

PUBLIC PROCUREMENT AUDIT

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FOREWORD

PUBLIC PROCUREMENT AUDIT

Public procurement has always accounted for a significant proportion of the European Union (EU) and its Member States' expenditure. According to the European Commission's estimation¹, every year, over 250 000 public authorities in the EU spend around 14% of GDP (2 000 billion euros) on the purchase of services, works and supplies.

The EU Public Procurement Directives, establishing how Member States should conduct public procurement, are based on the ideas that transparent, fair and competitive public procurement across the EU's single market generates business opportunities, drives economic growth and increases employment. At the same time, the application of these principles improves public governance and prevents fraud and corruption.

Therefore, the EU public procurement policy is a key instrument in establishing the single market and ensuring the efficient use of public funds. Supreme Audit Institutions (SAIs) are obviously expected to look into this important instrument, providing their external oversight.

Due to this importance, the Contact Committee of the SAIs of the EU and the European Court of Auditors (ECA) set up, in 2004, a *Public Procurement Working Group*, under the initiative of the SAI of Ireland. This group drew up the following 4 documents meant to help auditors in the public procurement related audits, which were further updated and developed by a subsequent working group co-chaired by the SAIs of Belgium and Slovenia:

- A ***Guideline for Auditors***, based on the EU Public Sector Procurement Directive 2004/18/EC, including summaries of the most important judgements of the Court of Justice of the European Union (CJEU).
- A ***Procurement Performance Model***, including key questions developed as reference pointers for auditors evaluating the performance of the procurement function in public sector bodies.
- ***Checklists for Financial and Compliance Audit of Public Procurement***, to use when auditing public procurement processes.
- ***Summaries of audit reports published by EU SAIs***.

The work was disseminated in 2010 by publishing the documents in a booklet, by making them available in the web and by holding a seminar for all European SAIs about the audit of public procurement.

¹ See https://ec.europa.eu/growth/single-market/public-procurement_en and COM(2017) 572, on 3.10.2017.

In 2014, the EU approved new Directives regarding public procurement. These new directives keep the objective of ensuring open and fair competition in public procurement markets. However, they are meant to promote, in a more effective way, and among other aspects, simpler procedures, the access of small and medium enterprises to public procurement, the reinforcement of electronic procurement, the enhancement of innovation and performance and the adoption by Member States of appropriate measures to ensure compliance with social, environmental and labour law obligations.

In order to keep the relevance of the above-mentioned public procurement audit documents, the Contact Committee promoted a new update on them. Under the initiative and leadership of the SAI of Portugal, the update was conducted during 2017 and 2018 by a team of representatives of 13 EU SAIs. The set of public procurement guidelines and tools was jointly and comprehensively updated during 18 months, without physical meetings, making the best possible use of modern communication tools. In a seminar hosted by the Hellenic Court of Audit, in May 2018, the updated documents were presented and discussed and final suggestions for their improvement were requested and received from the participants. The overall result is now being published.

Public procurement audit has been for a long time in the SAIs' agendas. But, as public procurement priorities, strategies and procedures change, SAIs also need to adapt their audit approaches. The update now concluded faces this challenge, incorporating a forward-looking eye into a procurement function that seeks to promote flexibility, innovation, sustainability, environmental protection, social balance and use of technology. A wider perspective and foresight into global procurement policies and a value for money analysis (which considers the life cycle benefits and costs of projects) are strengthened.

This toolkit aims to be a relevant, useful, user-friendly and efficient help for our auditors, offering them a menu of options and a robust source of information to be used in the planning and execution of public procurement audits.

I deeply thank to all that have contributed for this continuing and valuable guidance.

Vítor Caldeira

President of *Tribunal de Contas* of Portugal

PRINCIPLES OF PUBLIC PROCUREMENT

PUBLIC PROCUREMENT AUDIT

1. BASIC PRINCIPLES OF PUBLIC PROCUREMENT

Knowledge of basic principles is very important because, due to diversity of living situations, legislation cannot establish norms for each circumstance.

Also in public procurement procedures, it is necessary to understand legal regulations through certain principles, guiding the contracting authority, in its decision-making, and the tenderer, in the assessment of its rights.

In this area, one must take into consideration both principles having become common value criteria of our civilization and covering the whole legal system and public procurement specific principles.

Public procurement system setup, development and implementation must be based on the principles of free movement of goods, freedom of establishment and freedom to provide services, all deriving from the Treaty establishing the European Community, and also on the principles of economy, efficiency and effectiveness, of ensuring competition among tenderers, of transparency, of equal treatment of tenderers and of proportionality.

The basic principles are specified in Article 2 of Directive 2004/18/EC, as follows:

- Principle of equal treatment,
- Non-discrimination and
- Transparency.

The Treaty establishing the European Economic Community (hereinafter referred to as

EEC Treaty) provides the basic framework for European public procurement legal regulations. This act was primarily aimed at establishing a relevant common internal market of Member States by prohibiting any national discrimination and any restriction in the selection of products and services, including the free movement of goods exclusive of all customs duties, as well as prohibiting quantitative limits (quotas) and measures having equivalent effect over customs duties and quotas among Member States.

The objective of the EEC Treaty would be best attained also by prohibiting restrictions to the free movement of labour force and services, capital, salaries and self-employment, as well as by the freedom of choice of establishment of enterprises in Member States.

The attainment of the Treaty objective is to include the development of European Community significant policies, notably in the areas of competition law, state aid and agriculture.

The EEC Treaty does not specifically mention public procurement, except in the context of funding Community contracts in overseas countries and when in relation to industrial policy.

Nevertheless, provisions might be found in the EEC Treaty constituting a basis for public procurement system establishing. These are principally provisions referring to the free movement of goods (Article 28), the freedom of establishment (Article 43), and the freedom to provide services (Article 49) (Arrowsmith 2005: 182). Other provisions are equally important relating to the prohibition of discrimination (Article 12) and to the issue of acquired undertaking (Articles 81, 86, and 87).

The regime of free movement of goods and services is the most important for the area of public procurement. Treaty establishing the European Community (hereinafter referred to as EC Treaty) contains the basic objective of the public procurement acquis, meaning the opening of the public procurement market among Member States and allowing tenderers to participate in public contract awarding procedures beyond the frontiers of individual Member States.

Since it would not be possible for Member States, nearly on the basis of the EC Treaty, to establish more specific public procurement rules, public procurement directives have been adopted as a secondary legal source.

Understanding basic principles and establishing thereof to a legislation system is even more significant in view of the fact that, though the implementation of the directives was not effective everywhere, the principles as such create a single core for interpreting and attaining objectives accompanying the public procurement system through founding contracts and relevant directives.

The principles have an important role to play, both in directing the legislator when adopting the content of legal norms and in the understanding of legal provisions, particularly in cases of imprecise determination thereof. Primarily proper understanding and interpretation of certain principles facilitates the interpretation of legal norms in terms of content, context, and purpose. Legal principles connect legal norms to a single whole providing such norms with the required content, particularly in cases where the flamboyance and diversity of actual circumstances cannot always be covered by a legal norm. A legal rule needs to be understood by means of a specific principle constituting both the direction and the purpose of drafting a particular legal norm.

2. CONFLICT OF PRINCIPLES IN PRACTICE THROUGH VALUES, NORMS AND RELATIONS

Proper understanding of public procurement principles is important for contracting authorities also in terms of awareness on the limitation of rights while using public assets for public procurement purposes. This use must not be directed towards the attaining of personal benefit or of the benefit of specific groups, rather to the meeting of the public interest «in

largo sensu»...The importance of principles also reflects itself in their restrictive state function within its regulatory attributes.

Interesting questions occurring with the presentation of fundamental principles are whether these principles are mutually equal in rank or whether they are placed in a subordinate-superior order, whether they are mutually exclusive or complementary, and whether they support public procurement objectives to a same direction.

So far, the relation between the principle of formality and the principle of economy (often opposed to each other) has shown itself to be a problematic one.

Contracting authorities experience this conflict in cases when, due to formal reasons, an offer must be rejected – which is not regular due to a missing document that is actually non-essential for good performance of the work but has been demanded by the contracting authority in the documentation – although that particular offer is most appropriate according to tender documentation criteria. Such an offer must be rejected in order to abide by the formality principle in terms of the practice of control institutions, though a decision in favour of this offer would be in accordance with the principle of economy.

Then where is the boundary in the weighting between significance and relation when these two principles are racing? Is it even possible to place them within a system of values which would, in a relatively objective manner, establish in advance boundaries and circumstances under which one of the principles becomes more appropriate than the other? Or should the formality principle be simply placed above the principle of economy not taking into account any economic implications?

It would be ideal if we could offer an answer. Yet, unfortunately, it cannot be given till the time wider consensus is reached among various institutions on the importance of a specific principle in relation to other principles.

While solving this problem, we could consider as an initial point the case law of the Constitutional Court of the Republic of Slovenia in the process of its evaluation of proportionality, when significance is weighted against the intervention with a specific right in the case of a right tending to protect itself against such intervention, and when it judges there has been more severe intervention proportionate to the higher level of such right being affected. If the Constitutional Court finds that the importance of the right which is to be protected by intervention prevails over the importance of the intervention to the right in question, the intervention will undergo this aspect of the proportionality test.

A certain form of a proportionality test could be established also in the case of public procurement, when an attempt is made to protect a principle by violating another one. This may occur in cases where, for example, for the purpose of protection of the principles of economy, efficiency and effectiveness, the formality principle is violated under assumptions determined in advance, on the basis of which the proportionality test could be examined.

A certain right (in our theoretical case, the principle of formality) may be limited only in cases where it is necessary for the purpose of protection of other rights (in our theoretical case, protection of the principle of economy), where it is necessary to respect the constitutional principle of proportionality, this meaning that it is obligatory to fulfil three conditions for admissibility of those limitations or interventions: urgency, adequacy and proportionality in the narrow sense.

The intervention to the constitutional right is allowed only in cases where such intervention is necessary (inevitable) for the protection of other human rights, which means that a legislative objective cannot be achieved with one more lenient intervention in the constitutional right or without it. The intervention must be appropriate for achievement of a desired, constitutionally allowed objective (for example, protection of the rights of others or of public interest, where the protection of the public in interest represents a constitutionally allowed objective.). The intervention should not be excessive, this meaning that only the mildest of all possible interventions is allowed whereby a constitutionally allowed and wanted objective can be achieved, as well as protection of equally important rights of others. Within the frames of proportionality, the importance of the intervention should be also assessed compared with the importance of the right which is to be protected by the intervention.

Of course, we do not make direct equation between public procurement and constitutional rights. Some of them may even be derived from the use of public procurement or are violated for the purpose of misuse or limitation through legal or executive acts, or by decisions of certain institutions or authorities. In spite of this, mentioned conditions allowing interventions to constitutional rights could, in a reasonable adjustment, create assumptions and basis for assessment of the admissibility of the limitation and exclusion of one fundamental principle of public procurement for the purpose of implementation of another principle.

Not only necessity, but also adequacy and proportionality may be considered input elements in the test of proportionality in the area of public procurement, in which case we would also have to assess the nuisance of the implications of violation of one of the principles in view of the benefit and objectives which are to be achieved through the implementation of another principle and which must be based on the law.

In this way, determined formal insufficiency or violation would not necessarily mean the exclusion of a tenderer from a procedure, in case such insufficiency or violation would not have any negative or adverse implications on other principles of public procurement (the principles of equal treatment of tenderers, non-discrimination etc.).

This disregard would then enable the selection of an offer that would mean implementation of the principle of economy for the purpose of economically most advantageous conditions, appropriate relationship between investments and obtained value. The disregard of the principle of formality on behalf of the principle of economy in this case would also be necessary, appropriate, and proportional.

The above discussed could represent a consideration regarding the formulation of the proportionality test in the area of public procurement, which would represent an important and necessary step ahead in view of recent practice, both for contracting authorities and institutions monitoring regularity and deciding on violations in public procurement procedures, as well as on violations of fundamental principles.

One of the more difficult tasks of legal regulation and practice is to find an appropriate ratio between fundamental principles of public procurement.

We can say that no principle can be excluded, but no principle can also be definitely implemented.

Igor Šoltes

Former President of the SAI of Slovenia

Currently Member of European Parliament

Note: Proportionality is now explicitly mentioned, in Article 18 of the Directive 2014/24/EU, as one of the principles of public procurement.

GUIDELINE FOR AUDITORS

EU PUBLIC SECTOR PROCUREMENT DIRECTIVE 2014/24/EU

Disclaimer

The 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.

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INTRODUCTION

The Treaty on the Functioning of the European Union (EU) provides for free movement of goods, freedom of establishment and freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, all in order to implement an internal single market.

Public procurement has always accounted for a significant proportion of EU expenditure. In 2015, the 28 EU Member States spent around 2 015,3 billion euros, representing 13,7% of GDP, on government procurement of works, goods and services. In the same year, the estimate of total public procurement expenditure, excluding utilities and defence, represented 13,1% of the EU GDP, the highest value for the last 4 years², and the value of tenders published in the *Official Journal of the European Union* (TED supplement), excluding utilities and defence, amounted to 349,18 billion euros. According to the European Commission's estimation³, every year, over 250 000 public authorities in the EU spend around 14% of GDP (2 000 billion euros) on the purchase of services, works and supplies.

Therefore, EU public procurement policy is a key instrument in establishing the single market and ensuring the efficient use of public funds, while increasing productivity in the supply industries and improving participation in and access to such markets by enterprises.

The EU has been adopting Public Procurement Directives to set out in law what Member States must do in exercising the public procurement function, to give effect to the principles of the Treaty and to implement the benefits of the internal market. These directives have been based on the ideas that transparent, fair and competitive public procurement across the EU's single market generates business opportunities, drives economic growth and increases employment. Improved governance, the simplification of procedures and the greater use of electronic tools in public procurement are also recognised as important tools for fighting fraud and corruption.

In 2014, a set of three new directives on public procurement were adopted with the view to ensuring that all the above principles are given practical effect and that open and fair competition is applied. Furthermore, they promote that Member States adopt appropriate measures to ensure compliance with social, environmental and labour law obligations established by EU law, national law, collective agreements or international obligations⁴.

The provisions of the new Directives are consistent with the Europe 2020 strategy for: i) a smart growth, founded on an economy based on knowledge and innovation, ii) a sustainable growth, promoting a more resource efficient, greener and more competitive economy and iii)

² Source: European Commission, *Public Procurement Indicators 2015*, 19 December 2016. Up to now, there is no update available on these concrete indicators.

³ See https://ec.europa.eu/growth/single-market/public-procurement_en and COM(2017) 572, on 3.10.2017.

⁴ Article 18 (2) of Directive 2014/24/EU.

an inclusive growth, fostering a high employment economy delivering social and territorial cohesion⁵.

In light of the above, the role of the Supreme Audit Institutions (SAIs) of the EU Member States regarding the audit of public procurement contracts is very important.

Revision of Directives

In 2014, the European Parliament adopted three directives that revise and update the public procurement law to be transposed into the national law of all Member States of the EU. This set, the “*fourth generation*” of public procurement directives, includes:

- i) *Directive 2014/23/EU* of the European Parliament and of the Council, of 26 February 2014, on the award of concession contracts
- ii) *Directive 2014/24/EU* of the European Parliament and of the Council, of 26 February 2014, on public procurement, repealing Directive 2004/18/EC as from 18 April 2016, and
- iii) *Directive 2014/25/EU* of the European Parliament and of the Council, of 26 February 2014, on procurement by entities operating in the water, energy, transport and postal service sectors, repealing Directive 2014/17/EC as from 18 April 2016.

The stated objectives of these new directives are to increase the efficiency of public spending, to reinforce legal certainty and to integrate the case law that the Court of Justice of the European Union (CJEU) has produced about public procurement.

This guideline summarises the main features and provisions of Directive 2014/24/EU, as the basic public procurement directive, governing how public authorities should award public contracts of works, supplies and services.

For the first time, there is a separate directive (the 2014/23/EU) covering works and services concession contracts. Previously, directives did not cover service concessions, which were only subject to Treaty principles. Now, a specific directive for concessions sets out a common legislative framework for all concession contracts, which are based on the transfer of an operating risk to the concessionaire. Although principles of the EU rules are common for all contracts, there are differences comparing with the other two regulations that govern procurement award in the public sector and the utilities sector. A relatively light touch regime is applicable, including different thresholds, different requirements and design in procurement procedures and also differences in award criteria⁶.

The utilities Directive 2014/25/EU covers entities operating in the water, energy, transport and postal services sectors. The directive also covers private entities operating under special or exclusive rights in the utilities sector. The utilities directive, when compared with the public

⁵ COM(2010) 2020 final of 3 March 2010, ‘Europe 2020— A strategy for smart, sustainable and inclusive growth’.

⁶ See Appendix VIII.

sector one, provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities covered. This flexibility is now enhanced, by clarifying what is meant by special or exclusive rights and by allowing Member States or utility bodies to apply for exemptions where there is sufficient competition in the sector.

Neither the public contracts directive nor the utilities directive apply to contracts in the field of defence and security, which either fall within the scope of Directive 2009/81/EC⁷ or are excluded by it.

This guideline does not include guidance related to the concessions, utilities and defence or security contracts.

For additional guidance, the user is directed to the additional information provided in the appendices.

European Commission's activities regarding public procurement

The European Commission's involvement in the public procurement area is very broad and covers legislative as well as non-legislative actions. It is based on a public procurement strategy, which focuses on six strategic policy priorities:

- Ensuring wider uptake of innovative, green, and social procurement
- Professionalising public buyers
- Increasing access to procurement markets, notably by small and medium enterprises (SMEs)
- Improving transparency, integrity and data
- Boosting the digital transformation of procurement, and
- Cooperating to procure together.

DG Grow (Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs), is responsible for setting the legislative framework and providing related support, i.e. providing advice on how to transpose correctly the directives into national legislation. Currently, DG Grow is assisting Member States in improving the review of procurement decisions by promoting networking between first instance review bodies, and by providing special legal and technical assistance to Member States willing to create or strengthen specialised first instance administrative review bodies.

⁷ See Appendix IX.

DG Grow, along with Member States, plan to improve the transparency and quality of national procurement systems by the establishment of contract registers covering the whole life cycle of contracts.

In October 2017, DG Grow announced an initiative with the aim of carrying out procurement more efficiently and in a sustainable manner, while making full use of digital technologies to simplify and accelerate procedures⁸. The initiative has four main strands focusing on:

- Encouraging the use of innovative, green, and social criteria and improving access by SMEs;
- Managing complex infrastructure projects by ex-ante evaluation by the Commission;
- Making procurement more professional, and
- Consultation on stimulating innovation through public procurement.

In order to assist Member States with addressing public procurement related issues, Directorates-General responsible for implementing the European Structural and Investment (ESI) funds (Regio, Empl, Agri, and Mare) included in partnership agreements specific conditions for public procurement systems that must have been fulfilled by Member States by the end of 2016 at the latest (so called ex-ante conditionality). The aim was to ensure that Member States' public procurement mechanisms are ready to absorb ESI funds.

Besides, under the Directorate-General for Employment, Social Affairs and Inclusion (DG Empl) management, the Member States were advised to use *Arachne* – an anti-corruption IT data mining tool, which can examine the public procurement side of EU-funded projects' management.

In 2014, DG Regio's' (Directorate-General for Regional Policy) directors endorsed an internal action plan for the public procurement area with 12 short, medium and long-term non-legislative measures. As of mid-2017, this action plan increased to 18 measures and all the shared management Directorates-General (Regio, Empl, Agri, and Mare) as well as DG Grow are cooperating in carrying out these measures. Almost one half of the action plan is already completed.

One of the actions was to produce and publish guidance on public procurement. This guidance was updated in 2018: *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*, and is available on DG Regio web site.⁹

⁸ See http://ec.europa.eu/growth/content/increasing-impact-public-investment-through-efficient-and-professional-procurement-o_en

⁹ See http://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf

GENERAL ASPECTS

1. MAIN CHANGES INTRODUCED BY DIRECTIVE 2014/24/EU

The changes introduced by Directive 2014/24/EU are intended to provide a more flexible approach than the existing one, allowing the public procurement processes to be faster, less costly, and more effective for business and procurers.

At the same time, they intend to facilitate the involvement of small and medium enterprises (SMEs) in public procurement, to promote integrity as a means to prevent of fraud and corruption and to enhance the role of public procurement as a tool for public policies, mainly in the social, environmental and labour areas.

The key changes, detailed in subsequent sections, refer to the following:

- **Use of public procurement as an instrument of wider public policies, notably in the social, environmental and labour areas**, for example, by requiring economic operators to comply with social and labour law obligations, by admitting that contracts are reserved for sheltered workshops or sheltered employment programmes, by allowing selection criteria related to environmental and labour requirements, by ruling the possibility of requiring certifications and labels, by explicitly admitting social and environmental criteria for the award phase or by allowing social and environmental performance conditions;
- **Facilitate the involvement of SMEs in public procurement**, for instance, by encouraging contracting authorities to divide contracts into lots to facilitate SMEs' participation, by limiting company turnover requirements and by establishing a central on-line point where suppliers can find out the type of documents and certificates which they may be asked to provide in any EU country (e-Certis);
- **Introduce simpler processes to assess bidders' credentials**, by promoting the use of supplier self-declarations, creating a European single procurement document and a European database for procurement documents, and by stating that only the winning bidders should have to submit various certificates and documents to prove their status;
- **Reinforce electronic procurement**, by ensuring electronic versions of the procurement documentation, by progressively implementing full electronic communication at all stages of procedure, by integrating data-based approaches at various stages of the procurement process, by simplifying rules on dynamic purchasing systems and by encouraging electronic catalogues;
- **Clarify the situations where public-public cooperation falls outside the scope of the**

procurement rules (in-house contracting and inter-administrative cooperation);

- **Improve integrity and safeguards against corruption**, by requiring contracting authorities to put in place appropriate safeguards against conflicts of interests, by including new provisions on grounds for exclusion of economic operators (which allow their exclusion for collusive practices or poor performance), by introducing time limits for the exclusion of suppliers and by stating that suppliers who have been excluded from public procurement for bad practices can be included again if they demonstrate that they acted to prevent misconduct and wrongdoing (*“self clean”*);
- **Encourage market consultations**, by introducing a preliminary consultation mechanism for a better preparation of the procurement;
- **Allow more freedom to negotiate**, by creating a flexible competitive procedure with negotiation and by regulating the conditions for negotiations in several procedures such as the competitive dialogue and the innovation partnership;
- **Allow more scope for innovative ideas**, by introducing the *“innovation partnership”* procedure, where research for new products and services is encouraged;
- **Encourage central purchasing, framework agreements, dynamic purchase systems and joint procurement**;
- **Facilitate faster processes**, by reducing by about a third minimum time limits in which suppliers have to respond to advertised procurements and submit tender documents;
- **Introduce a new light-touch regime for social and health and some other services¹⁰**, replacing the former distinction between priority and non-priority services;
- **Explicit inclusion of proportionality amongst the general principles of public procurement**, especially regarding the procedural and substantial requirements to the subject-matter of the contract¹¹;
- **Selection of suppliers based on their ability to perform the contract**;
- **Stronger focus on the quality of the performance through adopting a new concept for the most economically advantageous tender as the award criteria**, by using a cost-effectiveness approach, such as life-cycle costing, by including the best price-quality ratio to be assessed on the basis of factors that may include qualitative, environmental and/or social aspects and by clarifying the possibility of considering the relevant skills and experience of individuals where relevant;

¹⁰ See Appendix III, for the list of services with a special regime.

¹¹ See article 18.

- Contracting authorities will be able to **reserve the award of certain services contracts to mutuals/social enterprises for a time-limited period**;
- **Incorporation in rules of the case law of the Court of Justice of the European Union (CJEU)** (examples: concepts, *in house* providing, modifications to contracts);
- **Extension of the scope of the procurement rules beyond the award and conclusion of a contract**, by including provisions to regulate the modification and termination of contracts;
- **New approach to allowed modifications to contracts**, by distinguishing substantial from non-substantial changes;
- **Possibility of imposing conditions to the performance of the contract**;
- **Need to appoint a national public body to oversee public procurement**.

2. PRINCIPLES GOVERNING PUBLIC PROCUREMENT

EU Treaty principles include the free movement of goods, the freedom of establishment and the freedom to provide services.

In public procurement, the respect for these fundamental freedoms within the EU space and the EU single market implies that any potential tenderer should be able to access any procurement, that the whole market is opened up to competition and that impartiality of the procedures is ensured. The objective is, therefore, to prevent public contracts being directly awarded to local providers without any competition.

This means that public procurement should be governed by the principles of *competition*, *equal treatment* and *non-discrimination*. The principles of equal treatment and non-discrimination imply an obligation of *transparency* which consists in ensuring, for the benefit of any potential tenderer, a degree of *advertising* sufficient to enable the market to be opened up to competition.

These principles, and the adequate conducts to apply them, have been extensively studied and elaborated by the case law of the CJEU and by the guidance of the European Commission.

Equal treatment, non-discrimination and transparency are long recognised. The current directive mentions them and reinforces them, notably by including a specific provision concerning the principles of procurement. Article 18 mentions that “*contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner*”.

One particular area of reinforcement concerns conflicts of interest. Article 24 demands that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures, thus avoiding the influence of financial, economic or other personal interests and reinforcing impartiality. For this purpose, the directive states that the concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure, have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Other articles strengthen the transparency requirements, for instance concerning information disclosure.

Proportionality is now explicitly mentioned as a principle in public procurement. The importance of proportionality regards mainly the procedural and substantial requirements set up by contracting authorities. They are allowed to establish requirements for suppliers and for tenders, to define which documents are needed, to set up deadlines, to design selection and award criteria, etc. All these will only be acceptable if they concern the subject-matter of the contract and if they are proportionate. They must not be superfluous, they must make sense and they must not be excessive, imposing too much or unjustified burdens over economic operators. Otherwise, sound competition would be endangered.

The directive states that the design of the procurement shall not be made with the intention of artificially narrowing *competition*. According to article 18, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

But, for the first time, the directive also recognises the need to use public procurement to stimulate other public policies. To enhance development, it provides incentives towards cross-border public procurement and to the participation of SMEs in the public procurement market. To stimulate an environmental policy, it promotes the use of environmental specifications, requirements and criteria and it encourages the analysis of life cycle costing of products (which includes their elimination and recycling). To promote social and labour policies, it allows the protection of businesses employing vulnerable and less favoured people and demands that social and labour laws are complied with by bidders. The directive explicitly considers this as a principle, since article 18(2) prescribes that “*Member States shall take appropriate measures to ensure that in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social and labour law*”.

3. SUBJECT-MATTER AND SCOPE OF DIRECTIVE 2014/24/EU

The directive is applicable to many but not to all public contracts.

Determining whether the directive applies to a specific contract has always been a key question. Directive 2014/24/EU refines the concepts that are relevant to solve it, in the face of the increasingly diverse forms of public action and CJEU case law. Articles 1 and 2 and recital of the directive include the relevant concepts and definitions and a significant number of clarifications to apply them. Similar provisions are included in the utilities directive. Sections 2, 3 and 4 of the directive set out the scope of the directive as regards thresholds and exclusions.

