 2004. The report highlighted the need for proper and consistent application of the principles underpinning Smart Acquisition. To this end, a programme of continuous improvement is now in place covering skills, performance management, project review and assurance, financial management, commercial and supplier development, and joint working within the department.

Findings

- As in recent years, there appears to be little evidence that project performance has improved. Our findings suggest cost overruns and delays will continue. The Department expects its top 20 equipment projects will meet key user requirements but at a cost of £50 billion, 14 percent higher than the expected cost of £44 billion when the projects were approved. In the previous year, forecast costs have increased by £1.7 billion, a four percent increase, and projects have been delayed by an average of three months.

- As recent Major Projects Reports have shown, there is little evidence that project performance has improved in recent years. Many of the projects, begun under Smart Acquisition, have not consistently applied the principles designed to underpin improvement in project performance.

End of Summary 3

Summary 4
Report Title: *Improving Public Services through better construction*
Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/04-05/0405364case_studies.pdf
Type of audit: Performance (value for money)

Subject area: Public Services

Sector: All central Government departments

Scope and main issues
This report assesses the progress that departments' and their agencies have made in improving their construction delivery performance since our 2001 report, in part by examining data on 142 construction projects delivered between April 2003 and December 2004 as well as the impact of Office of Government Commerce initiatives.

In February 2003, the Chief Secretary to the Treasury launched two strategic targets aimed at improving the cost, time predictability and quality of construction projects. In addition, reduction in average time scales of procurement was made a priority. Sole responsibility for delivery of the targets rests with the relevant department in question. The Office of Government Commerce has defined how the targets are to be measured and is responsible for monitoring and reporting overall progress. There are two main aims associated with achieving these strategic targets:

- 70 percent of central government construction projects to be delivered to time and budget, by March 2005.
- Also, by March 2005 for each sector to reduce the average time period from start of procurement to award of contract by 25% for construction projects taking over a year, and 15% for all other construction projects

Findings

The impact on departments of the OGC's initiatives is still not clear. Guidance provided by the OGC is not always followed, partly because many departments do not have the skills and experience to implement it effectively. Furthermore, many departments may simply choose not to use the advice and support the office can provide. For example not all departments and their agencies conduct independent Gateway Reviews of their significant construction activities.

End of Summary 4

Summary 5
Report Title: *Purchasing and Managing Software licences*
Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/02-03/0203579.pdf

Type of audit: Performance (value for money)

Subject area: Software licences

Sector: All central Government departments

Scope and main issues

This report examines how departments purchase and manage their software licences; focusing in particular the extent to which departments are taking advantage of the Memoranda of Understanding which OGC has negotiated with IT suppliers. The study is based on a survey of 66 departments and agencies together with more detailed examinations of four departments. Departments are still primarily responsible for deciding what software to purchase and how they manage it. The OGC is responsible for promoting value for money improvements in the way departments undertake their procurement.

Findings

- Departments have been slower in taking up the terms offered by Microsoft than OGC anticipated. However, OGC and Microsoft consider that many departments are waiting until their existing agreements expire.
- Ten departments were able to estimate savings achieved to date which were around £5.4 million, all of which had come from Microsoft.
- OGC has negotiated agreements with other suppliers to encourage departments to purchase software from a wider range of companies. Other than Microsoft, suppliers so far consider the take up by departments as disappointing and have little impact on the level of business they receive from public sector organisations.
- For the four departments subject to a rigorous examination i.e. The MOD, DFES, Land registry and Ordnance survey, our examination reveals measures to achieve cost savings are already in place or being put in place.
- Nine departments could not easily identify the cost of the various licences they own. However, all departments had information on the detail of their licences avoiding the risk of financial penalty as a result of breaching contractual obligations.

End of Summary 5

Summary 6
Report Title: *Procurement of Vaccines by the Department of Health*
Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/02-03/0203625.pdf
Type of audit: Performance (value for money)

Subject area: Vaccines Procurement

Sector: Health

Scope and main issues

In 2002, following Parliamentary and media concerns about possible links between donations made by the Chief Executive of PowderJect to the Labour Party and the award of the contract for smallpox vaccine supplies, the National Audit Office (NAO) examined the robustness of the Department's arrangements for buying vaccines including small pox, within the context of their central purchasing arrangements. The examination did not seek to question the particular choice of vaccines nor procurement arrangements in NHS organisations.