The most important criteria to determine whether the directive applies are:

Is there a public contract?

Procurement within the meaning of the directive is now expressly defined as “*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*”¹².

“*Public works contracts*” means public contracts having as their object primarily the execution or both the design and execution of works related to activities specified in Annex II of the Directive or of a work, meaning the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function. It also includes the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

“*Public supply contracts*” means public contracts having as their object the purchase, lease, rental or hire purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations.

“*Public service contracts*” means public contracts having as their object the provision of services other than works. The previous distinction between categories of services (priority and non-priority services) has been abolished. Therefore, all above threshold service contracts are subject to the procurement rules with the exception of a new light-touch regime for health and social services as well as a limited number of other specified services, e.g. cultural services, listed in Annex XIV of the directive.

The directive is also applicable to design contests organised by contracting authorities.

¹² See article 1(2).

Is the contract awarded by a contracting authority?

Even if the contract matches one of the types described, it will only fall within the scope of the directive if it is awarded by a contracting authority.

The notion of “*contracting authorities*” and in particular that of “*bodies governed by public law*” have been repeatedly examined in the case-law¹³ of the CJEU.

For the purposes of the directive, “*contracting authorities*” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law. This definition covers not only the executive authority of the state, but all state entities. The directive introduces the distinction between central government authorities and sub-central contracting authorities.

“*Bodies governed by public law*” means bodies that meet cumulatively the following three criteria:

- i. They are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- ii. They have legal personality; and
- iii. They are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have 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.

In this context, a body operating in normal market conditions, with the aim to make a profit and bearing the losses resulting from the exercise of its activity should not be considered as being a “*body governed by public law*”. The needs this body should meet, even if they are of general interest, can be deemed to have an industrial or commercial character.

As regards criteria iii), payments from users, which are imposed, calculated and collected in accordance with rules of public law, should be considered as public funding.

In specific cases, the procurement of a contract may fall within the scope of the directive even if the contract is not awarded by a contracting authority. When some works and service contracts are subsidised by contracting authorities by more than 50%, the directive may apply, even if they do not themselves award the contract or if they award it for or on behalf of other entities¹⁴.

¹³ See Appendices X and XI.

¹⁴ See article 13. This provision applies only to specific cases as defined by the directive, such as civil engineering works and works in some specific sectors

Does the value of the contract meet the applicable threshold?

The directive only applies if the estimated value of the contract placed by a contracting authority reaches the financial thresholds explicitly mentioned in article 4 of the directive. These thresholds vary according to types of contracts and types of contracting authorities. Article 74 sets a specific threshold for contracts for social and other specific services.

The thresholds applying from 1 January 2018 to 31 December 2019 are set out in Appendix II.

The thresholds are revised by the Commission, under the terms of the directive, in order for them to stay aligned with the thresholds defined in the Agreement on Government Procurement (GPA), within the framework of the World Trade Organisation. The revision of the thresholds is made at two-yearly intervals and is published in the OJEU¹⁵.

The Public Contracts Directive includes a binding commitment on the Commission to review the economic effects of the thresholds on the internal market, which is expected to be completed by 2019.

The calculation of the procurement's estimated value is made according to rules laid down in article 5 of the directive. The following is highlighted:

- The estimation is made at the moment at which the call for competition is sent or at which the contracting authority commences the procurement procedure (depending on cases);
- The estimation is net of value-added tax (VAT);
- Any form of option and any renewals thereof, as explicitly set out in the procurement documents, shall be taken into account;
- The method used to estimate the value of a procurement should not be selected with the intention of excluding the procurement from the scope of the directive;
- The estimation can be based on a subdivision of the procurement only where justified by objective reasons;
- When a proposed work or service may result in contracts being awarded in the form of separate lots, account should be taken of the total estimated value of all such lots. Where the aggregate value of the lots is equal to or exceeds the threshold laid down in article 4, the directive shall apply to the awarding of each lot.

Contracts with no pecuniary interest¹⁶ as well as non-economic services of general interest do not fall within the scope of the directive.

¹⁵ See article 6.

¹⁶ See article 1(6).

Does any exclusion apply to the concrete procurement?

Directive 2014/24/EU shall not apply to a large number of contracts specified in articles 7-17, among which, by way of illustration, contracts:

- In the water, energy, transport and postal services sectors
- Awarded pursuant to international rules
- Awarded on the basis of an exclusive right
- Between entities within the public sector
- Involving defence and security aspects

The public sector directive, as well as the utilities directive, include a number of new specific exclusions for service contracts, such as legal services, loans, civil defence, civil protection and danger protection services, public passenger transport services by rail or metro, political campaign services and specific research and development services.

4. PUBLIC CONTRACTS BETWEEN ENTITIES WITHIN THE PUBLIC SECTOR

One of the exclusions is explicitly established in law for the first time. It concerns contracts conducted between public sector entities. In this respect, article 12 codifies the CJEU's extensive case-law regarding "*in-house exemptions*"¹⁷.

These exemptions constitute the Member States and their public authorities' right to perform the public service tasks conferred on them by using their own organisation and resources, which includes the possibility of cooperating with other public authorities.

However, it should be ensured that any exempted public/public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors. Thus, contracts between contracting authorities do not automatically fall outside the scope of the European public procurement law. Only two types of exemptions are allowed, as follows.

¹⁷ See article 12 and the following CJEU cases: C-107/98, *Teckal*, C-480/06, *Commission v Germany*, C-26/03, *Stadt Halle*, C-231/03, *Coname*, C-458/03, *Parking Brixen*, C-340/04, *Carbotermo*, 22 C-295/05, *Asemfo v Tragsa*, C-573/2009, *Sea Srl*, and C-324/07, *Coditel*.

Institutionalised cooperation

The first type of exemption is referred to as “*institutionalised cooperation*” or “*quasi in-house exemption*”. In this case the performer of a service is a legally separate entity, which is dependent on the relevant public authority or contracting authorities. Cooperation between contracting authorities based on the institutionalised exemption does not necessarily have to involve services derived from the public interest.

The “*institutionalised*” in-house procurement is regulated in detail in article 12(1)-(3). Three conditions for exemption are laid down, namely control, activity and ownership:

- i. As far as the control exercised by the contracting authority over a legal person is concerned, the said control is defined as similar to that which the contracting authority exercises over its own departments (subparagraph a);
- ii. With respect to the activity requirement, the controlled entity's activities must be performed at a percentage of 80% for the controlling contracting authority or for other legal persons controlled by the latter (subparagraph b);
- iii. With regard to the third condition, any form of direct private capital participation in the controlled legal person is not permitted, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert decisive influence on the controlled legal person (subparagraph c). This means that indirect private capital is allowed.

Article 12(2) covers both “reverse vertical” and “horizontal” institutionalised cooperation, as exempted awards of public contracts. The first notion refers to a “bottom-up contract award”, meaning that the controlled entity awards a contract to the controlling parent, while the second one refers to a contract awarded between two in-house entities controlled by the same parental entity.

Article 12(3) specifies that a contracting authority may award a public contract directly to an entity over which it exercises the control jointly with other contracting authorities, even if it cannot control the economic operator individually. It is accepted that joint control cannot be identical to the control a public authority exercises over its own departments but this control must at least be effective¹⁸. In the exercise of joint control the following conditions must be fulfilled:

- i. The decision-making bodies of the controlled legal person should be composed of representatives of all participating contracting authorities;
- ii. The contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- iii. The controlled legal person is not allowed to pursue any interests which are contrary to those of the controlling contracting authorities (second subparagraph).

¹⁸ See CJEU case C-324/07, *Coditel*, par. 46.

In the joint control situation “reverse vertical” and “horizontal” institutionalised cooperation are not provided for.

Non-institutionalised cooperation

The second type of exemption concerns “*non-institutionalised horizontal cooperation*” between contracting authorities based on a public interest task, which rests on all of these authorities. In these cases, also referred to as “*public/public*” cooperation, two or more contracting authorities, such as bodies governed by public law that may have private capital participation, may establish horizontal cooperation for the provision of a public task, without creating a jointly controlled in-house entity.

According to article 12(4), in order for the contract to be exempted from the directive, all of the following conditions must be fulfilled:

- i. The contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving the objectives they have in common;
- ii. The implementation of that cooperation is governed solely by considerations relating to the public interest; and
- iii. The participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

Article 12(5) establishes the basic rules for calculating the above mentioned percentages of activities.

5. CONTRACTS EXCLUDED FROM THE SCOPE OF EU PUBLIC PROCUREMENT DIRECTIVES

According to the ruling of the public procurement directives, some contracts are not subject to them, for example because the type of contract is not covered or because their estimated value falls below the relevant threshold.

The CJEU case law states that the award of these contracts is, however, subject to a basic set of standards derived directly from the rules and principles of the Treaty¹⁹. EU Treaty-based or

¹⁹ See CJEU cases C-324/98, *TeleAustria*, C-231/03, *Coname*, C-458/03, *Parking Brixen*, C-59/00, *Bent Mousten*

derived principles include equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The application of these principles imply sufficient advertising, preventing public contracts from being directly awarded to local providers without any competition²⁰.

Nevertheless, the CJEU case law considers that these standards apply only to the award of contracts that have a sufficient connection with the functioning of the internal market. It is recognised that in some cases (e.g. such as a very modest economic interest at stake) a contract award would be of no interest to economic operators located in other Member States.

It is the responsibility of the individual contracting authorities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States, based on an evaluation of the individual circumstances of the case (e.g. subject matter of the contract, estimated value, size and structure of market, geographic location of the place of performance). Where the authority considers that a contract is likely to attract cross-border interest, it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before the award.

According to the CJEU case law, the principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition. Contracting authorities are responsible for deciding the most appropriate medium for advertising their contracts. Their choice should be guided by an assessment of the relevance of the contract to the internal market. The greater the interest of the contract to potential bidders from other member states, the wider the coverage should be. Nevertheless, selective approaches and passive publicity are not considered as suitable.

6. PUBLICATIONS IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION (OJEU)

As already mentioned, the principles of equal treatment and non-discrimination imply an obligation of transparency, which is strongly ensured by a sufficient degree of advertising. According to Annex XI, 30% of errors found in the tendering phase of public procurement processes related to non-compliances with publication and/or transparency requirements. These cases are mostly those where contracting authorities fail to publish all the required information.

Vestergaard, C-264/03, *Commission v. France* and C-234/03, *Contse*.

²⁰ See Appendix IV.

Advertising the procurement

One of the obligations the directive imposes on contracting authorities is to advertise the procurement and its requirements in the OJEU.

Advertising is very important for public procurement because it facilitates competition, promotes transparency and helps in the battle against corruption.

Notices for contracts that are subject to the directive must be advertised, where applicable, in the Supplement to the OJEU, in accordance with the standard forms provided by the European Commission²¹. A free online version of the Supplement to the OJEU, called Tenders Electronic Daily (TED), is available.

Many EU Member States may also require advertising at national or local level. In such a case, this publication must not take place before the contract notice has been published in the OJEU, unless the contracting authorities have not been notified by the EU Publications Office of the publication in the OJEU within 48 hours of the confirmation of receipt of the notice²². Advertising at national level must not contain information other than that contained in the OJEU contract notice²³.

Advertising is necessary:

- i. Before the start of the formal procurement process²⁴, to avoid the awarded contract being considered ineffective²⁵;
- ii. At the end of a contract-specific procurement process, within 30 days of the conclusion of a contract²⁶; and
- iii. On the modification of a contract during its term for additional necessary works, services or supplies where a change of contractor cannot be made and where the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee (provided that the respective requisites are fulfilled)²⁷.

Prior information notices

According to article 48 of the directive, contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice

²¹ Regulation (EC) No 2015/1986 of 11 November 2015, establishing standard forms for the publication of notices in the field of public procurement.

²² See article 52(1).

²³ See article 52(2).

²⁴ See article 49.

²⁵ See Remedies Directives 89/665/EEC and 92/13/EEC.

²⁶ See article 50.

²⁷ See article 72(1).

(PIN). Previously, they were encouraged to do so when their aggregated procurement exceeded certain thresholds. These thresholds are no longer applicable.

PINs allow contracting authorities to inform the market in advance of what they intend to buy in the future. They have three main functions:

- Contracting authorities can use them to check the market and find out what is available before launching a tender;
- They can be used to reduce the timescales of a subsequent public procurement procedure in case certain requirements are met;
- Sub-central contracting authorities can use them effectively as contract notices. In this case, a PIN may be used as a call for competition for the restricted or competitive procedure with negotiation. Additional information must be included in the PIN if used for this purpose.

A PIN shall be published either by the EU Publications Office or by the contracting authorities on their *buyer profiles*.

A contracting authority can keep the market informed of future potential procurement opportunities by setting up its own internet-based “*buyer profile*”. The buyer profile includes general information about the contracting authority together with information about ongoing invitations to tender, scheduled purchases, contracts concluded, and procedures cancelled. In some cases, these buyer profiles may be used as an alternative to publication, mainly at national level.

7. COMMON PROCUREMENT VOCABULARY

Common Procurement Vocabulary (CPV) is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories. It establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe procurement contracts.

The nomenclature was adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council and amended by European Commission Regulation (EU) No. 213/2008, issued on 28 November 2007. It can be accessed on the <http://simap.ted.europa.eu/> website and the appropriate code should be used for describing the subject of the contract when advertising in the OJEU²⁸.

As for May 2018, CPV is being revised (see <https://ec.europa.eu/docsroom/documents/27821>) and, so, the site of the European Commission should be consulted for information on the

²⁸ See article 23.

review process or for the up to date version of this nomenclature.

8. TENDERING PROCEDURES

To set in forth the principles of the Treaty, the directive imposes on contracting authorities the obligation to use procurement procedures that provide open and transparent competition.

Articles 25 to 32 describe how Members States should provide that contracting authorities choose the tendering procedures when awarding public contracts. As mentioned in Annex XI, the incorrect selection of the tendering procedure to follow accounts for 12,5% of errors found in public procurement processes.

The directive permits six tendering procedures, as described below. The open and the restricted procedures are still the basic procedures that may be used freely by contracting authorities without the requirement to satisfy conditions.

(i) Open procedure ²⁹

Under this procedure, any interested economic operator may submit a tender in response to a call for competition. Information on tenderers' capacity and expertise may be sought and, in this case, only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated. If there are minimum requirements, it is important that they be made clear in the notice or the request for tenders to avoid unqualified bidders incurring the expense of preparing and submitting tenders.

(ii) Restricted procedure ³⁰

This is a two-stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties. The second step involves issuing the complete specifications and tender documents with an invitation to submit tenders only

²⁹ See article 27.

³⁰ See article 28.

to those who possess the requisite level of professional, technical and financial expertise and capacity.

As a basis for pre-qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the Directive³¹ are permissible. The CJEU and the EU Commission have ruled clearly on this.

Contracting authorities may opt to shortlist-qualified candidates if the contract notice indicates this intention and the number or range of candidates indicated. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules made known to candidates. The directive requires that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided there is at least this number who meet the qualification criteria)³².

(iii) Competitive procedure with negotiation ³³

The competitive procedure with negotiation has been substantially amended by the new directive, in what regards conditions for its use, time limits for submission of requests to participate and tenders, content of procurement documents and scope and procedures for negotiation.

This procedure is also a two-stage procedure that starts with a call for competition.

A selection is firstly made of those candidates who respond to the advertisement. The selection is made on the basis of pre-qualification criteria (with the same described characteristics).

Secondly, only the selected candidates (at least three) are invited to submit a tender for the contract. The difference towards the restricted procedure is that, in this case, the tender presented by the candidate will be an initial one, since the contracting authority will then open negotiations with the tenderers to seek improved offers. In the procurement documents, contracting authorities must indicate a description of the needs and characteristics required, the minimum requirements to be met by all tenders and the contract award criteria. These are not subject to negotiations. Negotiation may take place in successive stages, with a possible reduction of the number of tenders. Pre-defined objective criteria and equal treatment are key during the whole process.

The 2014 directive allows contracting authorities more flexibility to choose a procurement procedure and, so, the limitations to use a competitive negotiation procedure are less strict than in the previous directive. However, this procedure should not be used for off-the-shelf services or supplies that can be provided by many different operators on the market. In fact,

³¹ See articles 56-58.

³² See articles 65 and 66.

³³ See article 29.

this procedure may be used for complex purchases relating to products or services that are not currently available in the market. Adaptation and design efforts through negotiations will guarantee that the supply or service in question corresponds to the needs of the contracting authority. It could also be used where an open or restricted procedure resulted only in irregular or unacceptable tenders, in order to obtain regular and acceptable tenders through negotiation³⁴.

(iv) Competitive Dialogue ³⁵

The conditions under which this procedure may be adopted are the same conditions described for the competitive procedure with negotiation. Competitive dialogues is, however, mainly designed for those cases where the contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions³⁶. This procedure is applicable for complex contracts, such as for example public private partnerships (PPP's).

It follows the main steps of the restricted procedure and of the competitive procedure with negotiation: pre-qualification of candidates and invitation only to those selected. In this case, the selected ones will be invited to participate in a dialogue to develop solutions.

The dialogue can be developed in successive stages and follows the key principles of negotiations (equality of treatment and respect for the intellectual property rights of all candidates). It is specifically targeted at identifying and defining the means best suited to satisfying the needs of the contracting authority. This means that, during the dialogue, all aspects of the procurement may be discussed with the chosen participants and that the dialogue will continue until the contracting authority identifies the solution or solutions that are capable of meeting its needs.

Having declared that the dialogue is concluded and having so informed the remaining participants, the contracting authority shall ask each of them (at least three³⁷) to present their final tenders on the basis of the solutions or solutions presented and specified during the dialogue. The provisions related to the conduct of competitive dialogue have been amended, in particular concerning the extent to which it is permitted to clarify final tenders; and the nature of negotiations that are permitted with the tenderer identified as having submitted the best tender. Aspects of tenders may be clarified or fine-tuned provided that there is no distortion of competition or discrimination against any tenderer. The tenders received will be assessed against the defined award criteria, necessarily based on the best price-quality ratio.

³⁴ See article 26.

³⁵ See article 30.

³⁶ See article 26.

³⁷ See article 65.

(v) Innovation partnership ³⁸

Innovation partnership is a new concept and a new procedure introduced by the 2014 directive to provide flexibility for the development of an innovative product, work or service not available on the market. The innovation partnership cannot be used if the product, work or service is already available on the market.

An innovation partnership is implemented through a three-stage procurement process (prequalification, negotiation, delivery). The contracting authority buys both research and development services to develop an innovative solution and the resulting innovative products, services or works.

In the procurement phase, the innovation partnership is based on the steps and procedural rules that apply to the competitive procedure with negotiation. The contracting authority selects candidates, through a pre-qualification process (in this case, selection criteria should concern the candidate's capacity in the field of research and development and of developing and implementing innovative solutions). The negotiated approach is then used to invite suppliers to submit ideas to develop the innovative works, supplies or services. When satisfied with the best means of meeting its requirements, the contracting authority must specify them and invite at least three candidates to submit tenders. Equality of treatment and respect for the intellectual property rights of all candidates must be ensured during the whole process. Aspects of tenders may be clarified or fine-tuned, provided that there is no distortion of competition or discrimination against any tenderer. The contracts are awarded on the sole basis of the best price-quality ratio, which is most suitable for comparing tenders for innovative solutions.

Innovation partnerships are intended to be long-term partnerships that allow for both the development and subsequent purchase of new and innovative products, services or works. An innovation partnership combines in one process (i) the appointment of one or more innovation partners; (ii) parallel innovative development work where there is more than one innovation partner; (iii) the reduction of the number of partners during the process where there is more than one partner at the outset; and (iv) the option for a contracting authority to purchase the innovative supplies, services or works developed as a result of the innovation partnership.

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

³⁸ See article 31.

(vi) Negotiated procedure without prior publication ³⁹

Through a negotiated procedure without prior publication of a contract notice, contracting authorities approach one or more suppliers, directly and without any advertising, seeking to negotiate the terms of the contract with them.

This procedure is a departure from the core principles, has detrimental effects on competition and is exceptional. Thus, it should only be used in the limited circumstances set out in article 32⁴⁰. Contracting authorities must ensure that these precise circumstances exist before deciding on the use of this procedure and must justify the use of the exemption: they must provide reasons why there are no reasonable alternatives or substitutes, such as using alternative distribution channels, including those outside the respective Member State, or considering functionally comparable works, supplies and services. The CJEU and the EU Commission interpret definitions used in the described exemptions in a very strict way.

The main instances where this procedure may be used are:

- When an open or restricted procedure has not attracted suitable tenders (provided the specifications of the requirement are not altered substantially);
- When, for technical or artistic reasons or due to the existence of exclusive rights, there is only one possible supplier or service provider (provided that no reasonable alternative or substitute exists and that the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement);
- In cases of extreme urgency (provided that factors giving rise to urgency are unforeseeable and outside the control of the contracting authority);
- Where supplied products are manufactured purely for the purpose of research (provided that the supply does not include quantity production to establish commercial viability or to recover research and development costs);
- For additional deliveries by the original supplier, as a partial replacement or extension of existing supplies, under specified conditions;
- For supplies quoted and purchased on a commodity market;
- For the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure;
- For public service contracts following a design contest;

³⁹ See article 32.

⁴⁰ See article 26(6).

- For works and services contracts repeating similar requirements (according to the indications of a basic project).

9. PROCUREMENT INSTRUMENTS

Central purchasing bodies

Contracting authorities may purchase through central purchasing bodies (CPBs)⁴¹. CPBs may act as a ‘wholesaler’ – supplying an authority on the basis of contracts it has itself awarded and/or provide contracting authorities with access to framework deals or dynamic purchasing systems it has established. Member States have the option of requiring certain kinds of procurement to be carried out by using a central purchasing body or bodies. A new requirement establishes that all procurement conducted by CPBs is to be performed using electronic means.

A contracting authority is responsible, however, for fulfilling its own obligations with regard to the parts of those procedures that it conducts itself. The contracting authority is responsible when it:

- Awards a contract under a dynamic purchasing system;
- Re-opens a competition under a framework agreement;
- Determines which economic operator is to be awarded a contract under a framework agreement when competition is not re-opened.

The new directive includes more extensive provisions on central purchasing, differentiating central purchasing activities from “*ancillary purchasing activities*”. Ancillary purchasing activities are activities that support purchasing activities, such as the provision of technical infrastructure, advice on the conduct or design of public procurement activities, and preparation and management of procurement processes. Contracting authorities may award contracts for carrying out these activities to a central purchasing body without having to apply the procedures provided in the directive.

Framework agreements

The directive provides for specific systems of procurement applicable to continuous purchases during a certain period. Through “*framework agreements*”, the contracting authorities enter

⁴¹ See article 37.

into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a given period of time, usually no longer than four years⁴². This is a tool that is recommended for established and repetitive needs when the contracting authority does not know in advance either the contract amount or exactly when their need will occur.

Frameworks may be agreed between one or more contracting authorities and one or more economic operators through competitive processes. The different cases will determine differences on the process to award contracts based in the framework agreements. Contracting authorities have to follow the rules of procedure for all phases up to that award.

The new directive introduces clarifications of the rules on frameworks relating mainly to transparency. Thus, contracting authorities must not use a framework unless clearly identified in the notice as permissible users and contracting authorities must be transparent about the methods of call off to be used. The directive confirms that a contract awarded under a framework may have a completion date after the end of the framework.

*Dynamic purchasing systems*⁴³

A dynamic purchasing system is similar to a framework agreement in the fact that it is also an instrument for continuous purchases during a certain period, without the need to advertise in the OJEU each time the contracting authorities wish to award a contract under the system. The differences are that this system is to be run as a completely electronic process and that new suppliers can join at any time.

The dynamic purchasing system is applicable for commonly used purchases generally available on the market.

In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, with the following specificities:

- The system will be valid for the indicated period;
- The system can be divided into categories of products, works or services objectively defined (the characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed);
- All the candidates satisfying the selection criteria shall be admitted to the system (the number of candidates shall not be limited);
- The purchasing system shall be open throughout the period of validity to any economic operator that satisfies the selection criteria;

⁴² See article 33.

⁴³ See article 34.

- Assessment of requests to participate is finalised within 10 working days following their receipt;
- The procurement documents indicate the nature and estimated quantity of the purchases envisaged;
- All communications shall only be made by electronic means;
- The procurement documents indicate how the system operates, the electronic equipment used and the technical connection arrangements and specifications;
- Unrestricted and full direct access is offered as long as the system is valid;
- Contracting authorities shall simultaneously invite all admitted participants to submit a tender for each specific procurement under the system;
- They shall award the contract on the basis of the award criteria set out in the contract notice for the dynamic purchasing system.

Joint procurement

Articles 38 and 39 of the directive allow two or more contracting authorities or contracting authorities from different Member States to agree to perform certain specific kinds of procurement jointly.

The provisions refer to allocation of responsibility between the participating contracting authorities, to the applicable national provisions and to the internal organisation of the procurement procedure. An agreement between the participating contracting authorities concerning these aspects may be needed.

Electronic procurement

The directive keeps the pace of allowing and encouraging the use of electronic purchasing techniques by contracting authorities.

Contracting authorities may decide that the award of a public contract is preceded by an **electronic auction** in open, restricted or competitive procedures with negotiation, as well as in framework agreements or in dynamic purchasing systems⁴⁴.

Electronic auctions are only applicable when the content of the procurement documents, in particular the technical specifications, can be established with precision. The auction is based on prices and/or new values of the features of tenders.

Electronic reverse auctions are those conducted electronically where the buyer indicates its requirements and suppliers progressively bid downwards. The most common objective is to drive prices down. The lowest bidder wins the right to supply. Since the evaluation is done

⁴⁴ See article 35.

electronically, it can only be done by means of an algorithm. Thus, only the elements suitable for automatic evaluation by electronic means, without any intervention or appreciation by the contracting authority, namely elements that are quantifiable so that they can be expressed in figures or percentages, may be the object of electronic auctions.

Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them. Then they will simultaneously invite bidders to submit new prices or new values by electronic means in successive phases, until the closing of the auction. The mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices and/or new values submitted must be included in the invitation.

On the other hand, the public contracts directive provides helpful confirmation that *electronic catalogues* can be used as a basis for tenders for contracts or frameworks. According to article 36, where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment. Safeguards are established to ensure that:

- The catalogue that is transmitted in response to a given procurement procedure contains only products, works or services that the economic operators estimated - after an active examination - correspond to the requirements of the contracting authority;
- Where tenders have been generated by the contracting authority, the economic operator concerned is given the opportunity to verify that the tender does not contain any material errors and, in that case, is not bound by the generated tender;
- Contracting authorities avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues.

10. TIME LIMITS FOR REPLIES

The European directives on public procurement have always imposed minimum time limits for submission of expressions of interest and tenders, in order to ensure that economic operators from several Member States have enough time to be made aware of the existence of the procurement, to obtain and study the procurement documents and to be able to prepare a serious offer.

The current directive reduces the minimum time limits in almost all situations, with the aim of increasing flexibility and because, in the current electronic environment, the existing minimum time limits were unnecessarily long. In certain circumstances, these minimum time limits can be shortened further where the requirement is urgent or where sufficient information has already been provided by a prior information notice.

Minimum time limits are set down for different stages of the particular contract award procedure chosen. Contracting authorities are allowed to determine the time limits at those different stages according to their own needs, provided that they respect the defined minimum. When fixing the timescale for submitting requests to participate or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

The **main minimum time limits** are described in Appendix V ⁴⁵.

These time limits are reckoned from the date of dispatching the notice to the OJEU or, where a prior information notice is used as a means of calling for competition, from the date the invitation to confirm interest is sent. In all cases, the times are specified in calendar days.

Time limits for the receipt of tenders shall be extended in the cases where⁴⁶:

- A visit to the site or an on-the-spot inspection of the documents is needed;
- Necessary additional information is not provided on time;
- Significant changes are made to the procurement documents.

Sub-central contracting authorities (not covered by GPA) may agree on shorter time limits for the receipt of tenders in the restricted procedure and in the competitive procedure with negotiation⁴⁷. In the absence of an agreement, the minimum time limit for the receipt of tenders is 10 days.

The contracting authority must substantiate matters of urgency, demonstrating that they have been caused by unforeseeable events outside the control of the contracting authority, that they derive from no delay or inaction on its part and that they render impracticable the normal time limits⁴⁸.

⁴⁵ See articles 27-31 and 47.

⁴⁶ See article 47.

⁴⁷ See articles 28(4) and 29(1).

⁴⁸ See articles 27, 28 and CJEU case law (e.g. cases 194/88, *R. Commission v. Italy*, C-24/91, *Commission v. Spain*, and C-394/02, *Commission v. Greece*).

CONDUCT OF THE PUBLIC PROCUREMENT PROCESS

11. PREPARING THE PROCUREMENT

The European regulation regarding the preparation of the procurement and the content of the procurement documents is mainly targeted at safeguarding the principle of non-discrimination. The objective is to ensure all suppliers established in countries covered by the rules are treated on equal terms, avoiding obstacles to the single market and to the fundamental freedoms of the Treaty.

Favouring or disfavouring economic operators when identifying and describing the needs that the procurement aims at meeting or when designing the rules and criteria of the procurement would distort competition and equality among competitors. It would also be a factor of corruption in public procurement.

On the other hand, this design phase cannot neglect that, besides safeguarding equality for competitors, the procurement intends to meet public needs. The best definition and achievement of those often requires room for flexibility and for convenience concerns. Public procurement is also increasingly recognised as an instrument to implement public policies, such as promoting development and ensuring compliance to environmental, social and labour requirements.

Scope of the procurement

Methods for defining the procurement and estimating its value have long been influenced by the idea that they should not be used with the intention of excluding the procurement from the scope of the directive. This led to the principle that a procurement should not be subdivided with the effect of preventing it from falling within the scope of the directive, unless justified by objective reasons⁴⁹.

Nevertheless, the current generation of directives encourages contracting authorities to divide public contracts into lots so as to increase the participation of small and medium-sized enterprises in the public procurement market, with objectives of economic development.

Article 46 promotes that a contract should be divided into separate lots. This is done by allowing the contracting authorities to do so, determining the size and subject matter of such lots, and by demanding from them, when they do not do it, to provide an indication of the main reasons for their decision not to subdivide into lots (reasons to be included in the

⁴⁹ See article 5(3).

procurement documents and in the contract report). Members States are encouraged to make the use of lots obligatory.

Other provisions permit contracting authorities to limit the number of lots for which a tenderer may bid and to combine the award of more than one lot. An optional provision allows a contracting authority to limit the number of lots that a tenderer can win.

However, this does not mean that the aggregation principle for the purposes of applying the directives is no longer valid. According to article 5(8), where a proposed provision of services results in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots. Where the aggregate value of those lots is equal or exceeds the threshold laid down in article 4, the directive shall apply to the awarding of each lot. Only specific situations and small value lots may be exempted from this principle, as stated in the following paragraphs of article 5.

Preliminary market consultations

The 2014 directive introduces new provisions that specifically permit the use of preliminary market consultations⁵⁰. Contracting authorities may conduct preliminary market consultations “with a view to preparing the procurement and informing economic operators of their procurement plans”. An example is included of the search for, or acceptance of, advice from independent experts, authorities or market participants. This process must not distort competition or violate principles of non-discrimination and transparency.

Prior involvement of candidates or tenderers

The directive introduces another new provision that reflects the case law of the CJEU⁵¹. According to this provision, contracting authorities must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer having had prior involvement in advising the contracting authority or preparing the procedure. Article 41 includes examples of the sorts of measures that a contracting authority may take in this regard. However, the contracting authorities may only exclude candidates or tenderers on the grounds of prior involvement where there are no other means of ensuring equal treatment. If a contracting authority does decide to exclude on this basis, it must give the candidate or tenderer concerned the opportunity to prove that this prior involvement would not distort competition.

⁵⁰ See article 40.

⁵¹ See article 41 and CJEU cases C-21/03 and C-34/03, *Fabricom*.

*Technical specifications*⁵²

The technical specifications lay down the characteristics required of works, services or supplies. Those characteristics may also refer to the specific process or method of production or provision of the work, supply or service or to a specific process for another stage of its life cycle. The directive encourages the use of performance specifications.

The requirements must be described avoiding brand names and other references, which would have the effect of favouring or eliminating particular providers, products or services.

The key changes in the provisions related to technical specifications, as introduced by the new directive, reflect the increasing emphasis on social and environmental considerations and on the development of CJEU case law on this issue⁵³.

The directive allows some scope for building into the specifications social/environmental issues (e.g. a requirement to conform to social or environmental labels), equality issues (e.g. access issues for the disabled), production processes and methods (e.g. environmentally friendly means of production or disposal of a product or production process in accordance with fair trade principles) and accessibility criteria.

The described requirements must be linked to the subject matter of the contract and be proportionate. A principle of equivalence applies: contracting authorities must accept products that satisfy the requirement by any appropriate means.

According to article 43, technical specifications may now refer to specific labels. A contracting authority may require a specific label, or part of a label, as proof that the works, supplies or services correspond to specific environmental, social or other characteristics. The requirement for a specific label may be included in the technical specifications, award criteria or contract performance conditions. Where a contracting authority does specify a particular label, it may only do so when a number of conditions are met. These conditions are set out in article 43(1) (a) to (e). The application of the principle of equivalence means that contracting authorities must accept equivalent labels and other appropriate means of proof.

⁵² See article 42.

⁵³ See CJEU case C-368/10, *Commission v. Netherlands*, concerning the use of fair trade and environmental requirements and labels.

12. RECEIPT, OPENING AND CLARIFICATION OF TENDERS

The new directive does not regulate in detail the requirements for opening of the tenders. Requirements relating to tools and devices for the electronic receipt of tenders, requests for participation as well as plans and projects in design contests are dealt with in Annex IV of the directive. They must at least guarantee, through technical means and appropriate procedures that certain requirements are fulfilled as stated in the Annex IV, such as the exact time and date of the receipt of tenders. Paragraph 21 of Annex V-Part C establishes that in open procedures the date, time and place of the opening of tenders must be disclosed. All in all the procedure adopted should ensure that, in the case of any dispute, there is a clear and formal independently vouched report of the tenders received. Tenders received after the closing time for receipt of tenders should not be accepted.

According to article 56(3), where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing the directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

13. ELECTRONIC COMMUNICATION

A major emphasis in the 2014 directive is placed on communication using electronic means. The initial presumption is that all communication and information exchange is conducted by using electronic means. The time limits in tender processes are calculated, in general, on the assumption that electronic means are used and, if that is not the case, those time limits should be prolonged⁵⁴.

The directive requires electronic submission of OJEU notices, full, unrestricted and free electronic availability of procurement documents at the time of notice publication, and electronic communication and information exchange for all communication, subject to specified exclusions. Full electronic communication (with some exceptions) will become mandatory for public contracts in established deadlines.

Procurement documents that should be available electronically are defined in article 2(13). They are “*any document produced or referred to by the contracting authority to describe or*

⁵⁴ See article 53.

determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents”.

Contracting authorities must ensure that the tools and devices used for electronic communication meet certain requirements set out in the directive. Article 22 provides that tools and devices used for electronic communication must be non-discriminatory, generally available and interoperable with technology in general use. In the event that contracting authorities do require the use of tools that are not generally available, they must then offer suitable alternative means of access.

Contracting authorities are required to ensure that in all communication, exchange and storage of information the integrity of data and the confidentiality of tenders and requests to participate are preserved.

Member States have the option of providing for the acceptance of electronic signatures. Article 22(6)(c) contains detailed provisions related to the use of electronic signatures.

Responses to requests for information or additional information, requested in good time, must be issued at least six days before the deadline fixed for the receipt of tenders. In order to avoid giving unfair advantage, additional information supplied to one party in response to a request should be supplied to all interested parties if it could be significant in the context of preparing a tender⁵⁵.

14. SELECTION OF SUPPLIERS

Exclusion grounds

The directive describes a number of grounds for excluding economic operators from participating in a procurement procedure, based on evidence of their unsuitability. Reasons for exclusion may be mandatory or optional. Significant changes have been made to both the grounds for exclusion and to the approach that contracting authorities must adopt when excluding candidates or tenderers⁵⁶.

Mandatory grounds for exclusion of economic operators from procurement include:

⁵⁵ See articles 47 and 53(2).

⁵⁶ See article 57.

- Criminal conviction for certain serious offences (participation in criminal organisations, corruption, fraud and money-laundering and, as added in the new directive, terrorism, terrorist financing, child labour and other forms of human trafficking);
- Failure to pay taxes or social security contributions, where the breach has been established by a judicial or administrative decision having final and binding effect.

Optional grounds for exclusion mean that the contracting authorities may exclude or may be required by Member States to exclude an economic operator from participating in a procurement. These grounds have been amended and expanded by the new directive and include:

- Breach of obligations related to the payment of taxes or social security contributions, where demonstrated by any appropriate means;
- Previous poor performance which has led to early termination, damages or other comparable sanctions;
- Non-compliance with environmental, social and labour law;
- Plausible indications of an agreement between economic operators aimed at distorting competition;
- Conflict of interest arising in the conduct of the procurement process, which cannot be remedied by measures that are less intrusive than exclusion;
- Distortion of competition due to prior involvement of economic operators in the preparation of the procurement procedure, which cannot be remedied by measures that are less intrusive than exclusion;
- Situations where the economic operator has sought to unduly influence the decision-making process, to obtain confidential information, or to negligently provide misleading information.

The 2014 directive incorporates a new principle of mitigation or “*self-cleaning*”, which should benefit economic operators facing the prospect of exclusion from the tender process. Provisions on this respect now oblige contracting authorities to consider, on a case-by-case basis, evidence from tenderers that may justify a decision to not exclude them. Article 57(6) provides that an economic operator has the right to provide evidence demonstrating its reliability despite the existence of mandatory or optional grounds for exclusion. If such evidence is considered by the contracting authority to be sufficient, then the economic operator shall not be excluded. The article lists the types of evidence that may be sufficient to demonstrate the reliability required. Such provisions are in line with the case law of the CJEU, which requires certain grounds for exclusion to be considered on a case-by-case basis and casts doubt on the legality of using automatic exclusion lists.

Member States may provide for a derogation from the mandatory grounds for exclusion, on an exceptional basis, “*for overriding reasons relating to the public interest such as public*

*health or the protection of the environment*⁵⁷ or where an exclusion would be clearly disproportionate.

There are also statutory limits to the duration of any exclusion period.

Assessment of suppliers

The contracting authorities may set out selection criteria for economic operators as requirements for their participation in the procurement⁵⁷. In this case and for this purpose, those suppliers not excluded will then be assessed on the basis of their economic and financial standing, suitability to pursue the professional activity and/or technical and professional ability.

The definition of the selection criteria is a key issue. As mentioned in Annex XI, almost a third of errors made in the tendering phase relate to contracting authorities setting up unlawful or discriminatory selection or award criteria.

Articles 58 to 64 describe the several possible selection criteria and the means of demonstrating they are fulfilled. The contracting authorities shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject-matter of the contract.

When bidders are requested to meet proportionate levels of financial soundness, the directive requires that where this is judged on the basis of turnover this should not normally exceed twice the value of the contract. This provision intends to avoid overly demanding requirements that could constitute an unjustified obstacle to the involvement of SMEs in public procurement. Contracting authorities should also be able to request information on the ratios, for instance, between assets and liabilities in the annual accounts. A positive ratio showing higher levels of assets than of liabilities could provide additional evidence that the financial capacity of economic operators is sufficient.

Suppliers may also be assessed on their technical capacity and ability, e.g. that they will be adequately equipped to do the job and that their track record is satisfactory. Environmental management criteria are also possible. Bidders can be asked to present related certificates.

Since many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria, the directive establishes the use of a *European Single Procurement Document* (ESPD)⁵⁸. The ESPD consists of an updated self-declaration, as preliminary

⁵⁷ See articles 56(1) (b) and 58.

⁵⁸ See article 59.

evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the required conditions.

Contracting authorities are able to request all or part of the supporting documents at any moment (particularly in the case of two-stage procedures) and the tenderer winning the contract should be required to provide the relevant evidence.

The access to relevant databases and the use of documents from earlier procurement procedures are also envisaged. The European Commission provides and manages an electronic system, e-Certis, which is currently updated and verified on a voluntary basis by national authorities⁵⁹. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. So far, voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of SMEs in particular. Maintenance is rendered obligatory in a first step. Recourse to e-Certis will be made mandatory at a later stage.

15. EVALUATION OF TENDERS AND AWARD OF CONTRACT

Award criteria

European directives impose that contracts are awarded on the basis of clear and objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous one.

As already mentioned, almost a third of errors made in the tendering phase relate to unlawful or discriminatory selection or award criteria. The most serious infringements found are those where contracting authorities set up those criteria in such a way that in effect the criteria hampered the competition leading to direct award “in disguise”. Less serious are those cases where contracting authorities set up discriminatory or illegal criteria, but there was still sufficient competition maintained, or those criteria did not change the outcome of tender procedures.

The award criteria must follow some basic principles:

- They must be clearly defined beforehand;
- They must be self-explanatory and allow no room for unrestricted freedom of choice;

⁵⁹ See article 61.

- They must be unbiased; and
- They must be linked to the subject matter of the contract

To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities have to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements that will be applied in the contract award decision. Thus, procurement documents must indicate the chosen criteria for awarding the contract and the weighting of the respective factors⁶⁰. In duly justified cases where the weighting cannot be established in advance, in particular because of the complexity of the contract, contracting authorities must indicate the criteria in decreasing order of importance. New or amended criteria must not be introduced in the course of the contract award procedure.

The previous directive provided that contracts were to be awarded by using one of two criteria, either (i) the most economically advantageous tender or (ii) the lowest priced tender. The 2014 directive changes the approach and places more emphasis on the combined evaluation of qualitative and quantitative criteria other than simply the price. Article 67(2) of the new directive states that "*contracting authorities shall base the award of public contracts on the most economically advantageous tender*", which is now the only criterion.

The concept of the most economically advantageous tender has also changed. Contracting authorities may use a "*price-quality ratio*" approach that is the equivalent of the "*most economically advantageous tender*" under the 2004 directive. But the concept has been enlarged and is now explained as follows: "*The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of price or cost, using a cost-effectiveness approach, such as life-cycle costing (...) and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects linked to the subject matter of the public contract in question (...)*." Article 67(2) provides examples of criteria that may be used.

The change is somewhat apparent since, according to this wording, it is still possible to use only price or only cost as the award criterion. In fact, contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions instead of quality award criteria. However, under an article 67(2)'s optional provision, Member States have the option of stipulating that contracting authorities may *not* use price only or cost only as the sole award criterion, in order to encourage a greater quality orientation of public procurement.

The major changes are the requirement to use a "*cost-effectiveness approach*" in the evaluation of cost and the new requirements in article 68 concerning "*life-cycle costing*". Life-cycle costing is an example of a cost-effectiveness approach where costs over the lifecycle of a

⁶⁰ See article 67(5).

product, service or work are considered (costs of acquisition, use, maintenance and end of life collection and recycling as well as costs imputed to environmental externalities). This could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly. Where contracting authorities use a life-cycle costing approach, they must include in the procurement documents information on the data to be provided by economic operators and on the method that the contracting authority will use to assess that data.

When assessing the best price-quality ratio, contracting authorities should determine the economic and qualitative criteria linked to the subject-matter of the contract that they will use for that purpose. Article 67(3) confirms that award criteria are to be considered as linked to the subject matter of the contract where they relate to any stage in the life cycle of the works, supplies or services to be procured. That life cycle may include specific processes of production, provision or trading. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria, which include environmental and social aspects, is set out in the directive. The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

The *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds* includes useful guidance and examples of good and bad practice in defining award criteria and methods.

Abnormally low tenders

Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. The explanations may relate, for instance, to the economics of the manufacturing process, the services provided, the construction method, the technical solutions chosen or any exceptionally favourable conditions available to the tenderer, the originality of the work, supplies or services proposed or the possibility of the tenderer obtaining State aid⁶¹.

Under the 2004 directive, a contracting authority was under the obligation to investigate a tender that seemed to be abnormally low only if it had the intention of rejecting that tender. The 2014 directive requires a contracting authority to investigate all abnormally low tenders, irrespective of its intention to accept or reject such a tender.

The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable

⁶¹ See article 69.

environmental, social and labour law or agreements⁶². Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer and where the latter is unable to prove that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU.

Evaluation of tenders

The contracting authority must verify that the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents⁶³.

Tenders must be evaluated objectively and transparently solely against the published weighted criteria. Objectivity and transparency are best achieved by the use of a scoring system or marking sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion.

Under two-stage procedures, care should be taken to ensure that pre-qualification criteria are not used in the tender evaluation process. Tenderers will be deemed to have met the minimum requirements concerning their capacity to perform the contract. Tenders should be assessed solely on the basis of how they meet the award criteria.

Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4), they shall do so by applying the award criteria stated in the procurement documents⁶⁴.

16. DISCLOSURE OF INFORMATION

For transparency reasons and also to guarantee the rights of unsuccessful candidates and tenderers to react against unlawful decisions, certain information must be disclosed after the award of a contract.

⁶² See article 18(2).

⁶³ See articles 45 and 56

⁶⁴ See article 66

Notifying tenderers and standstill period

According to article 55, on request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

- (i) Any unsuccessful candidate, of the reasons for the rejection of its request to participate;
- (ii) Any unsuccessful tenderer, of the reasons for the rejection of its tender, including the reasons for its decision that the works, supplies or services do not meet the technical specifications or the performance or functional requirements;
- (iii) Any tenderer that has made an admissible tender, of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,
- (iv) Any tenderer that has made an admissible tender, of the conduct and progress of negotiations and dialogue with tenderers.

Contracting authorities may decide to withhold certain information, where the release of such information would impede law enforcement or would be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, or might prejudice fair competition between economic operators.

After the award of a contract, the conclusion of a framework agreement or the admittance to a dynamic purchasing system, contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached. This notification includes the grounds for any decision not to conclude or to recommence the procedure⁶⁵.

To allow suppliers to seek effective review of contracting authorities' decisions, contracting authorities are required to include a 10/15 day standstill period between the point when the decision on the award of the contract is made and the signature of the contract. The standstill letter must provide certain information about the contracting authority's decision. There are detailed requirements for this process⁶⁶. On January 2017, the European Commission published a report recognising that economic operators are using the remedies directives' mechanisms, such as this standstill period, to challenge deviations from public procurement rules.

Contract award notices and reports

Following the decision to award or conclude a contract or a framework agreement, contracting authorities shall send a contract award notice for publication in the OJEU on the results of the

⁶⁵ See article 55.

⁶⁶ See Remedies Directive 89/665/EEC, amended by Directive 2007/66/EC and CJEU cases C-81/98, Alcatel v. Austria 1 and 2.

procurement procedure⁶⁷. This contract award notice shall be sent no later than 30 days after the conclusion of the contract and shall contain the information set out in Annex V, part D, of the directive. Notices shall be published no later than five days after they are sent.

The new directive has shortened the timeframe to produce this notice.

Contracting authorities may group notices on contracts based on dynamic purchasing on a quarterly basis and Member States may require them to publish, on a quarterly basis, contract award notices relating to the award of contracts under framework agreements.

Certain information may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

Contracting authorities must also draw up a written report for every contract or framework agreement and every time a dynamic purchasing system is established⁶⁸. The content requirements of the report include, among other aspects, the subject matter and value, the substantiation of the choice of procedure, the results of qualitative selection, the reasons for rejection of tenders, identified conflicts of interests, the identification of the selected tender and the reasons for the selection. They must also keep documentation concerning all the decisions taken during the process.

The report, or its main elements, shall be communicated to the European Commission or the national monitoring authorities, bodies or structures where they so request⁶⁹.

Contracting authorities no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for contracting authorities.

17. CONTRACT PERFORMANCE

Subcontracting

The provisions on subcontracting under the new directive are much more extensive than in the previous directives. As before, contracting authorities are allowed or required to request that a

⁶⁷ See articles 50 and 51.

⁶⁸ See article 84.

⁶⁹ See also article 83.

tenderer indicates any share of the contract that it intends to subcontract and any proposed subcontractors. But article 71 includes now other provisions related to subcontracting.

The main contractor is required to provide details of subcontractors, and changes in subcontractors, working at a facility under the direct oversight of the contracting authority. This requirement applies after the award of the contract and at the latest by the time the performance of the contract commences. Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.

Compliance with obligations under environmental, social and labour law and other grounds for exclusion includes, where applicable, mechanisms of joint liability and verification that the relevant grounds for exclusion do not apply to subcontractors. It also concerns obligations on the main contractor to replace a subcontractor that is subject to other grounds for exclusion.

Member States may put into place measures permitting direct payment by the contracting authority to a subcontractor, with or without a request from the subcontractor.

It is unclear whether it is permissible under the directive for contracting authorities to require the subcontracting of a specific minimum or maximum share of a contract.

Modification of contracts during their term

The 2004 directive had very limited provisions concerning the modification of contracts during their term. Those provisions related to circumstances where the use of the negotiated procedure without prior publication of a contract notice was allowed. Article 72 of the current directive includes far more extensive provisions, some of which are linked to and expand upon CJEU case law.

This is a risk area that auditors should look into. As mentioned in Annex XI, 20% of errors found in public procurement processes relate to amendments to contracts. These include unjustified substantial modifications to contracts without a new procurement procedure.

In principle, a new procurement procedure is required in cases of material or substantial changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is particularly the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications to contracts without the need to carry out a new procurement procedure are considered as acceptable as long as they comply with the relevant conditions laid down in the directive, which are briefly described below. They mainly relate to minor changes below defined thresholds, modifications already envisaged by review or options clauses, replacements or extension of existing services, supplies or installations, unforeseen external circumstances and internal reorganisation of undertakings.

However, most exceptions will not apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.

Under the 2014 directive, contracts or framework agreements may be modified without a new procurement procedure in six circumstances:

1. *Where the modifications have been provided for in the initial procurement documents.*

Review clauses must be clear, precise and unequivocal and they must state the scope and nature of possible modifications or options as well as the conditions under which they may be used. The clauses shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement and they can refer to price revision or options.

2. *For additional necessary works, service or supplies where a change of contractor cannot be made* for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority.

Any increase in price shall not exceed 50% of the value of the original contract for each modification. Any consecutive modifications must not aim at circumventing the application of public procurement rules.

3. *Where the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee.*

This modification is permitted where it does not alter the overall nature of the contract and the increase in price is not higher than 50% of the value of the original for each modification. Any consecutive modifications must not aim at circumventing the application of public procurement rules.

4. *Where a new contractor replaces the one to which the contracting authority had initially awarded the contract* as a consequence of either:

- (i) An unequivocal review clause or option;
- (ii) Universal or partial succession into the initial contractor following corporate restructuring e.g. takeover, merger;
- (iii) If the contracting authority assumes the contractors obligations towards its subcontractors.

5. *Where the modifications, irrespective of their value, are not substantial.*

Substantial modifications are changes that make the contract materially different in character from the original contract. Article 72(4) includes a non-exhaustive list of modifications that will always be considered as substantial and will therefore require a new procurement procedure, such as:

- (i) The modification introduces conditions which had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected, acceptance of a tender other than that originally selected or would have attracted additional participants in the procurement procedure;
- (ii) The modification changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract;
- (iii) The modification extends the scope of the contract considerably;
- (iv) Where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under item above.

6. *Low value modifications.*

Modifications representing values below 10% of the initial contract value for service and supply contracts or below 15% of the initial contract value for works contracts, all below the thresholds set out in Article 4, may be introduced even if they are considered as substantial. However, they cannot alter the overall nature of the contract. In this case, where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

Termination of contracts

The 2014 directive includes new provisions covering circumstances where contracting authorities have the possibility of terminating a contract. These circumstances are described in article 73.

Member States should ensure that a contract may be terminated at least under the following circumstances and under the conditions determined by the applicable national law:

- Where it has been subject to a substantial modification that would have required a new procurement procedure;
- Where one of the mandatory grounds for exclusion listed in article 57(1) applied to the contractor at the time of the contract award, and
- Where the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive that has been declared by the CJEU.

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**EU PUBLIC SECTOR PROCUREMENT DIRECTIVE
2014/24/EU**

**GUIDELINE FOR AUDITORS
APPENDICES**

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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.

Exclusion grounds: reasons for the Contracting Authority to exclude an economic operator from participation in a procurement procedure. Among those reasons are participation in a criminal organisation, corruption, fraud, terrorist offences or offences linked to terrorist activities, money laundering or terrorist financing, child labour and other forms of trafficking in human beings.

Open procedure: In open procedures, any interested economic operator may submit a tender in response to a call for competition.

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 57 to 64 of Directive 2014/24/EU) 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 OJEU IS OBLIGATORY, APPLICABLE FROM 1 JANUARY 2018 TO 31 DECEMBER 2019⁷⁰**

Works	
€ 5,548,000	Threshold applies to Government departments and offices, local and regional authorities and other public bodies
Supplies and Services	
€ 221,000	Threshold applies to local and regional authorities and public bodies outside the utilities sector
€ 144,000	Threshold applies to Government departments and offices
Social and other specific services	
€ 750,000	
Concessions for works and services	
€ 5,548,000	

⁷⁰ Except for the threshold of € 750,000 for social and other specific services, the thresholds are revised every two years and published in the OJEU.