The Department and the NHS Purchasing and Supply Agency buy goods and services under EU procurement directives. The Agency plays a key role in the tendering and contracting process for childhood vaccines, but the procurement of the first tranche of smallpox vaccine was arranged in-house by the Department's Communicable disease Branch with advice provided by the Procurement Policy Advisory Unit.

Findings

It was found the Department acted properly in awarding vaccine contracts by complying with appropriate EU procurement regulations, encouraging sufficient competition and evaluating tenders fairly. The procurement arrangements for emergency supplies of small pox vaccine were unusual as the Department chose not to adopt standard competitive procedures, for national security. This is allowable under EU regulations.

The numbers of suppliers able to compete for the contract were limited because of the strain of vaccine needed, speed of delivery, security of supply and small number of companies operating in this market. Nevertheless, the Department went further by seeking to establish a degree of competition by exploring with a number of companies whether they could meet the necessary requirements. In the event, only PowderJect could supply the required doses against the time-scale and specified criteria. However, suppliers contacted by the NAO considered the procurement process was not transparent. The common theme was that the Department did not reveal to the companies in detail the procurement criteria or timeliness. The Department's view is that they provided to each company as complete information as they felt able to give under the circumstances.

The review by the Permanent Secretary with regards to the donation and vaccine procurement revealed that in the short-term the only source of the Lister strain small pox vaccine in the UK was from PowderJect. The key factors in award of the contract were the Lister Strain, speed of delivery and national security issues.

End of Summary 6

Summary 7
Report Title*: Modernising Procurement in the Prison Service*

Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/02-03/0203562.pdf

Types of audit: Performance (value for money)

Subject area: Prison service procurement

Sector: Law & Order

Scope and main issues

The NAO report examined the Prison Service's efforts to improve the procurement activities of its prisons, to make best use of purchasing power, control stock levels and consumption, reduce waste and improve efficiency. The report focused on the 128 prisons in England & Wales managed directly by the prison service. Each prison is headed by a Governor with delegated financial responsibility to buy the goods and services required to maintain and operate each establishment.

Findings

The Prison Service has made great strides to improve the performance of its central purchasing team by centralising a number of purchasing functions and improving the skills and training of procurement staff across the service. The key findings were as follows:

- The Prison Service presided over a 24% reduction in stock holdings from £62.8 million in March 2000 to £47.6 million in March 2002.
- Savings of £5.76 million in 2001-2002 arising from the negotiation of central contracts.
- Significant differences between the costs of procurement in similar prisons still remain. Apart from the Governor there is often no single person with the authority and responsibility to ensure that the different procurement activities are efficient overall.
- Procurement within the prison service lacks as yet a common service-wide IT support for purchase, order processing and stock control.

End of Summary 7

Summary 8
Report Title: *Ministry of Defence: The Rapid Procurement of Capability to Support Operations*

Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/03-04/03041161.pdf

Type of audit: Performance (value for money)

Subject area: Defence procurement

Sector: Defence

Scope and main issues

This report examines how successfully the Department (The MOD) procures Urgent Operational Requirements, including how well Urgent Operational Requirement activity is managed. Urgent Operational Requirements is a process used to describe the additional capability requirements of specific operations. The process is a streamlined version of the Department's normal procurement procedures with the sole aim of providing speedy and flexible procurement of capabilities as and when needed.
The varied nature of operations and operational environments means needs may change at very short notice.
Given that the Department does not have the resources to buy all the equipment or services it may need for all the various types of operations, it has to plan on the basis that it will have to meet some capability gaps by Urgent Operational Requirements.

Findings

- For operations in Iraq and Afghanistan the Department procured 312 Urgent Operational Requirements to support the war effort at an approved cost of £658 million. Enhancement to existing capabilities ranged from light machine guns and armour protection to temporary accommodation and medical supplies.
- Urgent Operational Requirements equated to approximately 2 to 3 percent of the some £6 billion spent each year by the Department on the procurement of equipment.
- The Department's analysis of Urgent Operational Requirements in Iraq is fragmented preferring to report by exception. Based on the available data, the report found two thirds of Urgent Operational Requirements were delivered on time.
- Some Urgent Operational Requirements for the operation in Iraq were delivered with impressive speed, reflecting staff commitment in the Department and in industry. Ingenuity in the form of leasing, rather than off-the-shelf purchases helped to deliver customised solutions.
- The Department has recently appointed a Senior Responsible Owner to strengthen leadership in terms of guidance and delivery in the provision of Urgent Operational Requirements.
- Weaknesses still persist with management information available to everyone involved with a complete and common picture of the progress of Urgent Operational Requirements and to measure outcomes.

End of Summary 8

Summary 9

Report Title: *Improving IT Procurement: the impact of the Office of Government Commerce's initiatives on departments and suppliers in the delivery of Major IT-enabled projects*

Owner: National Audit Office, UK. Full report is available at:
http://www.nao.org.uk/publications/nao_reports/03-04/0304877.pdf

Type of audit: performance (value for money)

Subject area: IT procurement

Sector: all central Government departments (excluding Health and Defence)

Scope and main issues

In 2004, the National Audit Office (NAO) undertook a performance audit examination to assess the impact of recent initiatives designed to improve the capacity of central Government ministries and department to procure new IT systems successfully. The was against a backdrop of a number of high profile major IT procurement failures in recent years. The study focussed in particular on the work of the Office of Government Commerce (OGC) – a central body set up within HM Treasury in 2000 - to assist Government departments to improve their IT procurement capability.

The OGC put in place four main initiatives designed to improve the procurement of IT projects:

- A "Gateway" Review Process designed to establish a series of review points or "gates" whereby IT projects are subject to regular scrutiny by independent expert review teams.
- The establishment of the "Successful Delivery Toolkit" - an internet-based set of tools and guidance;
- The introduction of new training and development programmes for staff engaged in the procurement of major IT systems - the Successful Delivery Skills Programme and Programme and Project Management Specialism
- Closer working with representatives from the IT supply industry including the creation of good practice codes for both departments and suppliers.

Findings

Our analysis of the OGC's activities suggests that the Gateway review process, in particular, is increasing the likelihood of IT project and programme success, but more remains to be done to develop project and programme management skills, and closer links with the IT supply industry.