APPENDIX III

OVERVIEW OF SOCIAL AND OTHER SPECIFIC SERVICES REFERRED TO IN ARTICLE 74 OF DIRECTIVE 2014/24/EU

Description	CPV Code
Health, social and related services	75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 [Supply services of domestic help personnel]; 79624000-4 [Supply services of nursing personnel] and 79625000-1 [Supply services of medical personnel] from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 [Private households with employed persons] and 98513000-2 to 98514000-9 [Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services]
Administrative social, educational, healthcare and cultural services	85321000-5 and 85322000-2, 75000000-6 [Administration, defence and social security services], 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8 79950000-8 [Exhibition, fair and congress organisation services], 79951000-5 [Seminar organisation services], 79952000-2 [Event services], 79952100-3 [Cultural event organisation services], 79953000-9 [Festival organisation services], 79954000-6 [Party organisation services], 79955000-3 [Fashion shows organisation services], 79956000-0 [Fair and exhibition organisation services]
Compulsory social security services (1)	75300000-9
Benefit services	75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1
Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services	98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3
Religious services	98131000-0
Hotel and restaurant services	55100000-1 to 55410000-7; 55521000-8 to 55521200-0 [55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service] 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other

Description	CPV Code
	enterprises or other institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services
Legal services, to the extent not excluded pursuant to point (d) of Article 10	79100000-5 to 79140000-7; 75231100-5;
Other administrative services and government services	75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3
Provision of services to the community	75200000-8 to 75231000-4
Prison related services, public security and rescue services to the extent not excluded pursuant to point (h) of Article 10	75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 79430000-7; 98113100-9
Investigation and security services	79700000-1 to 79721000-4 [Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services] 79722000-1 [Graphology services], 79723000-8 [Waste analysis services]
International services	98900000-2 [Services provided by extra-territorial organisations and bodies] and 98910000-5 [Services specific to international organisations and bodies]
Postal services	64000000-6 [Postal and telecommunications services], 64100000-7 [Post and courier services], 64110000-0 [Postal services], 64111000-7 [Postal services related to newspapers and periodicals], 64112000-4 [Postal services related to letters], 64113000-1 [Postal services related to parcels], 64114000-8 [Post office counter services], 64115000-5 [Mailbox rental], 64116000-2 [Post-restante services], 64122000-7 [Internal office mail and messenger services]
Miscellaneous services	50116510-9 [Tyre-remoulding services], 71550000-8 [Blacksmith services]

(1) These services are not covered by the Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.

APPENDIX IV

GUIDANCE FOR AUDITORS ON PUBLIC CONTRACTS FALLING OUTSIDE THE SCOPE OF THE PUBLIC PROCUREMENT DIRECTIVES

Principles to be observed on procuring public contracts falling outside the scope of the Public Procurement Directive

- 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

Audit guidance

The auditor should aim to ensure 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 used, the approach may vary according to the risks encountered, e.g. the value of the tender, type of contract, experience (or lack of it) of the contracting authority.

Checks recommended during the audit process:

Pre-tender stage, issue of documents:

- Has there been sufficient advertising?
- Was there segmentation into smaller tenders? Is it clear that the segmentation was used with no intention of excluding the procurement from the scope of the directive?
- Has the tender procedure chosen complied with the principles mentioned above?
- Were no brand names or other references used (as these favour or eliminate potential providers or services)?
- Have principles been respected?

Evaluation stage:

- Was there a basis for rejecting candidates (unsuitability, financial soundness, technical capacity)?
- Have principles been consistently applied?
- Have decisions been properly verified and documented?
- Have the specified timeframes been observed?
- Have the announced criteria been respected and applied?
- Have there been any complaints submitted by any of the tenderers? Investigate.

APPENDIX V

PUBLIC SECTOR TIMESCALES⁷¹

1. Minimum time limits for open procedures laid down in Directive 2014/24/EU

Minimum time limit for the receipt of tenders			
Normal minimum time limit ⁷²	In case of urgency ⁷³	If tenders may be submitted by electronic means ⁷⁴	When a PIN ⁷⁵ has been used ⁷⁶
35	15	30	15

2. Minimum time limits for restricted procedures laid down in Directive 2014/24/EU

Minimum time limit for receipt of requests to participate		Minimum time limit for the receipt of tenders (*)			
Normal minimum time limit ⁷⁷	In case of urgency ⁷⁸	Normal minimum time limit ⁷⁹	In case of urgency ⁸⁰	When a PIN has been used ⁸¹	If tenders may be submitted by electronic means ⁸²
30	15	30	10	10	25

(*) In restricted procedures, Member States may provide that sub-central contracting authorities (*i.e.* local and regional government authorities) may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders. In the absence of agreement on the time limit for the receipt of tenders, the time limit has to be at least 10 days from the date on which the invitation to tender was sent.⁸³

⁷¹ Source: Constant DE KONINCK, Thierry RONSE and William TIMMERMANS, *European Public Procurement Law. The public sector procurement directive 2014/24/EU explained through 30 years of case law by the Court of Justice of the European Union* (second edition), Kluwer Law International, Alphen a/d Rijn, 2015, pp. 8-10.

⁷² See article 27, paragraph 1, second subparagraph.

⁷³ See article 27, paragraph 3.

⁷⁴ See article 27, paragraph 4 *inuncto* paragraph 1, second subparagraph.

⁷⁵ Prior Information Notice (see article 48).

⁷⁶ See article 27, paragraph 2 *inuncto* paragraph 1, second subparagraph.

⁷⁷ See article 28, paragraph 1, second subparagraph.

⁷⁸ See article 28, paragraph 6, (a).

⁷⁹ See article 28, paragraph 2, second subparagraph.

⁸⁰ See article 28, paragraph 6, (b).

⁸¹ See article 28, paragraph 3 *inuncto* paragraph 2, second subparagraph.

⁸² See article 28, paragraph 5 *inuncto* paragraph 2, second subparagraph.

⁸³ See article 28, paragraph 4.

3. Minimum time limits when using the competitive procedure with negotiation, laid down in Directive 2014/24/EU

Minimum time limit for receipt of requests to participate		Minimum time limit for the receipt of tenders (**)			
Normal minimum time limit ⁸⁴	In case of urgency ⁸⁵	Normal minimum time limit ⁸⁶	In case of urgency ⁸⁷	When a PIN has been used ⁸⁸	If tenders may be submitted by electronic means ⁸⁹
30	15	30	10	10	25

(**) When using the competitive procedure with negotiation, Member States may provide that sub-central contracting authorities (*i.e.* local and regional government authorities) may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders. In the absence of agreement on the time limit for the receipt of tenders, the time limit has to be at least 10 days from the date on which the invitation to tender was sent.⁹⁰

4. Minimum time limits for competitive dialogue and innovation partnership, laid down in Directive 2014/24/EU

	Minimum time limit for receipt of requests to participate	Minimum time limit for the receipt of initial tenders
Competitive dialogue	30 ⁽⁹¹⁾	No explicit time limits specified for submission of initial/subsequent tenders
Innovation partnership	30 ⁽⁹²⁾	No explicit time limits specified for submission of initial/subsequent tenders

⁸⁴ See article 29, paragraph 1, fourth subparagraph.

⁸⁵ See article 29, paragraph 1, fourth subparagraph (*in fine*) *iuncto* Article 28, paragraph 6, (a).

⁸⁶ See article 29, paragraph 1, fourth subparagraph.

⁸⁷ See article 29, paragraph 1, fourth subparagraph (*in fine*) *iuncto* Article 28, paragraph 6, (b).

⁸⁸ See article 29, paragraph 1, fourth subparagraph (*in fine*) *iuncto* Article 28, paragraph 3.

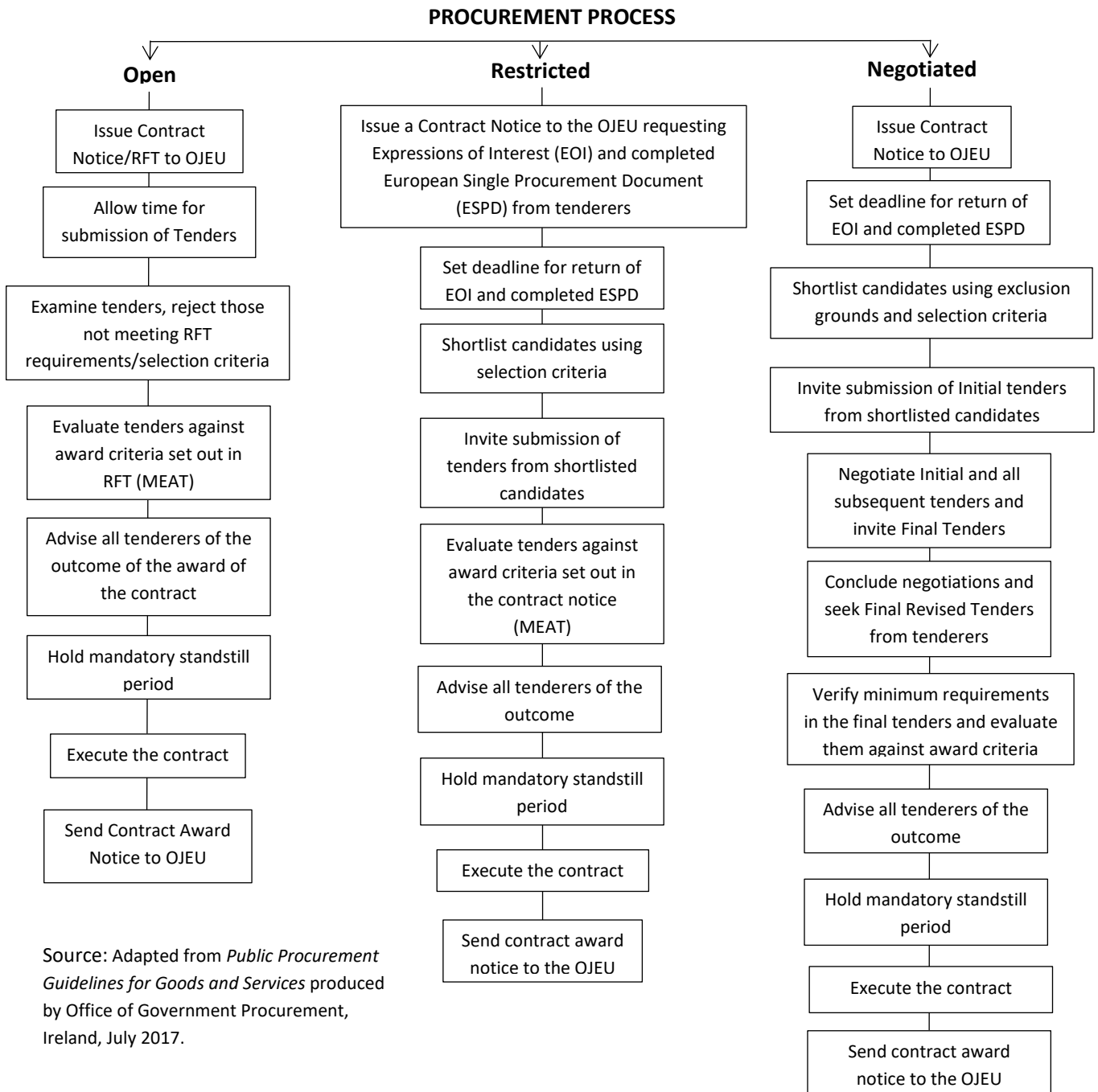
⁸⁹ See article 29, paragraph 1, fourth subparagraph (*in fine*) *iuncto* Article 28, paragraph 5.

⁹⁰ See article 29, paragraph 1, subparagraph 4 (*in fine*) *iuncto* Article 28, paragraph 4.

⁹¹ See article 30, paragraph 1, second subparagraph.

⁹² See article 31, paragraph 1, fourth subparagraph.

APPENDIX VI STEPS IN CONDUCTING A COMPETITIVE PROCESS FOR CONTRACTS ABOVE EU THRESHOLDS (OPEN, RESTRICTED AND NEGOTIATED PROCEDURES) (DIAGRAM)



Source: Adapted from *Public Procurement Guidelines for Goods and Services* produced by Office of Government Procurement, Ireland, July 2017.

APPENDIX VII

INFORMATION SOURCES ON PUBLIC PROCUREMENT

Guidelines and Directives

Directive 2014/24/EU covers the procurement of public sector bodies. Directive 2014/25/EU covers the procurement by entities operating in the water, energy, transport and postal services sectors. Directive 2014/23/EU covers the award of concession contracts. These Directives were published in OJEU No L 94 of 28 March 2014 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://ted.europa.eu/TED/main/HomePage.do>.

Other relevant websites

- EU Public Procurement website: https://ec.europa.eu/growth/single-market/public-procurement_en
- European Commission information on ESPD and E-CERTIS: https://ec.europa.eu/growth/single-market/public-procurement/e-procurement/espd_en
- ESPD: <https://ec.europa.eu/tools/espd>
- E-CERTIS: <https://ec.europa.eu/tools/ecertis/search>
- Electronic invoicing: https://ec.europa.eu/growth/single-market/public-procurement/e-procurement/e-invoicing_en and <https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2017/10/16/Publication+of+the+European+Standard+on+eInvoicing>
- Electronic procurement: Golden Book of e-procurement practices: <http://ec.europa.eu/DocsRoom/documents/15443/attachments/1/translations/>
- Innovation in public procurement: http://ec.europa.eu/growth/content/targeted-consultation-draft-guidance-public-procurement-innovation_en and https://www.innovation-procurement.org/fileadmin/editor-content/Guides/PPI-Platform_Guide_new-final_download.pdf

- General EU website: <http://europa.eu>
- WTO site on the 2014 revised 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 VIII

DIRECTIVE 2014/23/EU, ON THE AWARD OF CONCESSION CONTRACTS

Directive 2014/23/EU, of 26 February 2014, on the award of concession contracts, is the first specific legal framework at EU level governing the award and execution of concessions contracts.

Prior to this, the award of public works concessions was subject to the basic rules of Directive 2004/18/EC. The award of services concessions with a cross-border interest was subject to the principles of the Treaty on the Functioning of the European Union (TFEU), in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

Difficulties related to the divergent interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the CJEU. This legal uncertainty and the absence of clear rules at EU level led to obstacles to the free provision of services and caused distortions in the functioning of the internal market. Therefore, the definition of concession had to be clarified, in particular by referring to the concept of operating risk.

Member States now have at their disposal a legal framework for the award of concessions. This framework should ensure effective and non-discriminatory access to the market to all EU economic operators and greater legal certainty, favouring public investments in infrastructures and strategic services to the citizen.

Definition of concession

Concessions are contracts for pecuniary interest, whereby one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators.

Broadly speaking, the contracting authorities are State, Regional or Local Authorities or bodies governed by public law, while contracting entities are authorities or operators in the utilities sector exercising one of the relevant activities and awarding a concession for carrying them out.

The main feature of a concession, the right to exploit the works or services, must always imply the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions.

An operating risk should stem from factors that are outside the control of the parties, like the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk.

Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit.

The duration of a concession should be limited (5 years) in order to avoid market foreclosure and restriction of competition. However, a longer duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract.

This Directive applies only to concession contracts whose value is equal to or greater than EUR 5.225.000. The value of a concession is the total turnover of the concessionaire generated over the duration of the contract, net of VAT. The threshold is to be revised every two years by the Commission.

Principles for the award of concessions

Contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire. However, in order to ensure equal treatment and transparency throughout the awarding process, it is appropriate to provide for basic guarantees as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, the dissemination of information to candidates and tenderers and the availability of appropriate records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.

Contracting authorities or contracting entities should assess tenders on the basis of one or several award criteria. In order to ensure transparency and equal treatment, criteria for the award of concessions should always comply with some general standards. Those standards may refer to factors that are not purely economic, but influence the value of a tender from the point of view of the contracting authority or contracting entity and permit it to identify an overall economic advantage to the contracting authority or the contracting entity.

The criteria should be disclosed in advance to all potential candidates or tenderers, be related to the subject-matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice. It should be possible to include in award criteria, inter alia, environmental, social or innovation-related criteria.

The choice of proportionate, non-discriminatory and fair selection criteria, and their application to economic operators is crucial for the operators' effective access to the economic opportunities related to concessions.

In view of the detrimental effects on competition, the award of concessions without prior publication should only be permitted in exceptional circumstances.

Rules relating to the performance of the contract

Although the title of the directive concerns the award of concession contracts, it also contains rules relating to the performance of such contracts. This includes subcontracting, modification of contracts in progress, termination of concessions and control.

Compliance with environmental and social obligations also applies to subcontractors. In this respect, it is for the national authorities to take measures within their remit, such as labour inspection agencies or environmental protection agencies.

The directive lists a number of cases where concessions can be amended without a new award procedure. These provisions take into account the fact that concession contracts generally involve complex and long-term technical and financial mechanisms. It is therefore necessary to provide minimum thresholds below which a new allocation procedure is not required.

The directive lists the conditions allowing contracting authorities to terminate a concession when they are confronted with special circumstances.

Finally, the directive provides for the monitoring of the application of the rules for the award of concessions and the publication of the results of those checks.

Transposition

Member States had until 18 April 2016 to transpose Directive 2014/23/EU into their national legislation.

For more information, see: Directive 2014/23/EU on the award of concession contracts

APPENDIX IX

DIRECTIVE 2009/81/EC, ON THE AWARD OF CONTRACTS IN THE FIELDS OF DEFENCE AND SECURITY

The 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, entered into force on 21 August 2009. This directive was meant to become the cornerstone of a truly European Defence Market, supporting the development of the European defence-related supplier base. Until then, the vast majority of defence and sensitive security procurement contracts have been exempted from the Internal Market rules.

One of the reasons for this was that the existing EU procurement rules were 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.

The directive provides Member States with European 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 opened 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 directive's rules apply to the procurement of weapons, 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 346 TFEU 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.

For more information, see: https://ec.europa.eu/growth/sectors/defence/defence-firearms-directives_en#procurementdir

APPENDIX X(A)

CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION CONCERNING
PUBLIC PROCUREMENT (1982-2017) – SUBJECT INDEX⁹³

A

Abnormally low tender

- Judgment of 10 February 1982, Case 76/81, Transporoute
- Judgment of 22 June 1989, Case 103/88, Fratelli Costanzo
- Judgment of 27 November 2001, Joined Cases C-285/99 and C-286/99, Lombardini and Mantovani
- Judgment of 15 May 2008, Joined Cases C-147/06 and C-148/06, SECAP and Santorso
- Judgment of 29 March 2012, Case C-599/10, SAG ELV Slovensko

Advertising (obligations regarding-)

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 24 January 1995, Case C-359/93, Commission v. the Netherlands (UNIX)
- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 22 April 2010, Case C-423/07, European Commission v. Spain (Public works concession for

Alternatives proposed by tenderers (taking into account by the contracting authority of-)

- Judgment of 22 June 1993, Case C-243/89, Commission v. Denmark (Storebaelt)
- Judgment of 25 April 1996, Case C-87/94, Commission v. Belgium (Walloon buses)

Artificial splitting of a single work

- Judgment of 5 October 2000, Case C-16/98, Commission v. France (Electrification works in the Vendée region)

⁹³ Source: Constant DE KONINCK, Thierry RONSE and William TIMMERMANS, *European Public Procurement Law. The public sector procurement directive 2014/24/EU explained through 30 years of case law by the Court of Justice of the European Union* (second edition), Kluwer Law International, Alphen a/d Rijn, 2015, 987p.

B***Bodies governed by public law***

- Judgment of 15 January 1998, Case C-44/96, Mannesmann Anlagenbau Austria
- Judgment of 10 November 1998, Case C-360/96, BFI Holding
- Judgment of 17 December 1998, Case C-353/96, Commission v. Ireland (Irish Forestry Board)
- Judgment of 3 October 2000, Case C-380/98, University of Cambridge
- Judgment of 1st February 2001, Case C-237/99, Commission v. France (Low-rent housing)
- Judgment of 10 May 2001, Joined Cases C-223 and C-260/99, Agorà and Excelsior
- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 27 February 2003, Case C-373/00, Adolf Truly
- Judgment of 15 May 2003, Case C-214/00, Commission v. Spain (Commercial companies under public control)
- Judgment of 22 May 2003, Case C-18/01, Riitta Korhonen
- Judgment of 16 October 2003, Case C-283/00, Commission v. Spain (Experimental educational prison of Segovia)
- Judgment of 13 January 2005, Case C-84/03, Commission v. Spain (Bodies of private law)
- Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk and Others
- Judgment of 10 April 2008, Case C-393/06, Ing. Aigner, Wasser-Wärme-Umwelt v. Fernwärme Wien
- Judgment of 11 June 2009, Case C-300/07, Hans & Christophorus Oymanns, Orthopädie Schuhtechnik
 - Judgment of 12 September 2013, Case C-526/11, Ärztekammer Westfalen-Lippe

C***Capacity of other entities (reliance on the-)***

- Judgment of 14 April 1994, Case C-389/92, Ballast Nedam Groep (I)—
- Judgment of 18 December 1997, Case C-5/97, Ballast Nedam Groep (II)—
- Judgment of 2 December 1999, Case C-176/98, Holst Italia Judgment of 18 March 2004, Case C-314/01, Siemens and ARGE Telekom
- Judgment of 10 October 2013, Case C-94/12, Swm Costruzioni
- Judgment of 7 April 2016, Case C-324/14, Partner Apelski Dariusz
- Judgment of 2 June 2016, Case C-27/15, Pizzo

Combination/consortium of tenderers (change in combination of-)

- Judgment of 23 January 2003, Case C-57/01, Makedoniko Metro

- Judgment of 24 May 2016, Case C-396/14, Højgaard and Züblin

Contract award criteria

- Judgment of 28 March 1985, Case 274/83, Commission v. Italy (Criterion of the average price)
- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 28 March 1995, Case C-324/93, Evans Medical
- Judgment of 25 April 1996, Case C-87/94, Commission v. Belgium (Walloon buses)—
- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)—
- Judgment of 18 October 2001, Case C-19/00, SIAC Construction Judgment of 17 September 2002, Case C-513/99, Concordia Bus Finland
- Judgment of 19 June 2003, Case C-315/01, GAT
- Judgment of 16 October 2003, Case C-421/01, Traunfellner
- Judgment of 4 December 2003, Case C-448/01, EVN and Wienstrom
- Judgment of 7 October 2004, Case C-247/02, Sintesi
- Judgment of 14 October 2004, Case C-340/02, Commission v. France (Study contract for assistance to the maître d'ouvrage)
- Judgment of 27 October 2005, Case C-234/03, Contse
- Judgment of 24 November 2005, Case C-331/04, ATI EAC e Viaggi di Maio Judgment of 24 January 2008, Case C-532/06, Lianakis
- Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)
- Judgment of 26 March 2015, Case C-601/13, Ambisig
- Judgment of 14 July 2016, Case C-6/14, Dimarso

Contract award criteria (social considerations as-)

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Contract award criteria (environmental considerations as -)

- Judgment of 17 September 2002, Case C-513/99, Concordia Bus Finland Judgment of 10 April 2003, Joined Cases C-20/01 and C-28/01, Commission v. Germany (Waste disposal)

in Braunschweig)

- Judgment of 4 December 2003, Case C-448/01, EVN and Wienstrom
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Contract award criteria must be stated in contract notice or contract documents

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 16 October 2003, Case C-421/01, Traunfellner
- Judgment of 14 October 2004, Case C-340/02, Commission v. France (Study contract for assistance to the maître d'ouvrage)
- Judgment of 24 November 2005, Case C-331/04, ATI EAC e Viaggi di Maio
- Judgment of 24 January 2008, Case C-532/06, Lianakis
- Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)

Contract award criterion (selection criterion used as a-)

- Judgment of 19 June 2003, Case C-315/01, GAT
- Judgment of 24 January 2008, Case C-532/06, Lianakis
- Judgment of 12 November 2009, Case C-199/07, European Commission v Greece (Terms and conditions appearing in a contract notice issued by the public entity)
- Judgment of 26 March 2015, Case C-601/13, Ambisig

Contract specifications (amendment of - by the contracting authority)

- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Contracting authorities

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 26 April 1994, Case C-272/91, Commission v. Italy (Loto)
- Judgment of 15 January 1998, Case C-44/96, Mannesmann Anlagenbau Austria Judgment of 17 September 1998, Case C-323/96, Commission v. Belgium (Flemish Parliament)
- Judgment of 10 November 1998, Case C-360/96, BFI Holding
- Judgment of 17 December 1998, Case C-353/96, Commission v. Ireland (Irish Forestry Board)
- Judgment of 18 November 1999, Case C-107/98, Teckal

- Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia
- Judgment of 3 October 2000, Case C-380/98, University of Cambridge
- Judgment of 7 December 2000, Case C-94/99, ARGE Gewässerschutz
- Judgment of 1st February 2001, Case C-237/99, Commission v. France (Low-rent housing)
- Judgment of 10 May 2001, Joined Cases C-223 and C-260/99, Agorà and Excelsior
- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 27 February 2003, Case C-373/00, Adolf Truly
- Judgment of 15 May 2003, Case C-214/00, Commission v. Spain (Commercial companies under public control)
- Judgment of 22 May 2003, Case C-18/01, Riitta Korhonen
- Judgment of 16 October 2003, Case C-283/00, Commission v. Spain (Experimental educational prison of Segovia)
- Judgment of 18 November 2004, Case C-126/03, Commission v. Germany (Transport of waste)
- Judgment of 13 January 2005, Case C-84/03, Commission v. Spain (Bodies of private law)
- Judgment of 20 October 2005, Case C-264/03, Commission v. France (Task of delegated project contracting)
- Judgment of 10 November 2005, Case C-29/04, Commission v. Austria (Waste disposal in Modling)
- Judgment of 6 April 2006, Case C-410/04, ANAV
- Judgment of 19 April 2007, Case C-295/05, ASEMFO
- Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk and Others
- Judgment of 10 April 2008, Case C-393/06, Ing. Aigner, Wasser-Wärme-Umwelt v. Fernwärme Wien
- Judgment of 11 June 2009, Case C-300/07, Hans & Christophorus Oymanns, Orthopädie Schuhtechnik
- Judgment of 12 September 2013, Case C-526/11, Ärztekammer Westfalen-Lippe

Contracts falling outside the scope of the public procurement directives

- Judgment of 19 April 1994, Case C-331/92, Gestion Hotelera Internacional
- Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia
- Order of the Court of 3 December 2001, Case C-59/00, Bent Moustén Vestergaard
- Judgment of 20 October 2005, Case C-264/03, Commission v. France (Task of delegated project contracting)
- Judgment of 14 June 2007, Case C-6/05, Medipac

- Judgment of 13 September 2007, Case C-260/04, European Commission v. Italy (Renewal of horse-race betting licences)
- Judgment of 13 November 2007, Case C-507/03, European Commission v Ireland (An Post)
- Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk and Others
- Judgment of 18 December 2007, Case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia
- Judgment of 21 February 2008, Case C-412/04, European Commission v. Italy (Italian rules on mixed contracts)
- Judgment of 15 May 2008, Joined Cases C-147/06 and C-148/06, SECAP and Santorso
- Judgment of 15 October 2009, Case C-196/08, Acoset
- Judgment of 23 December 2009, Case C-376/08, Serrantoni and Consorzio stabile edili
- Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)
- Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici
- Judgment of 11 December 2014, Case C-113/13, Azienda sanitaria locale n. 5 «Spezzino»
- Judgment of 16 April 2015, Case C-278/14, Enterprise Focused Solutions
- Judgment of 22 October 2015, Case C-425/14, Impresa Edilux

Contracts in the fields of defence and security

- Judgment of 8 April 2008, Case C-337/05, European Commission v. Italian Republic (Agusta and Agusta Bell helicopters)— Judgment of 2 October 2008, Case C-157/06, European Commission v. Italy (Light helicopters for the police and the national fire service)
- Judgment of 7 June 2012, Case C-615/10, Engineering firm InsTiimi

Contracts of certain cross-border interest

- Judgment of 13 November 2007, Case C-507/03, European Commission v Ireland (An Post)
- Judgment of 21 February 2008, Case C-412/04, European Commission v. Italy (Italian rules on mixed contracts)
- Judgment of 15 May 2008, Joined Cases C-147/06 and C-148/06, SECAP and Santorso
- Judgment of 23 December 2009, Case C-376/08, Serrantoni and Consorzio stabile edili
- Judgment of 13 April 2010, Case C-91/08, Wall AG
- Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)
- Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici

- Judgment of 11 December 2014, Case C-113/13, Azienda sanitaria locale n. 5 «Spezzino»
- Judgment of 16 April 2015, Case C-278/14, Enterprise Focused Solutions
- Judgment of 22 October 2015, Case C-425/14, Impresa Edilux

Cooperation between public entities

- Judgment of 13 January 2005, Case C-84/03, Commission v. Spain (Bodies of private law)
- Judgment of 9 June 2009, Case C-480/06, European Commission v. Germany (Cooperation between local authorities)
- Judgment of 19 December 2012, Case C-159/11, Azienda Sanitaria Locale di Lecce
- Judgment of 13 June 2013, Case C-386/11, Piepenbrock
- Judgment of 8 May 2014, Case C-15/13, Technische Universität Hamburg
- Judgment of 21 December 2016, Case C-51/15, Remondis

D

Decision not to award a contract

- Judgment of 16 September 1999, Case C-27/98, Metalmeccanica Fracasso and Leitschutz
- Judgment of 18 June 2002, Case C-92/00, Hospital Ingenieure (HI)
- Judgment of 11 December 2014, Case C-440/13, Croce Amica One Italia

Design contest

- Judgment of 14 October 2004, Case C-340/02, Commission v. France (Study contract for assistance to the maître d'ouvrage)

Distortion of competition

- Judgment of 7 December 2000, Case C-94/99, ARGE Gewässerschut
- Judgment of 3 March 2005, Joined Cases C-21/03 and C-34/03, Fabricom
- Judgment of 18 December 2014, Case C-568/13, Data Medical Service

Documents (contracting authority asking to provide non enclosed tender -)

- Judgment of 10 October 2013, Case C-336/12, Manova
- Judgment of 6 November 2014, Case C-42/13, Cartiera dell'Adda

E

Economic operators

- Judgment of 12 July 2001, Case C-399/98, Ordine degli Architetti (Teatro alla Scala)
- Judgment of 18 November 2004, Case C-126/03, Commission v. Germany (Transport of waste)
- Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi

- Judgment of 23 December 2009, Case C-305/08, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)
- Judgment of 18 December 2014, Case C-568/13, Data Medical Service
- Judgment of 6 October 2015, Case C-203/14, Consorci Sanitari del Maresme

Employment of long-term unemployed persons

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)

Environmental obligations and considerations

- Judgment of 17 September 2002, Case C-513/99, Concordia Bus Finland
- Judgment of 10 April 2003, Joined Cases C-20/01 and C-28/01, Commission v. Germany (Waste disposal in Braunschweig)
- Judgment of 4 December 2003, Case C-448/01, EVN and Wienstrom
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Estimated value of public contracts

- Judgment of 5 October 2000, Case C-16/98, Commission v. France (Electrification works in the Vendée region)
- Judgment of 18 January 2007, Case C-220/05, Jean Auroux
- Judgment of 21 February 2008, Case C-412/04, European Commission v. Italy (Italian rules on mixed contracts)
- Judgment of 15 July 2010, Case C-271/08, European Commission v. Germany (old-age pensions of local authority employees)

Evaluation of tenders

- Judgment of 12 March 2015, Case C-538/13, eVigilo
- Judgment of 14 July 2016, Case C-6/14, Dimarso

Exclusion of economic operators from participating in a tendering procedure

- Judgment of 15 May 2003, Case C-214/00, Commission v. Spain (Commercial companies under public control)
- Judgment of 3 March 2005, Joined Cases C-21/03 and C-34/03, Fabricom
- Judgment of 9 February 2006, Joined Cases C-226/04 and C-228/04, La Cascina and
- Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi

- Judgment of 15 May 2008, Joined Cases C-147/06 and C-148/06, SECAP and Santorso
- Judgment of 16 December 2008, Case C-213/07,
- Judgment of 19 May 2009, Case C-538/07,
- Judgment of 23 December 2009, Case C-376/08, Serrantoni and Consorzio stabile edili
- Judgment of 23 December 2009, Case C-305/08, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)
- Judgment of 15 July 2010, Case C-74/09, Bâtiments et Ponts Construction
- Judgment of 10 May 2012, Joined Cases C-357/10 to C-359/10, Duomo
- Judgment of 13 December 2012, Case C-465/11, Forposta
- Judgment of 10 October 2013, Case C-94/12, Swm Costruzioni
- Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici
- Judgment of 6 November 2014, Case C-42/13, Cartiera dell'Adda
- Judgment of 11 December 2014, Case C-440/13, Croce Amica One Italia
- Judgment of 18 December 2014, Case C-470/13, Generali Previdencia
- Judgment of 22 October 2015, Case C-425/14, Impresa Edilux
- Judgment of 2 June 2016, Case C-27/15, Pizzo
- Judgment of 10 November 2016, Case C-199/15, Ciclat
- Judgment of 14 December 2016, Case C-171/15, Connexion Taxi Services

Exclusive rights (contracts awarded on the basis of-)

- Judgment of 10 March 1987, Case 199/85, Commission v. Italy (Solid urban waste in Milan)
- Judgment of 5 December 1989, Case 3/88, Commission v. Italy (Development of data-processing systems)
- Judgment of 26 April 1994, Case C-272/91, Commission v. Italy (Loto)
- Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia
- Judgment of 18 December 2007, Case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia

Exercise of official authority

- Judgment of 5 December 1989, Case 3/88, Commission v. Italy (Development of data-processing systems)
- Judgment of 26 April 1994, Case C-272/91, Commission v. Italy (Loto)
- Judgment of 20 October 2005, Case C-264/03, Commission v. France (Task of delegated project contracting)
- Judgment of 29 April 2010, Case C-160/08, European Commission v Germany (Emergency ambulance and qualified patient transport services)

Extreme urgency as justification for the use of a negotiated procedure

- Judgment of 10 March 1987, Case 199/85, Commission v. Italy (Solid urban waste in Milan)
- Order of the President of the Court of 27 September 1988, Case 194/88 R, Commission v. Italy (Solid urban waste in La Spezia)
- Judgment of 18 March 1992, Case C-24/91, Commission v. Spain (Universidad Complutense of Madrid)
- Judgment of 2 August 1993, Case C-107/92, Commission v. Italy (Avalanche barrier in Colle Isarco/Brennero)
- Judgment of 3 May 1994, Case C-328/92, Commission v. Spain (Pharmaceutical products and specialities)
- Judgment of 28 March 1996, Case C-318/94, Commission v. Germany (Dredging of the lower Ems)
- Judgment of 18 November 2004, Case C-126/03, Commission v. Germany (Transport of waste)
- Judgment of 2 June 2005, Case C-394/02, Commission v. Greece (Thermal-electricity generation plant at Megalopolis)

F***Fair trade products***

- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Financed for the most part, by the State, regional or local authorities, or by other bodies governed by public law

- Judgment of 3 October 2000, Case C-380/98, University of Cambridge
- Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk and Others
- Judgment of 11 June 2009, Case C-300/07, Hans & Christophorus Oymanns, Orthopädie Schuhtechnik
Judgment of 12 September 2013, Case C-526/11, Ärztekammer Westfalen-Lippe

G***Groups of economic operators***

- Judgment of 23 January 2003, Case C-57/01, Makedoniko Metro
- Judgment of 23 December 2009, Case C-376/08, Serrantoni and Consorzio stabile edili
- Judgment of 24 May 2016, Case C-396/14, Højgaard and Züblin

H***Health care services***

- Judgment of 27 October 2005, Case C-234/03, Contse
- Judgment of 22 December 2010, Case C-215/09, Mehiläinen and Terveystalo Healthcare

I***In-house exception***

- Judgment of 18 November 1999, Case C-107/98, Teckal
- Judgment of 7 December 2000, Case C-94/99, ARGE Gewässerschutz
- Judgment of 11 January 2005, Case C-26/03, Stadt Halle
- Judgment of 13 October 2005, Case C-458/03, Parking Brixen
- Judgment of 20 October 2005, Case C-264/03, Commission v. France (Task of delegated project contracting)
- Judgment of 10 November 2005, Case C-29/04, Commission v. Austria (Waste disposal in Modling)
- Judgment of 6 April 2006, Case C-410/04, ANAV
- Judgment of 11 May 2006, Case C-340/04, Carbotermo and Consorzio Alisei
- Judgment of 18 January 2007, Case C-220/05, Jean Auroux
- Judgment of 19 April 2007, Case C-295/05, ASEMFO
- Judgment of 8 April 2008, Case C-337/05, European Commission v. Italian Republic (Agusta and Agusta Bell helicopters)
- Judgment of 13 November 2008, Case C-324/07, Coditel Brabant
- Judgment of 10 September 2009, Case C-573/07, Sea
- Judgment of 29 November 2012, Joined Cases C-182/11 and C-183/11, Econord
- Judgment of 8 May 2014, Case C-15/13, Technische Universität Hamburg
- Judgment of 19 June 2014, Case C-574/12, Centro Hospitalar de Setúbal
- Judgment of 8 December 2016, Case C-553/15, Undis Servizi

L***Labels***

- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Lease

- Judgment of 29 October 2009, Case C-536/07, European Commission v. Germany (Köln Messe—Lease of land with four exhibition halls)

- Judgment of 10 July 2014, Case C-213/13, Impresa Pizzarotti

Legal form of a candidate as a selection criterion or exclusion criterion

- Judgment of 26 April 1994, Case C-272/91, Commission v. Italy (Loto)
- Judgment of 23 January 2003, Case C-57/01, Makedoniko Metro
- Judgment of 15 May 2003, Case C-214/00, Commission v. Spain (Commercial companies under public control)
- Judgment of 13 January 2005, Case C-84/03, Commission v. Spain (Bodies of private law)
- Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi
- Judgment of 23 December 2009, Case C-376/08, Serrantoni and Consorzio stabile edili

Limitation of number of candidates

- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 15 October 2009, Case C-138/08, Hochtief

Local undertakings (national rules favouring-)

- Judgment of 5 December 1989, Case 3/88, Commission v. Italy (Development of data-processing systems)
- Judgment of 20 March 1990, Case C-21/88, Du Pont de Nemours
- Judgment of 3 June 1992, Case C-360/89, Commission v. Italy (Preference to regional undertakings)
- Judgment of 22 June 1993, Case C-243/89, Commission v. Denmark (Storebaelt)

M

Management supervision by public authorities (criterion of-)

- Judgment of 15 January 1998, Case C-44/96, Mannesmann Anlagenbau Austria Board
- Judgment of 1st February 2001, Case C-237/99, Commission v. France (Low-rent housing)
- Judgment of 27 February 2003, Case C-373/00, Adolf Truly
- Judgment of 12 September 2013, Case C-526/11, Ärztekammer Westfalen-Lippe

MEAT Most economically advantageous tender

Medical transport services

- Judgment of 29 April 2010, Case C-160/08, European Commission v Germany (Emergency ambulance and qualified patient transport services)
- Judgment of 11 December 2014, Case C-113/13, Azienda sanitaria locale n. 5 «Spezzino»

- Judgment of 28 January 2016, Case C-50/14, Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA)

Minimum wages (obligation to pay)

- Judgment of 3 April 2008, Case C-346/06, Dirk Ruffert
- Judgment of 18 September 2014, Case C-549/13, Bundesdruckerei

Mixed contracts

- Judgment of 19 April 1994, Case C-331/92, Gestion Hotelera Internacional
- Judgment of 21 February 2008, Case C-412/04, European Commission v. Italy (Italian rules on mixed contracts)
- Judgment of 10 April 2008, Case C-393/06, Ing. Aigner, Wasser-Wärme-Umwelt v. Fernwärme Wien
- Judgment of 2 October 2008, Case C-157/06, European Commission v. Italy (Light helicopters for the police and the national fire service)
- Judgment of 11 June 2009, Case C-300/07, Hans & Christophorus Oymanns, Orthopädie Schuhtechnik—Directive 2004/18/EC
- Judgment of 29 October 2009, Case C-536/07, European Commission v. Germany (Köln Messe—Lease of land with four exhibition halls)
- Judgment of 6 May 2010, Joined Cases C-145/08 and C-149/08, Club Hotel Loutraki
- Judgment of 22 December 2010, Case C-215/09, Mehiläinen and Terveystalo Healthcare
- Judgment of 26 May 2011, Case C-306/08, European Commission v. Spain (Urban development of the Community of Valencia)
- Judgment of 7 June 2012, Case C-615/10, Engineering firm InsTiimi
- Judgment of 10 July 2014, Case C-213/13, Impresa Pizzarotti

Modification of contracts during their term

- Judgment of 29 April 2004, Case C-496/99 P, European Commission v. Succhi di Frutta
- Judgment of 19 June 2008, Case C-454/06, presstext Nachrichtenagentur
- Judgment of 15 October 2009, Case C-196/08, Acoset
- Judgment of 13 April 2010, Case C-91/08, Wall AG
- Judgment of 22 April 2010, Case C-423/07, European Commission v. Spain (Public works concession for motorways)
- Judgment of 29 April 2010, Case C-160/08, European Commission v. Germany (Emergency ambulance and qualified patient transport services)
- Judgment of 7 September 2016, Case C-549/14, Finn Frogne

Most economically advantageous tender

- Judgment of 28 March 1985, Case 274/83, Commission v. Italy (Criterion of the average price)
- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 28 March 1995, Case C-324/93, Evans Medical
- Judgment of 18 October 2001, Case C-19/00, SIAC Construction
- Judgment of 4 December 2003, Case C-448/01, EVN and Wienstrom
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

N

Nationality (discrimination by reason of -)

- Judgment of 5 December 1989, Case 3/88, Commission v. Italy (Development of data-processing systems)
- Judgment of 20 March 1990, Case C-21/88, Du Pont de Nemours
- Judgment of 3 June 1992, Case C-360/89, Commission v. Italy (Preference to regional undertakings)
- Judgment of 22 June 1993, Case C-243/89, Commission v. Denmark (Storebaelt)

Needs in the general interest, not having an industrial or commercial character

- Judgment of 15 January 1998, Case C-44/96, Mannesmann Anlagenbau Austria
- Judgment of 10 November 1998, Case C-360/96, BFI Holding
- Judgment of 10 May 2001, Joined Cases C-223 and C-260/99, Agorà and Excelsior
- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 27 February 2003, Case C-373/00, Adolf Truly Judgment of 22 May 2003, Case C-18/01, Riitta Korhonen

Negotiated procedure

- Judgment of 10 March 1987, Case 199/85, Commission v. Italy (Solid urban waste in Milan)
- Order of the President of the Court of 27 September 1988, Case 194/88 R, Commission v. Italy (Solid urban waste in La Spezia)
- Judgment of 18 March 1992, Case C-24/91, Commission v. Spain (Universidad Complutense of Madrid)
- Judgment of 2 August 1993, Case C-107/92, Commission v. Italy (Avalanche barrier in Colle Isarco/Brennero)
- Judgment of 3 May 1994, Case C-328/92, Commission v. Spain (Pharmaceutical products and specialities)

- Judgment of 28 March 1995, Case C-324/93, Evans Medical
- Judgment of 18 May 1995, Case C-57/94, European Commission v Italy (Rapid transit highway 'Ascolti-Mare')
- Judgment of 28 March 1996, Case C-318/94, Commission v. Germany (Dredging of the lower Ems)
- Judgment of 10 April 2003, Joined Cases C-20/01 and C-28/01, Commission v. Germany (Waste disposal in Braunschweig)
- Judgment of 16 October 2003, Case C-252/01, Commission v. Belgium (Surveillance of the national coast)
- Judgment of 14 September 2004, Case C-385/02, Commission v. Italy (Overflow basin in Parma)
- Judgment of 14 October 2004, Case C-340/02, Commission v. France (Study contract for assistance to the maître d'ouvrage)
- Judgment of 18 November 2004, Case C-126/03, Commission v. Germany (Transport of waste)
- Judgment of 13 January 2005, Case C-84/03, Commission v. Spain (Bodies of private law)
- Judgment of 2 June 2005, Case C-394/02, Commission v. Greece (Thermal-electricity generation plant at Megalopolis)
- Judgment of 8 April 2008, Case C-337/05, European Commission v. Italian Republic (Agusta and Agusta Bell helicopters)
- Judgment of 2 October 2008, Case C-157/06, European Commission v. Italy (Light helicopters for the police and the national fire service)
- Judgment of 15 October 2009, Case C-138/08, Hochtief
- Judgment of 15 July 2010, Case C-271/08, European Commission v. Germany (old-age pensions of local authority employees)
- Judgment of 5 December 2013, Case C-561/12, Nordecon
- Judgment of 28 January 2016, Case C-50/14, Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA)

P

Payment of social security contributions and taxes

- Judgment of 9 February 2006, Joined Cases C-226/04 and C-228/04, La Cascina and Zilch
- Judgment of 15 July 2010, Case C-74/09, Bâtiments et Ponts Construction
- Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici

Performance of contracts (conditions relating to the -)

- Judgment of 20 September 1988, Case 31/87, Beentjes

- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)

Preparatory work (person who has carried out certain-)

- Judgment of 3 March 2005, Joined Cases C-21/03 and C-34/03, Fabricom

Public contract (concept of “ – ”)

- Judgment of 12 July 2001, Case C-399/98, Ordine degli Architetti (Teatro alla Scala)
- Judgment of 13 January 2005, Case C-84/03, Commission v. Spain (Bodies of private law)
- Judgment of 19 April 2007, Case C-295/05, ASEMFO
- Judgment of 18 December 2007, Case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia
- Judgment of 25 March 2010, Case C-451/08, Helmut Müller
- Judgment of 11 December 2014, Case C-113/13, Azienda sanitaria locale n. 5 «Spezzino»
- Judgment of 21 December 2016, Case C-51/15, Remondis

Public private partnership

- Judgment of 15 October 2009, Case C-196/08, Acoset
- Judgment of 22 December 2010, Case C-215/09, Mehiläinen and Terveystalo Healthcare

Public service concessions

- Judgment of 7 December 2000, Case C-324/98, Telaustria Verlags
- Judgment of 21 July 2005, Case C-231/03, Coname
- Judgment of 13 October 2005, Case C-458/03, Parking Brixen
- Judgment of 6 April 2006, Case C-410/04, ANAV
- Judgment of 18 July 2007, Case C-382/05, Commission v. Italy (Municipal waste produced in the Region of Sicily)
- Judgment of 13 September 2007, Case C-260/04, European Commission v. Italy (Renewal of horse-race betting licences)
- Judgment of 13 November 2008, Case C-324/07, Coditel Brabant
- Judgment of 10 September 2009, Case C-206/08, Eurawasser
- Judgment of 15 October 2009, Case C-196/08, Acoset
- Judgment of 13 April 2010, Case C-91/08, Wall AG
- Judgment of 6 May 2010, Joined Cases C-145/08 and C-149/08, Club Hotel Loutraki

- Judgment of 10 March 2011, Case C-274/09, Privater Rettungsdienst und Krankentransport Stadler
- Judgment of 10 March 2011, Case C-348/10, Norma-A and Decom

Public service contracts

- Judgment of 14 October 2004, Case C-340/02, Commission v. France (Study contract for assistance to the maître d'ouvrage)
- Judgment of 18 November 2004, Case C-126/03, Commission v. Germany (Transport of waste)
- Judgment of 20 October 2005, Case C-264/03, Commission v. France (Task of delegated project contracting)
- Judgment of 27 October 2005, Case C-234/03, Contse
- Judgment of 18 July 2007, Case C-382/05, Commission v. Italy (Municipal waste produced in the Region of Sicily)
- Judgment of 13 December 2007, Case C-337/06, Bayerischer Rundfunk and Others
- Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi
- Judgment of 10 September 2009, Case C-206/08, Eurawasser
- Judgment of 15 October 2009, Case C-196/08, Acoset
- Judgment of 15 July 2010, Case C-271/08, European Commission v. Germany (old-age pensions of local authority employees)
- Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)
- Judgment of 22 December 2010, Case C-215/09, Mehiläinen and Terveystalo Healthcare
- Judgment of 10 March 2011, Case C-274/09, Privater Rettungsdienst und Krankentransport Stadler
- Judgment of 10 March 2011, Case C-348/10, Norma-A and Decom Judgment of 19 December 2012, Case C-159/11, Azienda Sanitaria Locale di Lecce
- Judgment of 13 June 2013, Case C-386/11, Piepenbrock
- Judgment of 11 December 2014, Case C-113/13, Azienda sanitaria locale n. 5 «Spezzino»

Public service contracts and public service concessions (distinction between-)

- Judgment of 18 July 2007, Case C-382/05, Commission v. Italy (Municipal waste produced in the Region of Sicily)
- Judgment of 10 September 2009, Case C-206/08, Eurawasser
- Judgment of 15 October 2009, Case C-196/08, Acoset

- Judgment of 10 March 2011, Case C-274/09, Privater Rettungsdienst und Krankentransport Stadler
- Judgment of 10 March 2011, Case C-348/10, Norma-A and Decom

Public supply contracts

- Judgment of 26 April 1994, Case C-272/91, Commission v. Italy (Loto)
- Judgment of 14 June 2007, Case C-6/05, Medipac
- Judgment of 8 April 2008, Case C-337/05, European Commission v. Italian Republic (Agusta and Agusta Bell helicopters)
- Judgment of 2 October 2008, Case C-157/06, European Commission v. Italy (Light helicopters for the police and the national fire service)

Public works concessions

- Judgment of 25 March 2010, Case C-451/08, Helmut Müller
- Judgment of 22 April 2010, Case C-423/07, European Commission v. Spain (Public works concession for motorways)

Public works contracts

- Judgment of 19 April 1994, Case C-331/92, Gestion Hotelera Internacional
- Judgment of 5 October 2000, Case C-16/98, Commission v. France (Electrification works in the Vendée region)
- Judgment of 12 July 2001, Case C-399/98, Ordine degli Architetti (Teatro alla Scala)
- Judgment of 18 January 2007, Case C-220/05, Jean Auroux
- Judgment of 21 February 2008, Case C-412/04, European Commission v. Italy (Italian rules on mixed contracts)
- Judgment of 29 October 2009, Case C-536/07, European Commission v. Germany (Köln Messe—Lease of land with four exhibition halls)
- Judgment of 25 March 2010, Case C-451/08, Helmut Müller
- Judgment of 6 May 2010, Joined Cases C-145/08 and C-149/08, Club Hotel Loutraki
- Judgment of 26 May 2011, Case C-306/08, European Commission v. Spain (Urban development of the Community of Valencia)
- Judgment of 8 May 2013, Joined Cases C-197/11 and C-203/11, Eric Libert and others
- Judgment of 10 July 2014, Case C-213/13, Impresa Pizzarotti
- Judgment of 25 March 2010, Case C-451/08, Helmut Müller

Q

Qualitative selection

- Judgment of 10 February 1982, Case 76/81, Transporoute
- Judgment of 9 July 1987, Joined Cases 27-29/86, CEI and Bellini

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 3 June 1992, Case C-360/89, Commission v. Italy (Preference to regional undertakings)
- Judgment of 14 April 1994, Case C-389/92, Ballast Nedam Groep (I)
- Judgment of 26 April 1994, Case C-272/91, Commission v. Italy (Loto)
- Judgment of 18 December 1997, Case C-5/97, Ballast Nedam Groep (II)
- Judgment of 2 December 1999, Case C-176/98, Holst Italia Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 7 December 2000, Case C-94/99, ARGE Gewässerschutz Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 19 June 2003, Case C-315/01, GAT
- Judgment of 18 March 2004, Case C-314/01, Siemens and ARGE Telekom
- Judgment of 27 October 2005, Case C-234/03, Contse
- Judgment of 9 February 2006, Joined Cases C-226/04 and C-228/04, La Cascina and Zilch
- Judgment of 18 December 2007, Case C-357/06, Frigerio Luigi
- Judgment of 24 January 2008, Case C-532/06, Lianakis
- Judgment of 23 December 2009, Case C-376/08, Serrantoni and Consorzio stabile edili
- Judgment of 23 December 2009, Case C-305/08, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)
- Judgment of 15 July 2010, Case C-74/09, Bâtiments et Ponts Construction
- Judgment of 10 May 2012, Joined Cases C-357/10 to C-359/10, Duomo
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)
- Judgment of 18 October 2012, Case C-218/11, Hochtief Construction
- Judgment of 13 December 2012, Case C-465/11, Forposta
- Judgment of 10 October 2013, Case C-336/12, Manova
- Judgment of 10 October 2013, Case C-94/12, Swm Costruzioni Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici
- Judgment of 6 November 2014, Case C-42/13, Cartiera dell'Adda
- Judgment of 14 January 2016, Case C-234/14, Ostas celtnieks
- Judgment of 7 April 2016, Case C-324/14, Partner Apelski Dariusz
- Judgment of 24 May 2016, Case C-396/14, Højgaard and Züblin
- Judgment of 2 June 2016, Case C-27/15, Pizzo

R***Reduction of number of suitable candidates invited to tender***

- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 15 October 2009, Case C-138/08, Hochtief

Repetition of similar works

- Judgment of 14 September 2004, Case C-385/02, Commission v. Italy (Overflow basin in Parma)

Reservations formulated by tenderer (Storebaelt)

- Judgment of 22 June 1993, Case C-243/89, Commission v. Denmark (Storebaelt)

S***Secret contracts and contracts requiring special security measures***

- Judgment of 5 December 1989, Case 3/88, Commission v. Italy
- Judgment of 16 October 2003, Case C-252/01, Commission v. Belgium (Surveillance of the national coast)