End of Summary 9

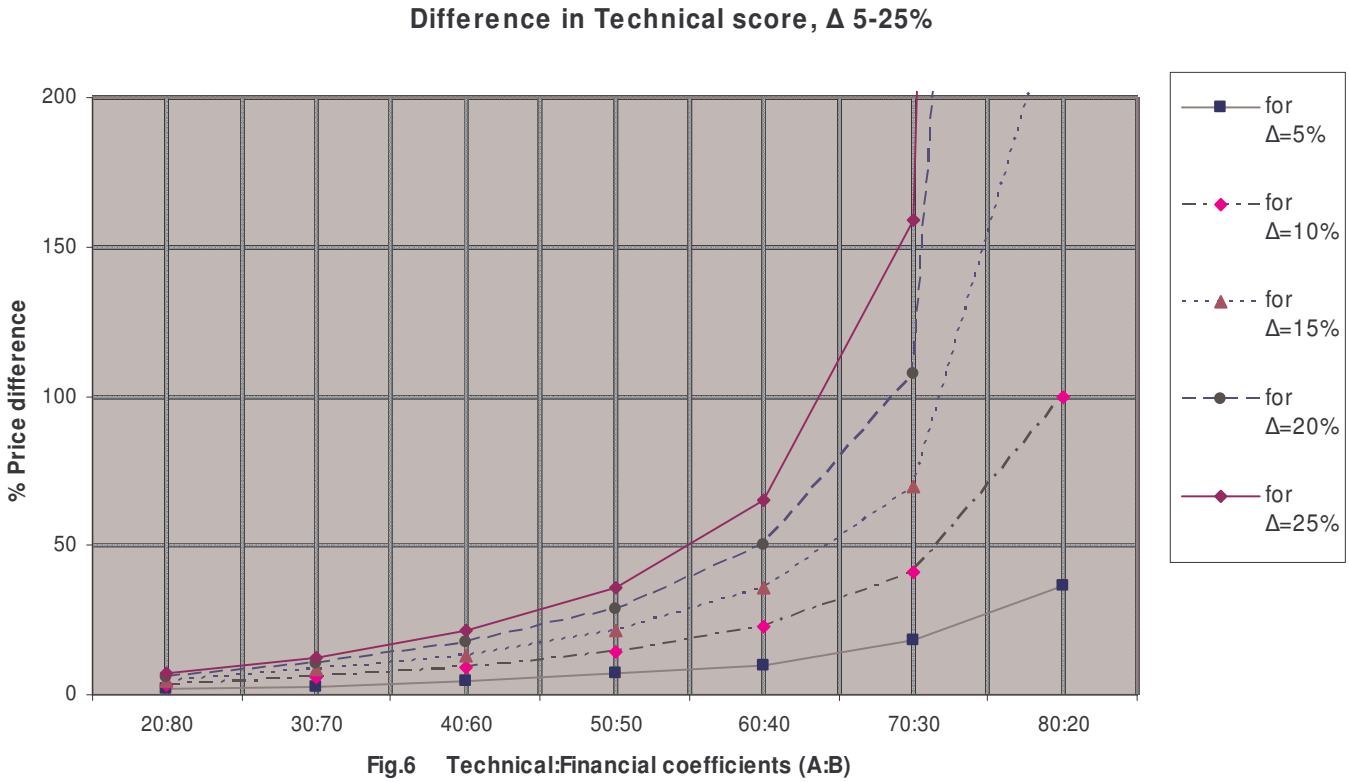

Fig.6 Technical:Financial coefficients (A:B)

Appendix XV: Directive 2009/81/EC of 13 July 2009 on the award of works contracts, supply contracts and service contracts in the fields of defence and security

The new Directive 2009/81/EC on defence and security procurement entered into force on 21 August 2009. The Directive is to become the cornerstone of a truly European Defence Market supporting the development of the European defence-related supplier base. Up until now, the vast majority of defence and sensitive security procurement contracts have been exempted from the Internal Market rules. One of the reasons for this is that the existing EU procurement rules are considered to be ill-suited for most defence- and security-related purchases. The new Directive should greatly improve this situation by providing tailor-made procurement rules for defence and security contracts. Member States now have at their disposal Community rules they can apply to complex and sensitive transactions without putting at risk their legitimate security interests.

More transparency and competition for Europe's defence and security markets

Before Directive 2009/81/EC, most defence and sensitive security equipment had to be procured on the basis of uncoordinated national rules, which differ greatly in terms of publication, tendering procedures, selection and award criteria, etc. This regulatory patchwork was a major obstacle on the way towards a common European defence equipment market and opened the door to non-compliance with the Internal Market principles.

Directive 2009/81/EC will open up the Internal Market for defence and security products by introducing transparent and competitive procurement rules specifically adapted to the needs of these highly sensitive sectors.

A tailor-made procurement regime for sensitive contracts

The new rules apply to the procurement of arms, munitions and war material and also to sensitive non-military contracts in areas such as protection against terrorism which often have similar features to defence contracts.

The Directive contains a number of innovations tailored to the specific needs of procurement in defence and security markets:

- Awarding authorities may use the negotiated procedure with prior publication as a standard procedure, which gives them flexibility to fine-tune all details of the contract.

- Candidates may be required to submit specific guarantees ensuring security of information (safeguarding of classified information) and security of supply (timely and reliable contract execution, especially in crisis situations).
- Specific rules on research and development contracts strike a balance between the need to support innovation and the necessary openness of production markets.
- Awarding authorities may oblige contractors to award subcontracts in a competitive manner, opening-up supply chains and creating business opportunities for SME's in the defence and security sector.
- A set of national review procedures will provide effective remedies protecting the rights of businesses taking part in the award procedure.

Limiting exemptions from the Internal Market rules to the strict minimum

Member States still have the possibility to use Article 296 EC Treaty to exempt defence and security procurement contracts which are so sensitive that even the new rules cannot satisfy their security needs. In most cases, however, Member States should be able to use the new Directive without any risk for their security.

Transposition

Member States have time until 21 August 2011 to transpose Directive 2009/81/EC into their national legislation.

For more information, see:

http://ec.europa.eu/internal_market/publicprocurement/dpp_en.htm