Selection criteria used as contract award criteria

- Judgment of 19 June 2003, Case C-315/01, GAT
- Judgment of 24 January 2008, Case C-532/06, Lianakis
- Judgment of 12 November 2009, Case C-199/07, European Commission v Greece (Terms and conditions appearing in a contract notice issued by the public entity)
- Judgment of 26 March 2015, Case C-601/13, Ambisig

Social considerations - Social protection of workers

- Judgment of 20 September 1988, Case 31/87, Beentjes
- Judgment of 3 April 2008, Case C-346/06, Dirk Ruffert
- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)
- Judgment of 18 September 2014, Case C-549/13, Bundesdruckerei
- Judgment of 17 November 2015, Case C-115/14, RegioPost

Social security contribution (obligations relating to the payment of-)

- Judgment of 9 February 2006, Joined Cases C-226/04 and C-228/04, La Cascina and Zilch
- Judgment of 15 July 2010, Case C-74/09, Bâtiments et Ponts Construction
- Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici
- Judgment of 10 November 2016, Case C-199/15, Ciclat

Splitting of a single work (artificial -)

- Judgment of 5 October 2000, Case C-16/98, Commission v. France (Electrification works in the Vendée region)

Studies (participation in certain preparatory - no reason for automatic exclusion)

- Judgment of 3 March 2005, Joined Cases C-21/03 and C-34/03, Fabricom

Subcontracting

- Judgment of 18 March 2004, Case C-314/01, Siemens and ARGE Telekom
- Judgment of 18 November 2004, Case C-126/03, Commission v. Germany (Transport of waste)
- Judgment of 18 September 2014, Case C-549/13, Bundesdruckerei

Sub-criteria

- Judgment of 24 November 2005, Case C-331/04, ATI EAC e Viaggi di Maio
- Judgment of 24 January 2008, Case C-532/06, Lianakis

Subsidized tenderers

- Judgment of 7 December 2000, Case C-94/99, ARGE Gewässerschutz
- Judgment of 23 December 2009, Case C-305/08, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)
- Judgment of 18 December 2014, Case C-568/13, Data Medical Service

Subsidized public contracts

- Judgment of 26 September 2013, Case C-115/12 P, France v. European Commission (Club Med in Martinique)

T

Taxes (obligations relating to the payment of -)

- Judgment of 9 February 2006, Joined Cases C-226/04 and C-228/04, La Cascina and Zilch
- Judgment of 15 July 2010, Case C-74/09, Bâtiments et Ponts Construction
- Judgment of 10 July 2014, Case C-358/12, Consorzio Stabile Libor Lavori Pubblici

Technical reasons to award a contract to a particular contractor

- Judgment of 10 March 1987, Case 199/85, Commission v. Italy (Solid urban waste in Milan)
- Judgment of 28 March 1995, Case C-324/93, Evans Medical
- Judgment of 18 May 1995, Case C-57/94, European Commission v Italy (Rapid transit highway 'Ascolti-Mare')
- Judgment of 10 April 2003, Joined Cases C-20/01 and C-28/01, Commission v. Germany (Waste disposal in Braunschweig)
- Judgment of 14 September 2004, Case C-385/02, Commission v. Italy (Overflow basin in Parma)
- Judgment of 2 June 2005, Case C-394/02, Commission v. Greece (Thermal-electricity generation plant at Megalopolis)

Technical requirements of tender specifications (tender not meeting -)

- Judgment of 22 June 1993, Case C-243/89, Commission v. Denmark (Storebaelt)
- Judgment of 25 April 1996, Case C-87/94, Commission v. Belgium (Walloon buses)
- Order of the Court of 3 December 2001, Case C-59/00, Bent Mousten Vestergaard
- Judgment of 29 March 2012, Case C-599/10, SAG ELV Slovensko
- Judgment of 5 December 2013, Case C-561/12, Nordecon
- Judgment of 12 March 2015, Case C-538/13, eVigilo

Technical specifications

- Judgment of 22 September 1988, Case 45/87, Commission v. Ireland (Dundalk water supply augmentation scheme)
- Judgment of 24 January 1995, Case C-359/93, Commission v. the Netherlands (UNIX)
- Order of the Court of 3 December 2001, Case C-59/00, Bent Mousten Vestergaard
- Judgment of 8 April 2008, Case C-337/05, European Commission v. Italian Republic (Agusta and Agusta Bell helicopters)
- Judgment of 29 March 2012, Case C-599/10, SAG ELV Slovensko
- Judgment of 10 May 2012, Case C-368/10, European Commission v. the Netherlands (Dutch coffee case)
- Judgment of 5 December 2013, Case C-561/12, Nordecon
- Judgment of 16 April 2015, Case C-278/14, Enterprise Focused Solutions
- Judgment of 14 January 2016, Case C-234/14, Ostas celtnieks

Tenders (clarification/completion/amendment of -)

- Judgment of 22 June 1993, Case C-243/89, Commission v. Denmark (Storebaelt)
- Judgment of 25 April 1996, Case C-87/94, Commission v. Belgium (Walloon buses)

- Judgment of 29 March 2012, Case C-599/10, SAG ELV Slovensko
- Judgment of 10 October 2013, Case C-336/12, Manova
- Judgment of 6 November 2014, Case C-42/13, Cartiera dell'Adda
- Judgment of 7 April 2016, Case C-324/14, Partner Apelski Dariusz

Time limits (reduction of -)

- Judgment of 26 September 2000, Case C-225/98, Commission v. France (School buildings in the Nord-Pas-de-Calais region)

Trade mark (reference to a particular -)

- Judgment of 24 January 1995, Case C-359/93, Commission v. the Netherlands (UNIX)
- Order of the Court of 3 December 2001, Case C-59/00, Bent Moustén Vestergaard

U

Urban development, land use and town and country planning

- Judgment of 12 July 2001, Case C-399/98, Ordine degli Architetti (Teatro alla Scala)
- Judgment of 18 January 2007, Case C-220/05, Jean Auroux
- Judgment of 21 February 2008, Case C-412/04, European Commission v. Italy (Italian rules on mixed contracts)
- Judgment of 25 March 2010, Case C-451/08, Helmut Müller
- Judgment of 6 May 2010, Joined Cases C-145/08 and C-149/08, Club Hotel Loutraki
- Judgment of 26 May 2011, Case C-306/08, European Commission v. Spain (Urban development of the Community of Valencia)

V

Variants

- Judgment of 25 April 1996, Case C-87/94, Commission v. Belgium (Walloon buses)
- Judgment of 16 October 2003, Case C-421/01, Traunfellner

W

Weighting of selection criteria or contract award criteria

- Judgment of 12 December 2002, Case C-470/99, Universale-Bau
- Judgment of 24 November 2005, Case C-331/04, ATI EAC e Viaggi di Maio
- Judgment of 24 January 2008, Case C-532/06, Lianakis
- Judgment of 18 November 2010, Case C-226/09, European Commission v. Ireland (contract for interpretation and translation services)
- Judgment of 14 July 2016, Case C-6/14, Dimarso

APPENDIX X(B)**CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION CONCERNING
PUBLIC PROCUREMENT (1982-2017) – SUMMARIES**

The text of this Appendix is only available in electronic format, in the following link:
http://www.tcontas.pt/pt/publicacoes/public_procurement.shtm

APPENDIX XI

EUROPEAN COURT OF AUDITORS (ECA)' ANALYSIS OF PUBLIC PROCUREMENT ERRORS

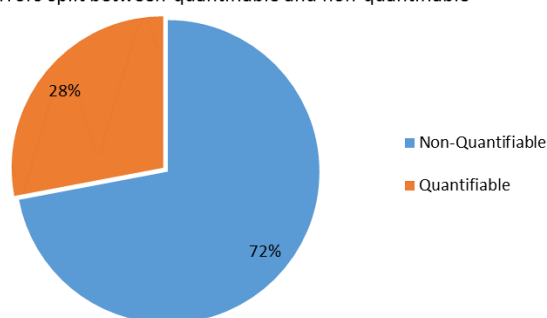
Introduction

The aim of this paper is to analyse public procurement errors that ECA found during the statement of assurance audits for the period 2013-2015. 490 public procurement procedures were tested in the area of cohesion policy, where infringements of public procurement rules contributed significantly to the estimated level of error. Within the tested procedures, slightly ca. 28% were affected by an error.

When testing a transaction, ECA's auditors always check compliance thereof with public procurement rules, if applicable. As a result, they have gathered considerable insight into which infringements with public procurement rules are made the most across all Member States.

ECA's methodology differs from the one the European Commission and Member States use. ECA reports serious infringements⁹⁴ with public procurement rules as quantifiable (100% of the tested transaction or part of it). ECA reports less serious infringements as non-quantifiable errors. On average, ECA reports as quantifiable error ca. every fourth public procurement error.

Public procurement errors split between quantifiable and non-quantifiable



Not all errors reported as a 100% ineligible payment result in a 100% financial correction; the European Commission and Member States might impose a financial correction of lower value (most likely 25%), provided there is no disagreement as to the substance of non-compliance. On the other hand, the European Commission and Member States might impose a financial correction on errors reported as non-quantifiable (most likely 25%, 10% or 5%). Due to these methodological differences, the paper analyses errors irrespective whether reported as quantifiable or not.

⁹⁴ Serious infringements are cases where tendering procedures frustrate open, fair and transparent competition i.e. the best bid does not get the tender.

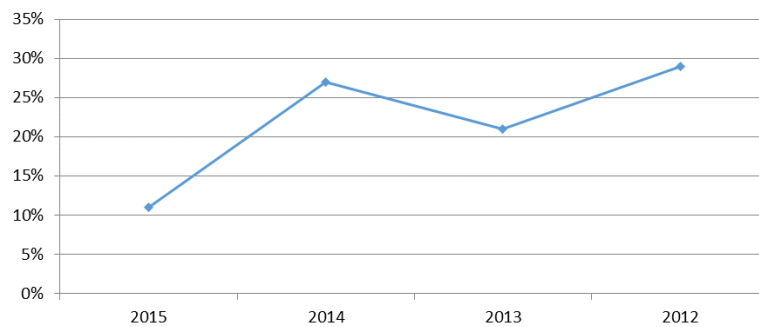
Main observations

Public procurement errors' contribution to ECA's estimated level of error for EU spending declines

Public procurement errors contribute less to ECA's estimated level of error. In 2012, almost 30% of the error rate stemmed from non-compliances with public procurement rules. In 2015, this contribution abated to some 11%.

This is accompanied by a decreasing trend of the estimated level of error ECA reports for the entire budget (from 4.8% in 2012 to 3.8% in 2015). This is also reflected by a decrease in absolute number of errors; in 2015 ECA detected ca. half of the number of errors compared to 2012.

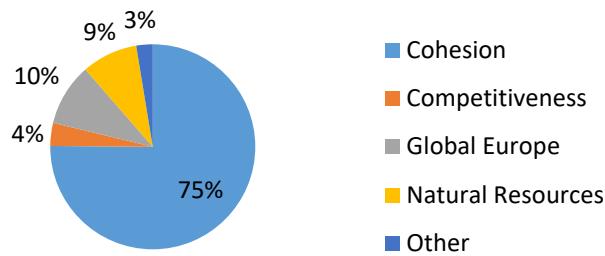
Contribution of public procurement errors to ECA's estimated level of error



Most of procurement errors are found in cohesion spending

ECA finds public procurement errors across all policy area spending, but most of them in cohesion spending. For example, in 2015, ECA tested over 300 public procurement procedures, of which ca. 40% fell in cohesion spending. This 40% part gave rise to 46% of public procurement errors. This indicates that ECA reports slightly more public procurement errors in cohesion spending than elsewhere.

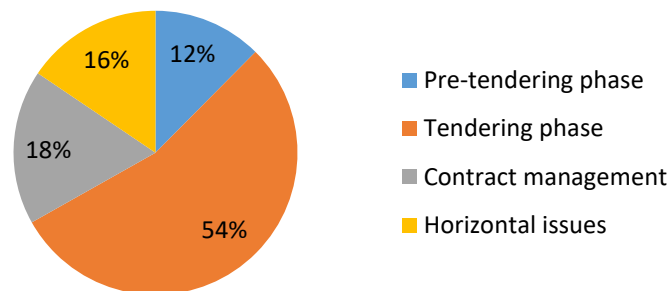
Public procurement errors by policy area



Most of the errors are found in the tendering phase

Errors are made in all phases of tender procedures. Contracting authorities made most of the errors in the tendering phase i.e. from preparation of tender documents until signing the contract and notifying contract award. Every fifth error ECA finds relates to non-compliances made during contract management phase, mainly when a contract is amended. Every sixth error covers horizontal issues that might affect all phases of the contract procedure. Lastly, ECA finds every eighth error in the pre-tendering phase, where contracting authorities incorrectly select the type of procedure to follow.

Public procurement errors in main phases of procurement procedure



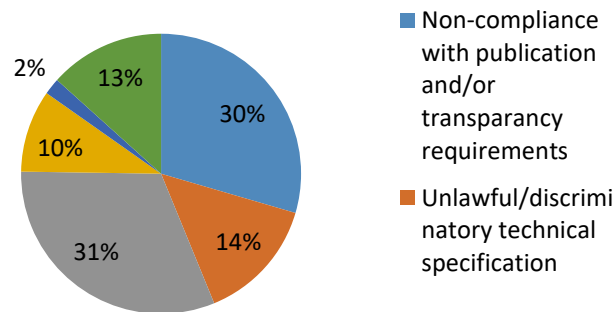
In the tendering phase, most errors result from discriminatory/unlawful selection/award criteria and non-compliances with publication and/or transparency requirements

In the tendering phase, almost a third of all errors are made because contracting authorities set up unlawful or discriminatory selection or award criteria. Although numerous, these errors are reported by ECA mostly as non-quantifiable (82%). The most serious infringements found are those where contracting authorities set up those criteria in such a way that in effect the criteria hampered the competition leading to direct award "in disguise". Less serious are those cases where contracting authorities set up

discriminatory or illegal criteria, but there was still sufficient competition maintained, or those criteria did not change the outcome of tender procedures.

30% of all errors found during this phase related to non-compliances with publication and/or transparency requirements. These cases are mostly those where contracting authorities fail to publish all required information. Most of these errors (94%) were assessed as less serious infringements of public procurement rules, and reported as non-quantifiable.

Public procurement errors in the tendering phase



In the remaining phases, less errors were reported in absolute numbers, but more serious

In the other phases of the public procurement procedures, ECA reported fewer errors, but these errors are more often serious ones (36%). Errors resulting from absence of tendering procedures and conflict of interests are almost always quantified. In case of unjustified substantial modification of the contract, ECA reported as quantifiable every second error. Lack of documentation and other errors were assessed mostly as non-quantifiable (89%).

PROCUREMENT PERFORMANCE MODEL

The Procurement Performance Model develops key questions as reference pointers for auditors evaluating the performance of the procurement function in public sector bodies.

META LEVEL – ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

- 1 Does government have an overall procurement strategy and/or policy?
- 2 Do government policies promote and/or safeguard fair competition?
- 3 Are procurement policies and practices in line with (international) good practice standards?
- 4 Is the performance of the several procurement functions/units in the different stages of the procurement process benchmarked against each other?
- 5 Are prices/qualities obtained by the several procurement functions/units compared as to highlight competitive results or improved value for money?

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT:

- 6 Are outsourcing and Public Private Partnerships considered as alternatives to in-house work?
- 7 Does the department have a procurement strategy and is it implemented?
- 8 Is the department’s procurement function/unit well organised?
- 9 Is the procurement process well organised?
- 10 Do the employees have the necessary skills and experience to carry out procurements efficiently?
- 11 Are there appropriate controls in place to ensure that procurement complies with the relevant legislation?
- 12 Are there mechanisms in place to evaluate the performance of the department’s suppliers?
- 13 Are risks managed to provide reasonable assurance regarding department procurement-objectives?
- 14 Are there regular reviews and analysis of the performance of the procurement function/unit?

MICRO LEVEL – ASSESSMENT OF A SINGLE PROCUREMENT PROJECT

- 15 Does the procurement project have a clear goal and does the goal meet the specified needs of the users?
- 16 Is the procurement project efficiently managed?
- 17 Are there appropriate controls in place to ensure that the procurement project complies with relevant legislation?

META LEVEL – ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

1. Does government have an overall procurement strategy and/or policy?

Why is this important?

Public procurement represents a significant portion of public spending and, therefore, is a powerful tool for using public money in an efficient, sustainable and strategic manner. It is a fundamental element of investment and is a crucial pillar of strategic governance and services delivery. It also plays an important role in establishing citizens' trust. For public procurement policies to produce expected results, the whole system has to be comprehensible, transparent and effective. Therefore, developing an overall government strategy and/or policy on public procurement is advisable.

Well-designed public procurement systems also contribute to achieving pressing policy goals such as environmental protection, innovation, job creation and the development of small and medium enterprises, which have been selected as priorities at the European level.

An overall strategy would facilitate a more unified approach by various government institutions and public entities. This government policy could include centralised or joint purchasing policies, performance targets for the various procuring units (e.g. on social inclusion, labour and environmental areas or on promoting innovation) and ethical guidelines related to public procurement.

Questions

Does government have an overall strategy and/or policy on public procurement, providing guidance for procuring entities?

Are the policies transparent and comprehensible for participants of the public procurement market?

Do the policies in place use public procurement in a strategic way?

Does the government policy include:

- Centralised or joint purchasing policies?
- Performance targets on value for money obtained and cost savings?
- Mechanisms to promote social, environmental and innovation objectives?
- Measures to facilitate access of SMEs to the public procurement markets?
- Ethical guidelines for public procurement?
- Provisions for obtaining overall management information on public procurement?

Is the information on procurement used to assess the achievement of the strategy/policy targets and to make amendments and updates as needed?

Guidance

- Strategic Public Procurement, European Commission, 2017 (<http://ec.europa.eu/DocsRoom/documents/25984>)
- Getting value for money from procurement / How auditors can help? – National Audit Office / Office of Government Commerce (UK)
- OECD (2017), “Central purchasing bodies”, in Government at a Glance 2017 (https://ec.europa.eu/growth/sectors/defence/defence-firearms-directives_en#procurementdir)
- Central Purchasing bodies, SIGMA, 2011 (http://www.sigmaweb.org/publications/Purchasing_Public_Procurement_2011.pdf)
- Compendium of good practices for integrity in public procurement, OECD, 2015 ([http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH\(2014\)2/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2014)2/REV1&docLanguage=En))
- Innovative public procurement procedures and Implementation of innovation strategy in public procurement, National Audit Office of Finland, 2017 <https://www.vtv.fi/en/publications/innovative-public-procurement-procedures/> and <https://www.vtv.fi/en/publications/implementation-of-innovation-strategy-in-public-procurement/>

META LEVEL – ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

2. Do government policies promote and/or safeguard fair competition?

Why is this important?

Public procurement can only be successful in a competitive business environment. There are business sectors in which sound competition has to be promoted or needs government attention. Typical government policies within this context may include law and regulations to promote free trade as well as anti corruption policies.

Questions

Is free and fair (international) competition promoted by government policies and legislation, in line with EU, trade organisations and other policies?

Are regulations on taxes, fees, duties, excises, tariffs etc. not impeding (international) competition?

Do government agencies oversee that rules of competition are adhered to?

Does government impose sanctions on companies who unduly limit competition?

Are regulations and protective measures in place to avoid corruption?

Is government transparent about winning bids and prices?

Guidance

- European Commission Communication COM(2017)572, Making Public Procurement work in and for Europe, (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A572%3AFIN>)
- OECD Recommendation on Public Procurement, 2015 (<http://www.oecd.org/gov/public-procurement/recommendation/OECD-Recommendation-on-Public-Procurement.pdf>)
- UNCITRAL Model Law on Public Procurement, 2011 (<http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>)
- European Directives on Public Procurement 2014/23,24 and 25/EU
- Competition impact assessment: guidelines for policymakers, Competition & Markets Authority, UK, 2015 (<https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers>)
- Preventing corruption in public procurement, OECD, 2016 (<http://www.oecd.org/governance/ethics/Corruption-in-Public-Procurement-Brochure.pdf>)

META LEVEL – ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

3. Are procurement policies and practices in line with (international) good practice standards?

Why is this important?

Multinational and supranational organisations (for example EU, UN, World Bank) have established standards and good practice guidelines for public procurement. These standards are designed to promote effective procurement, value for money, fair competition, harmonisation and transparency. It is therefore important that government is in compliance with international standards and adopts good practice guidelines.

Questions

Is government aware and informed about international procurement standards and good practice?

Are procurement policies, procedures and organisations evaluated against these standards?

Does government learn from benchmarking its own practices with international standards?

Guidance

- European Directives on Public Procurement 2014/23,24 and 25/EU
- OECD Recommendation on Public Procurement, 2015 (<http://www.oecd.org/gov/public-procurement/recommendation/OECD-Recommendation-on-Public-Procurement.pdf>)
- UNCITRAL Model Law on Public Procurement, 2011; Guide to Enactment of the UNCITRAL Model Law on Public Procurement, UN, 2012 (http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html)
- Preventing corruption in public procurement, OECD, 2016 (<http://www.oecd.org/governance/ethics/Corruption-in-Public-Procurement-Brochure.pdf>)
- World Bank: Benchmarking Public Procurement 2017 (<http://bpp.worldbank.org/en/reports>)

META LEVEL – ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

4. Is the performance of the several procurement functions/units in the different stages of the procurement process benchmarked against each other?

Why is this important?

Departmental agencies and non-departmental public bodies are responsible for determining the goods and services they need and for the way they acquire them. The procurement function/unit covers every aspect of the process, from determining the need for goods and services (including works), to buying, delivering and storing them. Benchmarking with other procurement functions/units may highlight options for further improvements.

Questions

Is the procurement function/unit compared with other procurement functions/units and what are the results of a comparative analysis including the various stages in competitive procurement, for example:

- Assessing the need for the goods and services;
- Specification of requirement;
- Agreeing list of potential suppliers;
- Invitation to tender;
- Evaluation of bids;
- Selection of supplier;
- Agreeing form of contract;
- Formal awarding of contract;
- Evaluation of contract performance?

Guidance

- Getting value for money from procurement / How auditors can help? – National Audit Office / Office of Government Commerce (UK)

META LEVEL – ASSESSMENT OF THE GOVERNMENTS OVERALL PROCUREMENT STRATEGY

5. Are prices/qualities obtained by the several procurement functions/units compared as to highlight competitive results or improved value for money?

Why is this important?

Procurements should be based on value for money (defined as the optimum combination of whole life costs and fulfilment of customer's requirements) rather than initial purchase price. Benchmarking with other procurement functions/units may highlight options for further improvements.

Questions

How do procurement functions/units compare regarding:

- Value for money obtained, comparing the quality of service and costs.
- Improving value for money by for example: (a) reducing the cost of purchasing and the time it takes; (b) negotiation; (c) improving project, contract, asset and/or risk management.

How do the procurement functions/units manage the procurement risks (e.g. the risk if the supplier does not deliver on time, to budget and of appropriate quality; the risk of indiscretion, fraud and waste)?

Which forms of contract strategies are generally used by the procurement functions/units and is the choice to use this specific contract strategy inspired by the need to deliver value for money (most likely compared to other strategies)?

Do the procurement functions/units work in compliance with proper project management procedures so that projects are delivered on time, within cost limits, meeting quality standards and with minimum disruption of services?

Do the contracting authorities conduct regular analysis of the value obtained in awarded contracts (e.g. obtained prices, implementation terms, etc.), so as to improve the future procurements?

Guidance

- Getting value for money from procurement / How auditors can help? – UK National Audit Office / Office of Government Commerce

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION / UNIT

6. Are outsourcing and Public Private Partnerships considered as alternatives to in-house work?

Why is this important?

The use of competition and Public Private Partnerships (PPPs) may ensure that the public way of handling tasks are organised appropriately and efficiently, including that there is a division of labour between the public and private sector. Therefore, it is important to consider in detail exactly what is produced in-house and what may advantageously be produced externally.

PPPs and concessions may be very effective instruments for infrastructures and services delivery, enabling to implement the public sector policy. Their implementation needs a careful consideration of advantages and costs in the long term and a balanced allocation of risks between the private and public partners. Oversight, control and assurance over contracted-out services must also be robust.

Questions

Are decisions to outsource and to be part of PPPs closely linked to the delivery of department's core services and functions?

Are advantages and disadvantages of in-house production, outsourcing and PPPs considered and compared before procurement decisions and launch of investment projects?

Is the possibility of entering into PPPs with private suppliers examined on a regular basis?

Is there a periodic testing on whether the public's way of handling tasks is competitive in relation to price and quality?

Are services/tasks combined in such a way that the market is used where relevant?

Is it assessed whether well-functioning markets exist for the departments' services/tasks?

Is it considered whether services/tasks are of a sufficient volume to make it attractive to outsource these services/tasks?

Does the department consider procedure and life-cycle costs in connection with tendering or entering into PPPs?

Are risks properly allocated to public and private partners?

Do decisions related to PPPs projects consider public consultations, expectations and assessments? Are they transparent enough?

Are oversight and control measures over outsourced activities given the proper attention?

Guidance

- <http://ncppp.org/> (USA)
- World Bank: Infrastructure and Public-Private Partnerships (<http://www.worldbank.org/en/topic/publicprivatepartnerships>) and Benchmarking Public-Private Partnerships Procurement 2017 (<http://bpp.worldbank.org/en/reports>)
- Public Private Partnerships in the EU: widespread shortcomings and limited benefits, ECA, 2018 (https://www.eca.europa.eu/Lists/ECADocuments/SR18_09/SR_PPP_EN.pdf)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION / UNIT

7. Does the department have a procurement strategy and is it implemented?

Why is this important?

A strategic approach to procurement is important because it can assist a department in meeting its policy objectives and to obtain value for money in procurement. A procurement strategy can help to:

- Build a common idea of what is more important when procurement decisions are made (e.g. the relationship between price, quality and service)
- Optimise procurement in the organisation as a whole, by using the collective buying power and reducing internal administrative cost
- Assuring the right competences among procurement staff and the right tools to support an efficient administration, e.g. e-procurement
- Support the achievement of departmental policy and business objectives by making a link to the procurement goals

Questions

Are the department's strategy and activities in line with the state public procurement strategy in place?

Is the procurement strategy focusing in obtaining value for money?

Does the procurement strategy adequately consider the promotion of environment, social inclusion, innovation, access of SMEs and use of electronic tools?

Is the relationship between in-house and external work considered in the strategy?

Does the strategy ensure that needs are met, but not exceeded?

Does the strategy ensure that the concepts of standardisation and coordination of procurement are used to take advantage of the department's collective buying power?

Does the strategy discuss the best manner of purchase, considering the types of goods and services needed?

Does the strategy ensure that the best supplier is chosen considering: price, quality, service, dependable operation, internal operation costs, life time operation costs and codes of ethics?

Does the strategy include a policy for identifying and training suitable procurement staff?

Does the strategy ensure that appropriate controls are in place to:

- ensure propriety and regularity in delivery?
- address risk of fraud and corruption?
- monitor behaviour of procurement staff?

Does the strategy contain incentives to evaluate the performance of the procurement function/unit?

Is the strategy implemented across the entire organisation?

Guidance

- Improving Procurement, UK National Audit Office, 2004
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)
- OECD Public Procurement Toolbox (<http://www.oecd.org/governance/procurement/toolbox/>)
- Commission Recommendation (EU) 2017/1805 on the professionalization of public procurement (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017H1805&from=EN>)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT

8. Is the department’s procurement function/unit well organised?

Why is this important?

Having procurement organised effectively is a very central area of effort, as the internal way of organising procurement may be a mean for a department to improve effectiveness of procurement. By this mean a department may reduce its costs of handling procurement and invoicing significantly.

Questions

Is there an overall mission for the procurement function/unit and are tasks the procurement function/unit should carry out clearly described?

Have guidelines been set up on how the procurement function/unit should carry out its procurements?

Has it been determined which areas of procurement the function/unit should cover?

Has it been determined which shared services the procurement function/unit should be part of?

Has it been determined what portion of the procurement portfolio should be managed by the procurement function/unit and what portion should be managed locally?

Is the procurement function/unit organised in the most appropriate way, taking into consideration the actual tasks which the department has to carry out?

Is the performance of the procurement function/unit regularly evaluated?

Guidance

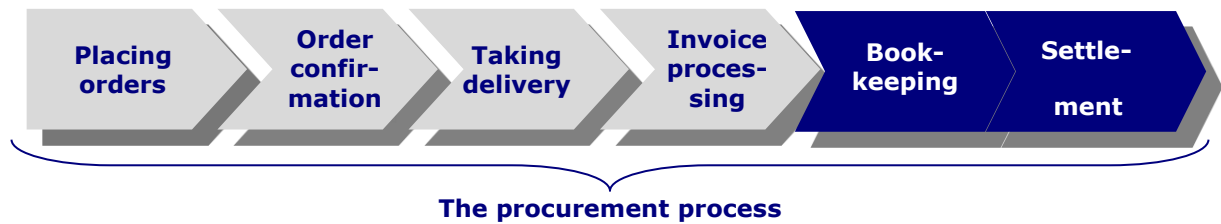
- Modernising Procurement, UK National Audit Office, 1999
- Improving Procurement, UK National Audit Office, 2004
- Framework for assessing the acquisition function at federal agencies, US GAO, 2005 (<https://www.gao.gov/assets/80/76901.pdf>)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT'S PROCUREMENT FUNCTION / UNIT

9. Is the procurement process well organised?

Why is this important?

Having the procurement process organised effectively is a significant task, as the procurement process may be a means for a department to reduce the transaction costs associated with procurement. The different steps in the procurement process are set out in Figure 1.



By having the procurement process organised effectively a department may reduce its costs of placing orders, order confirmation, taking delivery of goods, invoice processing, bookkeeping and settlements.

Questions

Has the department identified and described the different elements in the procurement process?

Have guidelines been set up for how the procurement process should be conducted?

Is the procurement process organised in the most appropriate way, taking into account the amount of procurement?

Is the procurement process fully digitalised?

Is electronic procurement applied to reduce transaction costs?

Does the procurement process compile basic procurement information such as how much is bought and spent with individual suppliers?

Is the efficiency of the procurement process regularly evaluated?

Guidance

- Improving Procurement, UK National Audit Office, 2004
- Commission Recommendation (EU) 2017/1805 on the professionalisation of public procurement (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017H1805&from=EN>)
- Purchasing Professional Services, UK National Audit Office, 2001

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT

10. Do the employees have the necessary skills and experience to carry out procurements efficiently?

Why is this important?

Procurement requires a mix of skills ranging from the ability to negotiate prices, interpreting market intelligence and an ability to negotiate terms and conditions, to competencies in electronic procurement and contract management. It is therefore important that the procurement function/unit has professional skills and experience to carry out the procurements efficiently.

Questions

Do procurement staff have recognised professional procurement qualifications or sufficient training?

Do procurement staff have skills to procure complex or special items (i.e. IT, PPPs, innovative products)?

Does the procurement function/unit understand customer needs, supply markets and suppliers?

Does the procurement function/unit have the ability to negotiate with customers and suppliers?

Does the procurement function/unit have the ability to apply public procurement principles and to prepare tender and contract documents?

Does the procurement function/unit have the ability to apply electronic procurement?

Does the procurement function/unit have the ability to secure best performance from contractors?

Guidance

- Improving Procurement, UK National Audit Office, 2004
- Roadmap: How to elaborate a Procurement Capacity Strategy, OECD, 2016 (<http://www.oecd.org/gov/public-procurement/publications/Roadmap-Procurement-Capacity-Strategy.pdf>)
- Improving IT procurement, UK National Audit Office, 2004
- e-Procurement reference guide, World Bank, 2011
- Innovation Procurement Toolkit, EAFIP (<http://eafip.eu/toolkit/>)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT**11. Are there appropriate controls in place to ensure that procurement complies with the relevant legislation?****Why is this important?**

It is important that appropriate controls are in place to ensure that procurement complies with relevant legislation and other rules. Failure to comply has the effect that optimum procurement is not achieved and that the department runs the risk of legal proceedings.

Questions

Are there internal control systems in place to secure that laws and regulations are observed?

Are the internal control systems operational?

Do the internal control systems function appropriately?

Has management taken the necessary steps to ensure that relevant control systems are always up to date?

Guidance

- <http://www.coso.org/>
- Procurement guidance for public entities, OAG, New Zealand, 2008 (<https://www.oag.govt.nz/2008/procurement-guide/docs/procurement-guide.pdf>)
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT**12. Are there mechanisms in place to evaluate the performance of the department’s suppliers?****Why is this important?**

The performance of a department’s suppliers is vital to an efficient procurement system and the attainment of department policy objectives. It is therefore important that there are mechanisms for evaluating the performance of suppliers. Failure to evaluate the performance of suppliers includes a risk of not identifying problems at an early stage and of failing to follow up on a service level that is unsatisfactory.

Questions

Are there mechanisms for evaluating the department’s suppliers’ performance in relation to prices, quality, delivery and innovation?

Do contracts contain regular reviews, targets and quality standards in order to assess suppliers’ performance?

Is there a forum where the department’s suppliers’ performance is regularly discussed with the suppliers?

Guidance

- Government-wide review of procurement, Parliamentary Secretary’s Task Force (Canada) 2005 (<http://publications.gc.ca/collections/Collection/P4-10-2005E.pdf>)
- Improving Procurement, UK National Audit Office, 2004
- Managing government suppliers, UK NAO, 2013, (<https://www.nao.org.uk/wp-content/uploads/2013/11/10298-001-Governments-managing-contractors-HC-811.pdf>)
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT

13. Are risks managed to provide reasonable assurance regarding department procurement-objectives?

Why is this important?

The systematic application of management policies, procedures, and practices to the tasks of analysing, evaluating and controlling risk in the procurement area is important to provide reasonable assurance regarding entity procurement objectives. Failure to apply risk management in the procurement area may result in prices that are not competitive, reduced standards of received goods and services and dissatisfied stakeholders.

Questions

Is information gathered to produce knowledge about procured goods and services, prices paid and supplier performance?

Are risks in the internal environment identified, for example:

- Inadequate organisation of the procurement function/unit?
- Disfunctional culture?
- Insufficient competencies among procurement staff?
- Ineffective internal communication in the procurement function/unit?

Are risk in the external environment identified, for example:

- Budgetary constraints?
- Competition on procurement staff?
- Threats to supplier relations?
- Stakeholder dissatisfaction?

Are the required quality and service standards set?

Is behaviour modification applied to change procurement of goods and services if procurement is not functioning properly?

Is there an effective risk management system continuously monitoring procurement risk?

Guidance

- Enterprise Risk Management – Integrated framework, COSO, 2004 (<https://www.coso.org/Pages/erm-integratedframework.aspx>)
- Risk management, in UN Practitioner’s Handbook (https://www.ungm.org/Areas/Public/pph/cho4so1.html#sect_41)

MACRO LEVEL – ASSESSMENT OF THE DEPARTMENT’S PROCUREMENT FUNCTION / UNIT

14. Are there regular reviews and analysis of the performance of the procurement function/unit?

Why is this important?

Regular reviews of the performance of the procurement function/unit are an important task as they enable the department to identify opportunities to increase value for money and to identify malpractice and procurement fraud. Failure to regularly review the performance will result in increased risk if the procurement function/unit is malfunctioning.

Questions

Does the department have a system for capturing performance data of the procurement function/unit, and does the information include:

- What is bought?
- The prices paid?
- Who are the key suppliers?
- Ways of procuring goods and services?
- Process cost of the procurement function?

Does the department evaluate and benchmark the performance of the procurement function/unit against other comparable procurement functions/units?

Are there systems for recording and monitoring in order to discover malpractice and fraud in the procurement function/unit?

Guidance

- Getting value for money from procurement, how auditors can help, UK National Audit Office / Office of Government Commerce (England)
- Government-wide review of procurement, Parliamentary Secretary’s Task Force (Canada), 2005
- Improving Procurement, UK National Audit Office, 2004
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)
- Framework for assessing the acquisition function at federal agencies, US GAO, 2005 (<https://www.gao.gov/assets/80/76901.pdf>)

MICRO LEVEL – ASSESSMENT OF A SINGLE PROCUREMENT PROJECT**15. Does the procurement project have a clear goal and does the goal meet the specified needs of the users?****Why is this important?**

Having a clear goal may improve value for money and may ensure a link between the purchase on one hand and the achievement of departmental policy and business objectives on the other. Carefully prepared procurement goals can help to ensure:

- That users needs are met, but not exceeded
- The best manner of procurement is chosen, considering the type of goods or service needed
- The procurement project can be evaluated

Questions

Is there a need for the procurement project at all?

Are the user's needs clearly and invariably defined and has the expected outcome or mission been clearly identified and communicated in measurable terms?

Have alternatives been considered for the specified procurement project?

Has an upper limit of cost been fixed?

Have the expected benefits from realisation of the procurement project been calculated?

Guidance

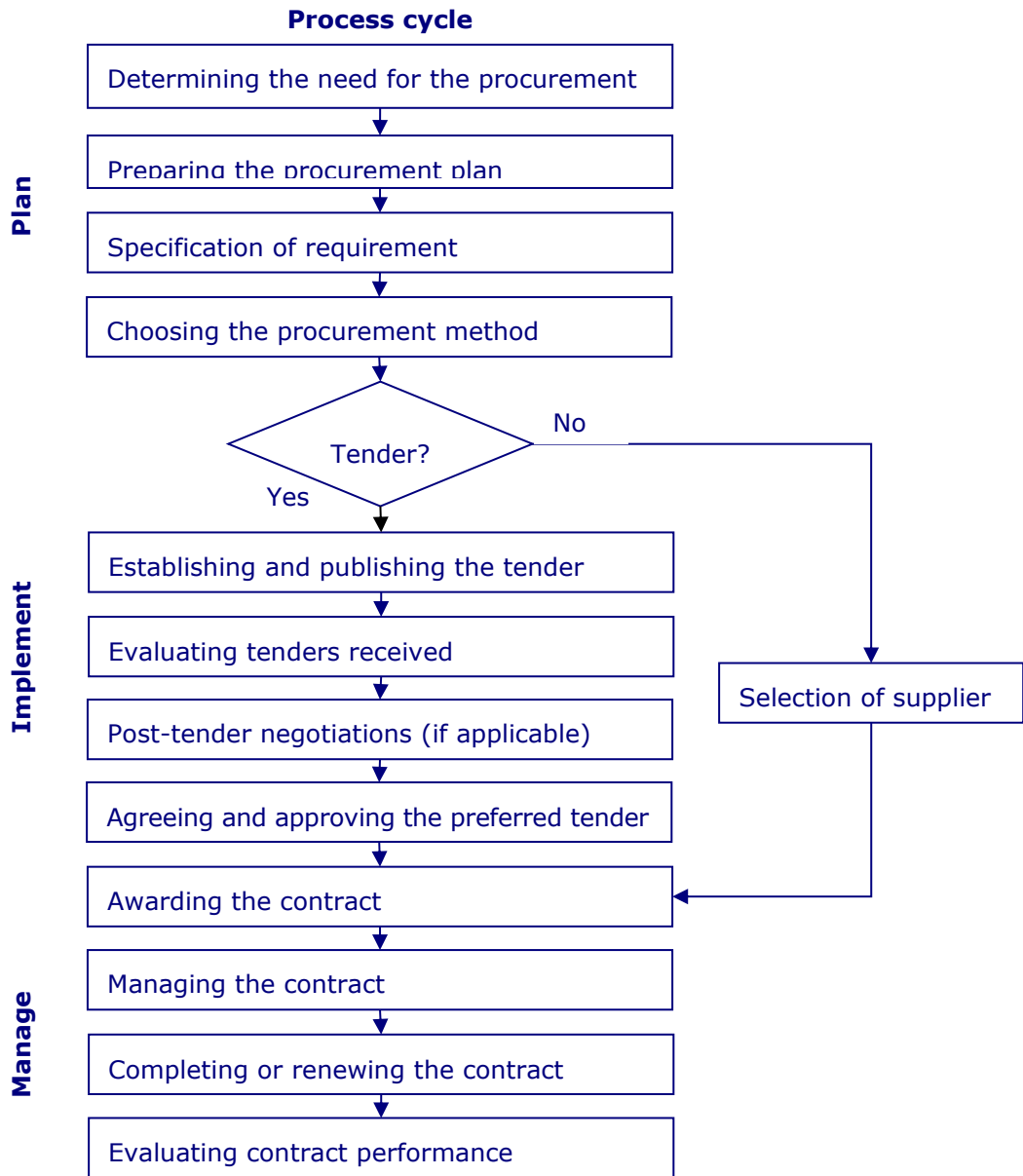
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)
- Getting value for money from procurement / How auditors can help? – UK National Audit Office / Office of Government Commerce
- Improving procurement, UK National Audit Office, 2004
- Procurement guidance for public entities, OAG, New Zealand, 2008 (<https://www.oag.govt.nz/2008/procurement-guide/docs/procurement-guide.pdf>)

MICRO LEVEL – ASSESSMENT OF A SINGLE PROCUREMENT PROJECT

16. Is the procurement project efficiently managed?

Why is this important?

The different steps of the supply process have to be executed with sufficient care. The following process cycle intends to show the different stages to be considered. Three main categories (plan, implement and manage) can be defined within the process cycle.



Questions

Are the right skills, experience and competencies present in the acquisition workgroup and are the necessary outside specialists involved in the process?

Does the procurement unit have sound commercial awareness and knowledge of suppliers and the market?

Do procurement staff, supplier and end user communicate properly?

Is confidentiality guaranteed during the whole process?

Process cycle:**Plan:**

Is it calculated whether aggregated procurement could be more cost-efficient?

Is an appropriate degree of standardisation of goods and services respected?

Is the budget compared with similar projects or procurements yet realised (historical standards)?

Is a cost/benefit analysis, a cost/effectiveness or a financial analysis considering life-cycle costs performed and is the funding of the procurement guaranteed?

Is a risk evaluation performed?

Is the appropriate procurement approach being chosen (considering for example the possibility of contracting out work or procuring low value items through a specific low cost procuring system)?

Are incentives to deliver on time and in quantity properly specified?

Implement:

Are there written rules on requirements for the specific quote and tender used in the transaction and are they applied?

Are there complementary rules to be used and are they applied? (e.g. emergency)

Is the opportunity properly published?

Is there time waste during tendering?

Are information technology resources (e-procurement) used to reduce costs?

Is the tender clearly and properly specified, including evaluation criteria and knowing about the market and therefore not over-prescriptive and receptive to innovation?

Are prequalification criteria of suppliers (size of company, track record and experience of the company with government bodies, capacity for suppliers to take on risk from the contracting body, price, environmental criteria) properly defined and applied?

Are tenders who do not comply with the requirements specified in the request for tenders rejected?

Is evaluation of tenders objective and transparent and based solely on the published criteria?

Is the contract awarded to the tender who best meets the relevant criteria?

Manage:

Is the chosen supplier part of the department's database? Is it a key supplier?

Does the contract meet criteria of completeness and consistency?

Are unsuccessful companies informed why their tender failed?

Does the contract include performance-based clauses?

In the case of time-and-material and labour-hour contracts, do the surveillance give an adequate and reasonable assurance that the contractor is using efficient methods and effective cost controls?

Are review meeting organised during contract execution and do they meet demand?

Are contract changes after awarding properly justified and executed?

Are internal control mechanisms performed before payments?

Are the established budget and timetable (milestones) respected?

Are there late payment interests to be paid and could they have been avoided?

Are there any complaints from the suppliers and/or end-users?

Guidance

- Framework for assessing the acquisition function at federal agencies, US GAO, 2005 (<https://www.gao.gov/assets/80/76901.pdf>)
- Getting value for money from procurement / How auditors can help? – UK National Audit Office / Office of Government Commerce
- Procurement guidance for public entities, OAG, New Zealand, 2008 (<https://www.oag.govt.nz/2008/procurement-guide/docs/procurement-guide.pdf>)
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)
- European Directives on Public Procurement 2014/23,24 and 25/EU
- Checklists for the financial and compliance audit of public procurement

MICRO LEVEL – ASSESSMENT OF A SINGLE PROCUREMENT PROJECT**17. Are there appropriate controls in place to ensure that the procurement project complies with relevant legislation?****Why is this important?**

Public procurement legislation contains rules concerning the process of acquiring goods, works and services by public sector entities. The primary purpose of such legislation is often to encourage economy and efficiency in the use of public funds - to give value for money. The essence of public procurement legislation is to define and implement the procedures that are most likely to produce an economic and efficient result, while respecting the public nature of the process, free competition and the duty of fairness to the suppliers.

Questions

Is there a legal authority for the procurement project?

Does the procurement project comply with European Union's regulations and rules?

Do appropriate controls ensure that procurement decisions are not biased by conflicts of interest or corruption?

Guidance

- Framework for assessing the acquisition function at federal agencies, US GAO, 2005 (<https://www.gao.gov/assets/80/76901.pdf>)
- Getting value for money from procurement / How auditors can help? – UK National Audit Office / Office of Government Commerce
- Procurement guidance for public entities, OAG, New Zealand, 2008 (<https://www.oag.govt.nz/2008/procurement-guide/docs/procurement-guide.pdf>)
- Public Procurement-Guidance for practitioners, European Union, 2018 (http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018)
- European Directives on Public Procurement 2014/23, 24 and 25/EU
- Report on the parallel audit of analysis of (types of) errors in EU and national public procurement within the Structural Funds programmes, https://www.eca.europa.eu/sites/cc/Lists/CCDocuments/Final%20report%202015/Final_report_2015_EN.pdf
- Non-compliance with the rules on public procurement, Efforts to address problems with public procurement in EU cohesion expenditure should be intensified, Errors in rural development spending: what are the causes, and how are they being addressed?, European Court of Auditors, 2015
- Checklists for the financial and compliance audit of public procurement

CHECKLISTS FOR FINANCIAL AND COMPLIANCE AUDIT OF PUBLIC PROCUREMENT

INTRODUCTION

The scope of public procurement is broad and incorporates a wide range of activities, including acquiring goods and services at an appropriate quality and quantity, bundling supply needs with other departments, outsourcing services and establishing partnerships with suppliers. In all cases the public body has to choose a supplier and pay for the goods delivered or service provided. In most of the EU Member States, public procurement represents 14% of GDP and from 25% to 30% of public spending.

Supreme Audit Institutions (SAIs) audit the use of public resources and, depending on mandates, may also promote sound management principles and the attainment of value. The audit mandates and activities of SAIs vary, as do national budgeting systems and public procurement regulations. Drafting a common checklist to be used when auditing public procurement processes was a difficult task, since the tool should be relevant and applicable to auditors operating within different frameworks, objectives, requirements and procedures.

An auditor may examine the procurement function as part of an audit of the accounts of a specific public authority. Alternatively he/she may be interested in examining specific areas or procedures and in considering efficiency, competition, fraud and corruption, regularity, fitness for purpose or value added. Some SAIs may strive to recommend good practice while others may concentrate on matters of compliance and the action taken in response to identified irregularities.

The checklists were prepared on the basis of common principles and procedures, having regard to the following:

- Following the analysis of the contributions received from several SAIs, it was concluded that all of them focus their review on the robustness of the procurement function, on how public needs were met and on how competition objectives and transparent procedures were followed;
- EU Member States are bound to the basic precepts of the Treaty on the Functioning of the European Union (TFEU) and of the Directive 2014/24/EU⁹⁵;
- No matter which national or local regulation is followed, State authorities must respect the requirements of a competitive process and make its decisions in a transparent way that respects all participants equally. In particular it must not discriminate on the grounds of nationality;

⁹⁵ Although there are other EU regulations on public procurement, this checklist mostly refers to Directive 2014/24/EC ruling.

- Procurement is a risk area for fraud and corruption and these usually result in the misuse of public resources.

While the checklists closely follow the requirements of the EU Directive, they are general in nature and are applicable to purchases falling below the EU threshold limits. They also address some relevant questions not included in the EU Directive, e.g. organisational issues. In addition, specific attention is given to aspects, which, from experience, are known to be prone to failure and irregular influence.

When using these checklists, the auditor should keep in mind that:


- They cover a wide range of topics along the procurement cycle. Depending on the particular audit scope and assessed risks, it is likely that not all questions will be applicable to each audit. The checklist are intended as a menu for an auditor to use in order to make a subset of questions to suit the particular audit's needs and objectives;
- The evaluation of public procurement processes may be only a part of the audit (as in the case of a financial audit), and, thus, the proposed questions may have to be integrated within the broad methodology of that audit;
- According to audit mandates and national systems, some items may have to be modified or questions may have to be added. For instance, financing through national, state or local budgets will put the procuring entity under the obligation of following the relevant national, state or local financial and procurement regulations;
- Where an audit is planned to include value for money questions, items from these checklists should be considered along with those included in the Procurement Performance Model.

The checklists begin with an analysis of the procurement function, and thereafter are organised according to the main stages of the procurement process such as pre-tender stage, choice of procurement procedure, publicity and notifications used, identification of potential bidders, evaluation of tenders and award procedure. A specific attention is given to additional works and supplies as a frequent form of direct contracting.

Each chapter has a number of main questions, which are then presented in the following format:

- **Background**, explaining the importance and giving some relevant information;
- **Questions**, detailing the areas and directions in which that item should be investigated. The criteria to answer the questions in an objective way must be looked for auditors considering each context. It may be found in the sub-questions themselves, in the directives, in the national legislation, in the guidance part or in other sources that the auditors may identify;

- **Guidance**, identifying documents that the auditor should consider in relation to the item under analysis:
 - The relevant parts of the Directive 2014/24/EU;
 - The related sections of the Guideline for Auditors;
 - Questions included in the Procurement Performance Model;
 - Important judgements of the Court of Justice of the European Union (CJEU Case-Law);
 - Audit reports and studies produced by SAIs⁹⁶.

Since public procurement is one of the public activities most vulnerable to corruption, originating costs commonly estimated around 20-30% of the project value⁹⁷, a fraud and corruption perspective is included in these checklists. Where the audit emphasis is on fraud and corrupt risks or practices, then the auditor should take special note of those questions highlighted with the following red flag: . If the answer to those questions is “**No**” increased risks of fraud and corruption are probable and further analysis is needed⁹⁸.

⁹⁶ Summaries, details and links to these reports are included in “*Supreme Audit Institutions Summaries of Procurement Studies*”, in the EUROSAI database of audits (<http://www.eurosai.org/en/databases/audits/>) or can be obtained by contact with the concerned SAI.

⁹⁷ See *Preventing Corruption in Public Procurement*, OECD, 2016, in <http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf>

⁹⁸ See AFROSAI-E guideline “*Detecting fraud while auditing*” for a global approach, for fraud checklist and for audit procedures, risks and suggested controls for selected audit areas, including public procurement). For types of fraud and corruption in contracts and warning signs of possible fraud and corruption in contracts see “*ASOSAI Guidelines for Dealing with Fraud and Corruption*”.

1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

- 1.1. Are procurement processes well organised and documented?
- 1.2. Are proper financing arrangements taken?
- 1.3. Are internal control systems in place?
- 1.4. Is procurement execution duly monitored and documented?

2. AUDITING THE PREPARATION OF THE PROCUREMENT

- 2.1. Are EU procurement regulations applicable?
- 2.2. Did the public authority calculate the contract value accurately?
- 2.3. Was the performance description adequate to needs and legal requirements?
- 2.4. Were the procurement documents comprehensive, transparent and free from restrictions or conditions that would discriminate against certain suppliers?
- 2.5. Was the submission of variant tenders accepted and duly ruled?
- 2.6. Has the public authority procedures in place to monitor the input of experts employed to assist the procurement function?

3. AUDITING THE PROCEDURE CHOSEN TO PROCURE

- 3.1. Did the public authority decide upon an adequate and admissible procurement procedure?
- 3.2. Did the chosen procedure ensure fair competition, transparency and equal treatment?

4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

- 4.1. Did the public authority report procurement processes and results in compliance with the Directives?
- 4.2. Was timely and equal access to contract documents and information provided to all candidates?
- 4.3. Was confidentiality ensured when necessary?

5. AUDITING THE AWARD PROCEDURES

- 5.1. Was the formal review of requests to participate or evaluation of bids correctly undertaken?
- 5.2. Was suitability of candidates accurately assessed?
- 5.3. Were the documents received scrutinised for completion and adherence to stated conditions before the tenders were evaluated?
- 5.4. Were bids properly evaluated?
- 5.5. Was the decision on the award process accurate and adequately communicated?

6. AUDITING THE CONTRACT IMPLEMENTATION

- 6.1. Is the execution of the contract adequately managed and monitored?
- 6.2. Were any identified modifications to contracts or additional works or deliveries admissible, without the need for a new procurement procedure?

1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

1.1. Are procurement processes well organised and documented?

Background

The organisation and assignment of responsibilities within the procurement process is critical to the effective and efficient functioning of that process.

The public authority must document all measures and decisions taken in a procurement process, in order to be able to follow progress, to review it when necessary and to support management decisions.

This organisation and documentation measures also form the basis for financial and compliance controls applied in the procurement process.

Questions

F/C Are the functions and responsibilities of those involved in the procurement function clearly established and documented?

Have guidelines incorporating the principles and objectives of a robust procurement practice been established?

F/C Are procurement processes organised and documented and include: needs to be addressed, contract performance description, documentation, notifications, award procedure and decision, draft and concluded contract, physical execution and payments made?

F/C In procurement procedures are electronic means of communication and information exchange set up and functional (transmission of notices in electronic form, electronic availability of procurement documents, possibility of electronic submission of requests for participation and tenders)?

F/C Are procedures conducted by electronic means sufficiently recorded and documented, making the audit trail easy to follow?

F/C Do these electronic procedures provide adequate level of security, notably as regards validation of signatures?

F/C Do staff involved in the various stages of the process have the appropriate skills and training to perform their duties effectively?

Are procurement proposals initiated, processed and approved by authorized officers, with no cases of overstepping?

Are there established and clear procedures for reporting and decision making and are they duly implemented?

F/C Are there no cases of documents missing, altered, back-dated or modified or after-the-fact justifications?

Guidance

- **Directive⁹⁹:**

For electronic availability of procurement documents, see article 53 and requirements in Annex IV.

For rules applicable to communication, see article 22.

- **Procurement Performance Model (PPM):**

For procurement strategy see n° 7 of PPM.

For organisation of the procurement function see n° 8 of PPM.

For organisation of the procurement process see n° 9 of PPM.

For staff's skills, experiences and competencies see n°s 10 and 16 of PPM.

For risks relating to internal and external environments see n° 13 of PPM.

For capturing and using performance data see n° 14 of PPM.

- **Audit reports and studies:**

For clear identification of functions:

Report	SAI
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	»
Public procurement overview, 2011	Lithuania
Simplified procurement procedures, 2012	»

For the need of guidelines:

Report	SAI
Contract marketing and promotion expenditure	Belgium
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»

⁹⁹ Unless otherwise explicitly mentioned, it always refers to Directive 2014/24/EU

Report	SAI
Procurement of maintenance services	Estonia
Organisation of public procurement in local governments, 2010	»
Statistics Finland's service procurements	Finland
The Defence administration's procurement activities – supply procurement	»
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Audit on the operation of the Hungarian Defence Forces public procurement systems projects	Hungary
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, FYR Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For the organisation, documentation and filing of procurement processes:

Report	SAI
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	Austria
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Consultancy contracts awarded by ministerial cabinets	»
The dematerialisation of public procurements in Walloon public service department, 2014	»
Funds of the state budget allotted for organisation of the 2009 FIS Nordic World Ski championships in Liberec	Czech Republic
Funds allotted for mending and maintaining of roads	»
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Statistics Finland's service procurements	Finland
Universities' procurement activities	»
Procurements of system work and ADP consulting services by the tax administration	»
Annual report on federal financing management, Part II	Germany
Centralised public procurement, 2013	Lithuania
Audit conducted in municipalities, 2015	»
Investments of local government units, including projects co-financed by the EU budget	Poland

Report	SAI
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education, financial years 1996 to 1998	Spain

For qualification of procurement staff:

Report	SAI
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	Austria
Report on procurement at Danish institutions of higher education, 2015	Denmark
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Infrastructure investments of the Polish State Railways Polish Railway Lines (PKP PLK SA)	Poland
Improving public services through better construction	UK
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	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For competency issues:

Report	SAI
Contract marketing and promotion expenditure	Belgium
Roads, motorways and waterways maintenance leases	»
Organisation of public procurement in local governments, 2010	Estonia

1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

1.2. Are proper financing arrangements taken?

Background

The financing of procurement contracts is particular to the budgetary framework applicable to the public body and in operation in the Member State. In examining procurement during the financial audit process, many audit approaches examine the financing arrangements as part of their testing of compliance with national legislation, financial rules and authorities.

Questions

F/C Has the procurement under review and the related funding been approved at the appropriate level (e.g. government, ministry, board, head of body)?

Is this funding legal or otherwise in compliance with relevant national laws or procedures governing the financing of this type of contract?

Have the funding arrangements been agreed where payments take place over several financial periods?

F/C Does the approved level of funding correspond to the estimated value of the contract calculated for the purpose of the procurement process?

Is funding made available for payments under the contract at the appropriate time and in accordance with the relevant national/public financial procedures?

Where funding is being arranged by borrowings, do these have the necessary approval and legal authority?

Guidance

- Check national fiscal and budget regulations
- **Procurement Performance Model (PPM):**
For risk of external environment/budgetary constraints see n° 13 of PPM
- **Audit reports and studies:**
For budgetary funding issues:

Report	SAI
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	Austria

Report	SAI
Railroad Project: Brenner Base Tunnel	»
Contract marketing and promoting expenditure	Belgium
Catering Operations in the Federal Government Departments, 2017	»
Funds earmarked for construction of a new building of the National Technical Library in Prague 6 - Dejvice	Czech Republic
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	»
The Finnish state's payment traffic procurement	Finland
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	Greece
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Poland
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System-1999 and 2000	Spain

1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

1.3. Are internal control systems in place?

Background

The procurement process interacts with the other financial controls that have been established in order to safeguard assets and prevent fraud or financial error. In some financial audit approaches the procurement process is examined as an integral part of the system of internal control.

Questions

Has any authority, body or structure been established to monitor the application of public procurement rules, to assist and provide guidance on the interpretation and application of public procurement law and to support contracting authorities in planning and carrying out procurement procedures?

F/C Does this authority, body or structure:

- Produce monitoring reports mentioning, among other aspects, the most frequent sources of wrong application and legal uncertainty and the prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities?
- Possess the necessary powers to indicate specific violations and systemic problems to national audit bodies, courts, ombudsman, national parliaments or appropriate committees?
- Make the results of its monitoring activities available to the public?

F/C Is there a system in place which controls requisitions, records contract performance and payments made and which sets out:

- Those responsible for the various procedures including assessment of needs and authorisation levels?
- Data to be recorded?
- Specific procedures to be adopted in ordering goods and services under agreed contract(s)?
- Procedures for verifying that goods/services have been properly delivered/performed and are in accordance with the contract terms?
- Procedures for approving payments, including reconciling claims made under the contract to delivery/performance records and checking the arithmetical accuracy of the payment requests?
- Management monitoring of transactions and balances?
- Enforcement of compliance in case contractors fail to meet contract terms?

Regular accounting reconciliations of contract payments, transactions and inventory?

- F/C** Is the progress of procurement procedures sufficiently documented, in such a way that:
 - Decisions taken at all stages are justified (preparation of the procurement documents, communications with economic operators, dialogues or negotiations if any, selection of bidders, award of the contract)?
 - Documentation is kept for a period of at least three years from the date of the award?
 - If requested, are procurement reports communicated to the competent authorities, bodies or structures?
- F/C** Is there appropriate segregation of duties between those procuring services, requisitioning goods / services, verifying the performance of the contract and approving payments?
- F/C** Have mechanisms to avoid conflicts of interests in the procurement processes been established (e.g. codes of conduct, training, declarations of absence of conflicts of interests by those taking part in the key stages of the procurement)?
- F/C** Are there no indications or evidences of conflicts of interest by officers authorizing transactions or by members of committees involved in the procurement processes?
- F/C** Are there no indications or evidences of repeated, unusual or unnecessary contacts by officers authorizing transactions or by members of committees involved in the procurement processes with contractors?
- F/C** Does an appropriate official review the procurement process on an ongoing basis to ensure that it is in compliance with applicable rules?
- F/C** Do controls exist for electronic procedures and records, covering in particular:
 - Access to data, including standing data, and the identification of restriction levels and authorised personnel?
 - Proper and complete records of transactions and events are maintained?
 - Transactions are properly verified after input or modification?
 - Is data securely stored?
- As for 1 January 2019 onwards, is electronic invoicing applied?
- F/C** Are there no materials provided to contractors who, according to the contracts, are supposed to provide them (such as office space, furniture, IT equipment) and no cases of employees from the contracting authority performing parts of contracted work?
- F/C** Are cases of double payment duly prevented and corrected?

Where it was later identified that mandatory grounds for exclusion applied to any contractor at the time of the contract award or that a contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive, were contracts terminated?

Guidance

- **Directive:**
 - For the establishment of monitoring and assistance authorities, bodies or structures, see article 83.

For reports of contracting authorities related to the procedures to award contracts, see article 84.

For rules applicable to communication, see article 22.

For electronic availability of procurement documents, see article 53 and requirements in Annex IV.

For the definition of conflict of interests, see article 24.

For termination of contracts, see article 73.

- See *Identifying conflicts of interests in public procurement procedures for structural actions*, OLAF, 2013, and *Principles for Integrity in Public Procurement*, OECD, 2009.

- **Procurement Performance Model (PPM):**

For the organisation of the procurement function see n° 8 of PPM.

For public procurement function controls see n° 11 of PPM.

For risk management see n° 13 of PPM.

For malpractice and fraud in the procurement function see n° 14 of PPM.

For conflicts of interests and corruption see n° 17 of PPM.

- **Audit reports and studies:**

For the need of an effective internal control system:

Report	SAI
Vienna International Airport Company – Vehicle Procurement and Fleet Management	Austria
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	»
Refurbishment of the Parliamentary Building – Planning Project	»
The Internal Control System in Cases of Direct Awards in the Selected Ministries of the Federal Ministry for Transport, Innovation and Technology and the Federal Ministry of Science, Research and Economy	»
Contract marketing and promotion expenditure	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»
Public procurement of the Fire and Medical Emergency Service of the Brussels-Capital Region, 2017	»
Public procurement and internal control within the Federal State Departments, 2017	»
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Organisation of public procurement in local governments, 2010	»

Report	SAI
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Simplified procurement procedures	Lithuania
Performance of public procurement contracts for external services by public sector entities	Poland
File, storage, safekeeping or management of medical histories and past procurement or in force in 1999 and 2000 on this activity for a sample of public hospitals of the National Health System	Spain
Modernising procurement in the prison service	UK
Improving IT procurement: the impact of the Office of Government Commerces' initiatives on departments and suppliers in the delivery of major IT-enabled projects	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For the most common errors in public procurement, their causes and how to address them:

Report	SAI
Efforts to address problems with public procurement in EU cohesion expenditure should be intensified, 2015	ECA
Errors in rural development spending: what are the causes, and how are they being addressed, 2014	»
Non-compliance with the rules on public procurement	»

For the need of clear segregation of duties:

Report	SAI
Contract marketing and promotion expenditure	Belgium
Public investment projects by the National Laboratory for Civil Engineering	Portugal

For preventing conflicts of interests:

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Procurement of consultancy services	Denmark
Organisation of public procurement in Viimsi Municipality, 2013	Estonia
Acquisition of cars in local governments, 2011	»

1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

1.4. Is procurement execution duly monitored and documented?

Background

Monitoring of contracts and the procurement process allows management to assess over time the effectiveness of procurement controls, contract performance and compliance with financial and other legal authorities, reducing scope for misuse of public resources. It involves assessing procurement execution and related controls on a timely basis and taking necessary corrective actions.

Questions

- F/C** Do the contracts usually include clauses for compensations in the case of non-compliance with the agreed terms?
- F/C** Are the responsibilities for monitoring the execution and performance of contracts clearly assigned?
 - Are those responsibilities discharged by persons:
 - With the appropriate authority to take actions in the event of non-compliance?
 - With the appropriate skills, technical knowledge and/or ability to effectively ensure the proper execution and performance of the contract?
- F/C** Are reports based on sound data available to those responsible for monitoring the performance of contracts?
 - Were warning indicators set up to identify underperformance of the contract?
- F/C** Are order quantities, deliveries and payment levels under the contract monitored by an appropriate official?
- F/C** Does an appropriately qualified official check the quality of performance against the contract terms?
- F/C** Are there systems for recording and managing stocks (where part of contract)?
- F/C** Are there established procedures for dealing with and documenting non-performance and return of goods?
- F/C** Is there an adequate and appropriate record for monitoring performance and any resulting or follow up actions?

Guidance

- **Procurement Performance Model (PPM):**

For regular evaluation of the procurement function see n. 8 of PPM.

For public procurement function controls see n° 11 of PPM.

For evaluation of suppliers' performance see n° 12 of PPM.

For malpractice and fraud in the procurement function see n° 14 of PPM.

- **Audit reports and studies:**

For the need of specialised staff/expertise in procurement:

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Annual Report concerning the financial year 2000, OJEC15-12-2001, page 318-328.	ECA
The Defence Administration's procurement activities – supply procurement	Finland
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Simplified procurement procedures	Lithuania
Improving public services through better construction	UK
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, FYR Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For the need of clear description of responsibilities:

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Public procurement of the autonomous ports of the Walloon region, 2015	»
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	»
Performance of public procurement contracts for external services by public sector entities	Poland
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System- 1999 and 2000	Spain
Ministry of Defence: the rapid procurement of capability to support operations	UK

For control on contract performance:

Report	SAI
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	Austria
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	»
Framework contracts: the Federal Central Buying Office's operation examined in terms of sound management and legality	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»
Public procurement of the Walloon Agricultural Research Centre, 2013	»
Federal State - Procurement of consultancy services (171st Report of the Court of Audit), 2014	»
Public procurement of the autonomous ports of the Walloon region, 2015	»
The procurement of public transport services	Finland
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Consultancy services in public owned companies, 2010	Portugal
Procurement awarded by the Provincial Delegations, financial year 2002, regarding the services of Home Assistance	Spain
Annual audit report of the autonomous (regional) and local public sectors, financial year 1996. Item concerning "Public procurement"	»
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System- 1999 and 2000	»

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.1. Are EU procurement regulations applicable?

Background

There are two main EU Directives setting up detailed rules for the award of public works, supplies and service contracts in the EU Member States: Directive 2014/24/EU and 2014/25/EU. The first one generally applies to most of the contracts and the second one coordinates specifically the procurement procedures of entities operating in the water, energy, transport and postal service sectors.

Basically, public authorities are obliged to observe the rules of the Directives provided the contract exceeds a certain threshold. In addition, the rules may also be applicable where public authorities subsidised contracts by more than 50%, or where an entity is granted special or exclusive rights to carry out a public service activity. Contracts below EU thresholds values and some other contracts explicitly excluded from the scope of application are not covered by those Directives. So, one must go through the complex rules and exemptions from the application of EU rules to determine when a contract is subject to the specific requirements.

Applying EU procurement regulations means that the public authority must follow certain procedures, recognise its obligations under the principle of fair competition, including advertising and transparency requirements, measures and decisions which allow all participants to operate on an equal basis, and avoid any kind of discrimination, including for reasons of nationality.

The Court of Justice of the European Union (CJEU) has confirmed that the internal market principles of the Treaty apply also to contracts outside the scope of the public procurement directives. According to CJEU's case law, for contracts that may attract cross-border interest there is an obligation of transparency, sufficient to enable the market to be opened up to competition through advertising contract details, and a duty to apply fair and impartial procedures.

Questions

Is a contract being awarded for works, supply of products or provision of services?

Does the contract involve the acquisition of works and supplies or the concession of works and services that are covered by the directives regimes?

Is the contractor a "*contracting authority*", as defined in the directive, is it a public works concessionaire or is the specific contract subsidised by more than 50% by a "*contracting authority*" (in the situations mentioned in article 13 of the directive)?

Has the public authority estimated that the value of the contract will exceed the thresholds of the Directive?

- F/C** Where contracts have several component parts (works, services or supplies):
- Are those parts objectively not separable, and was the procurement procedure applied the one corresponding to the main subject matter of the contract and the respective threshold?
 - Could those parts be separated, and was the procurement procedure applied the one possible according to any of the separable components?

F/C Where the public authority cites exemptions pursuant to articles 7-12 of the Directive, have the special requirements for those exemptions been met?

F/C If exemption concerning public contracts between entities within the public sector was applied, have the requirements pursuant to article 12 of the Directive been proved?

If a contract is being awarded for social or other services listed in Annex XIV, is the procedure in accordance with articles 74-77 of the Directive?

Guidance

- **Directive:**

For definitions of “contracting authority” and “public contract”, see article 2.1(1) and (5) and Annex I. See also article 11 for contracts awarded on the basis of an exclusive right.

For mixed contracts, see article 3.

For exemptions, see articles 7 to 12.

For thresholds, see articles 4 and 13, and be aware that the European Commission shall verify and possibly modify thresholds every two years.

See Annex III for supplies awarded by contracting authorities operating in the field of defence.

See Annex XIV for public contracts for social and other specific services.

For contracts in the water, energy, transport and postal service sectors see Directive 2014/25/EU.

For contracts in the field of defence and security see Directive 2009/81/EC

- **See also:**

2006/C 179/02- Interpretative Communication on the community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives, including references to the relevant ECJ case-law

C (2016) 7727- Guidance on the award of government-to-government contracts in the field of defence and security

COM/2006/0779-Interpretative Communication on the application of article 296 of the Treaty in the field of defence procurement

- **Guideline for Auditors:**

See n.ºs. 3 (Subject-matter and scope of Directive 2014/24/EU) and 4 (Public contracts between entities within the public sector) and Appendix II.

- **Procurement Performance Model (PPM):**

For compliance with EU law, see n.º 17.

- **CJEU Case-Law:**

For the «*scope of application of the directive*», see cases C-126/03 and C- 470/13.

For the concepts of «*contracting authority*», «*body governed by public law*» and «*public financing*», see cases C-31/87, C-44/96, C-323/96, C-353/96, C-360/96, C-275/98, C-380/98, C-237/99, C-223 and 260/99, C-470/99, C-373/00, C- 214/00, C-18/01, C-283/00, C-84/03 and C- 526/11.

For the concept of «*service provider*» and «*economic operator*», see cases C-568/13 and C-203/14.

For «*in house-contracting*», see cases C-107/98, C-26/03, C-295/05, C-324/07, C-573/07, C-29/04, C-182 and 183/11, C-574/12, C-15/13 and C-553/15.

For «*contracts between entities within the public sector*», see cases C-480/06, C-159/11, C-386/11 and C-51/15.

For the concept of «*pecuniary interest*», see case C-159/11.

For the concept of «*public works*», see cases C-16/98, C-451/08, C- 306/08, C-197 and 203/11 and C-213/13.

For «*service contracts*», see cases C-411/00, C145 and 149/08, C-215/09, C-95/10, C-386/11, C-113/13 and C-50/14.

For «*public service concession*», see cases C-458/03 and C-274/09.

For «*mixed contracts*», see cases C-331/92, C-145 and 149/08, C- 306/08, C-213/13 and C-215/09.

For «*contracts in the field of defence*», see case C-615/10.

For the «*principles applicable to public contracts excluded from the scope of the directive*», see cases C-264/03, C-358/12, C-278/14 and C- 425/14.

For «*cross border interest*», see cases C-278/14 and C- 425/14.

- **Audit reports and studies:**

For the need of complying with the basic standards of the EC Treaty:

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium

Report	SAI
Funds allotted for mending and maintaining of roads	Czech Republic
Funds earmarked for the D3 motorway construction	»
Funds earmarked for the construction of the ring road around the capital city of Prague	»

For the classification as a contracting authority:

Report	SAI
Organisation of public procurement in local governments, 2010	Estonia

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.2. Did the public authority calculate the contract value accurately?

Background

A public authority must not split a contract in such a way that it remains below thresholds in order to avoid the scope of the Directive or of the national law. In this context, the calculation of values shall be comprehensive and take account of any form of option (i.e. possible additional supplies or services) and renewals.


However, on the other hand, the 2014 Directive recognised that public procurement should facilitate the participation of small and medium-sized enterprises (SMEs) and, to that end, contracting authorities are encouraged to divide large contracts into lots. Nevertheless, in most cases account shall be taken of the total estimated value of all such lots.


Questions

Did the public authority identify the full contract value and include options and provisions for renewals?

Was the estimation of contract value (net of value added tax (VAT)) in accordance with the criteria fixed in the Directive?

- Including any options or renewals?
- Including prizes or payments to candidates or tenderers?
- Considering the aggregate value of all lots?
- In case of framework agreements and dynamic purchasing systems, the maximum value of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system?
- In case of innovation partnerships, the maximum value of the research and development activities to take place during all stages of the partnership as well as of the supplies, services or works to be developed and procured at the end?
- In case of concessions, the estimated total of the turnover of the concessionaire in consideration of the works and services being the object of the concession over the duration of the contract?

 Is there no evidence that the contracts and respective components were subdivided in order to remain below levels of authorisation or procedure?

 In case there was a subdivision, was it justified by objective reasons (i.e. separate operational unit of the contracting authority that independently runs the procurement procedures, makes the buying decisions and has a separate budget line)?

- F/C** In case the contract was divided into lots, and unless otherwise allowed, was the procurement procedure determined according to the aggregate value of the lots?
- F/C** Was the estimated contract value based on realistic and updated prices?
- F/C** Was the estimated contract value in line with the final cost of the awarded contract?

Guidance

- **Directive:**

For methods for calculating the estimated value of the procurement, see article 5.

For division of contracts into lots, see articles 46 and 5 (8, 9 and 10).

- **Guideline for Auditors:**

See n.ºs 3 (Subject-matter and scope of Directive 2014/24/EU) and 11 (Preparing the procurement).

- **CJEU Case-Law:**

For «*artificial splitting of a single work*», see case C-16/98.

For «*projects carried out in several phases for budgetary reasons*», see case C-574/10.

For «*estimation of contract value*», see case C-271/08.

- **Audit reports and studies:**

For estimation of contract value:

Report	SAI
Procurement of the Troop Radio System CONRAD, 2015	Austria
Reconstruction of the Salzburg Central Station	»
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	»
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
Construction of the “Deurganckdock” (Antwerp Container Terminal Complex)	»
Bus line services: cost price and contract award to operators	»
Performance audits of state owned companies’ public procurement 2011-2016	Croatia
Funds earmarked for transport infrastructure projects under the regional operational programmes	Czech Republic
Management of the state budget funds allotted for the Programme to support alterations of ex-military premises into municipal areas	»

Report	SAI
Funds earmarked for the Programme for the care of the national cultural treasure in the State ownership	»
Audit over a Rail Transport Institute	Portugal

For splitting of contracts to remain below levels of authorisation or procedure:

Report	SAI
Consultancy contracts awarded by ministerial cabinets	Belgium
Walloon Region - Public procurement of the Walloon Agricultural Research Centre	»
Funds of the state budget allotted for organisation of the 2009 FIS Nordic World Ski Championships in Liberec	Czech Republic
Funds allotted for construction of the Brno-Vienna (R52) road connection	»
Funds earmarked for housing support programmes	»
Funds provided to the Czech Republic from the European Economic Area and Norway Grants	»
Performance of public procurement contracts for external services by public sector entities	Poland
Public investment projects by public rail transport enterprise	Portugal
Integrated project of the Northern Railroad	»
Rehabilitation works in schools	»
Procurement awarded during the financial year 2002 by the state public sector	Spain
Autonomous (regional) and local public sectors. Financial year 2000. Item concerning "Public Procurement"	»
Procurement by the State public sector during the financial years 1999, 2000 and 2001	»

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.3. Was the performance description adequate to needs and legal requirements?

Background

The performance description is the heart of the procurement procedure. At this stage, the public authority defines its needs and the requirements the tenders must meet. Unjustified or inaccurate needs assessment may lead to the purchase of unnecessary goods or services. Poor planning at this starting point usually results in errors and unsuitable outcomes. On the other hand, when tender documents are unclear the tenderers tend to cover their risks by higher prices.

The new directive encourages contracting authorities to analyse and consult the market before launching the procurement. This allows them to gain prior knowledge and understanding of the potential solutions available to satisfy the needs, to further focus and define the subject matter and the budget of the contract and to apply the principle of sound financial management and achieve the best value for money. This analysis is fundamental in negotiated procedures without call for competition and in innovation partnerships, where the grounds for the use of the procedure depend on the inexistence of market solutions. Furthermore, situations where there are no answers to the call for competition because the market is not able to deliver what is requested could be avoided by analysing the market in advance. Prior information notices, desk market research, participation in fairs and market consultations are tools that can be used for this purpose.

Performance should be described unambiguously and comprehensively, so that all bidders have a clear understanding of what is required, so as to ensure that the detail in the tender documents received are comparable and in order to avoid that suppliers deliver less than expected.

In particular, the performance description must comply with the principles of equal treatment and transparency and may not discriminate in favour of any product or service. This means that the public authority is not entitled to require specified products unless justified by the subject matter of the contract. The issue of technical specifications is particularly sensitive because, by means of unjustified technical requirements, obstacles to competition and favouritism towards certain suppliers may take place within an apparent open competition. On the other hand, weak drafting of the specifications may cause subsequent contract modifications, due to not properly reflecting the needs of the contracting authority or the results expected from the works, supplies or services.

In principle, from the time notices are published, the described performance remains unchanged during the procedure and shall form the centre of the resulting contract.

In some procedures, like the negotiated ones, it is admissible that some items of the tenders may be adapted, provided that the character of the performance remains unaltered and requirements and specifications are respected.

In the case of particularly complex contracts, a dialogue with tenderers may be used to identify and define the means best suited to satisfy the requirements. For this case, a competitive dialogue procedure may be adopted, through which the contracting authority identifies the solution(s) capable of meeting its needs, following procedures that shall ensure equality of treatment among all tenderers.

The 2014 directive created a new procedure (the innovation partnership) for those situations where there is a need for innovative products, services or works that are not available in the market.

Questions

F/C Was there reasonable justification for the need of the purchase, namely when made towards the end of the financial year?

Did the public authority consider and evaluate alternatives, like sharing resources, renting, bundling needs with other departments or grouping supplies in separate lots with different characteristics?

Was a market analysis conducted? Was that analysis documented ?

F/C If preliminary market consultations were conducted, were transparency, equal treatment and non-discrimination ensured (e.g. announcing the consultation, no disclosure of privileged information, no biased influence over technical specifications, sharing the information with other candidates)?

F/C Was the decision to launch the procedure based on a proposal describing, inter alia, the need, the benefits to be obtained, the estimated costs, the available budget, the timescale, the potential risks, the options, a cost-benefit analysis, the rationale for choices and the subject matter of the procurement?

In the case where the contract was not divided into lots, did the contracting authority provide indication of the main reasons for that decision?

Were interested parties involved in describing the requirements for the performance?

F/C Was the performance described clearly, unambiguously and comprehensively, giving precise definition of the characteristics of what was to be supplied, so that all concerned had an equal understanding of requirements and that clarification or amendments are not necessary?

Was the scale and complexity of the procurement project adequately addressed?

In innovation partnerships, was the description of the performance designed suitably, according to a clear innovative strategy? Was the procedure prepared and conducted with sufficient expertise?

F/C Was the envisaged period for the execution of the contract feasible and reasonable, to allow a realistic execution, an adequate economic balance and a reopening to competition in a justified timeframe?

F/C In case of long-term contracts, such as concessions and public private partnerships, was the envisaged duration of contracts set according to:

- The type of services concerned?
- The time the contractors could reasonably need to recoup their investment, together with a return on invested capital?
- The need to reopen the competition in order to avoid an excessive duration and dependence for the contracting authority?

Have the performance conditions opened the possibility for economic operators to group and join forces regarding the respective economic, financial and technical capacities?

Could the bidders assess the economic risks the successful bidder would be responsible for, thus limiting the inclusion of extra charges for risk?

Were technical requirements set strict enough to guarantee the desired performance without being unnecessarily tight to exclude favourable bids that do not comply with all requirements?

F/C Did technical specifications (required characteristics of a material, product, supply or service) afford equal access for tenderers, containing no feature that directly or indirectly discriminate in favour, or against, any bidder, product, process or source?

- Were they drafted in such a way that they do not mirror key characteristics of supplies, services or works usually offered by a specific economic operator?

F/C Were technical specifications formulated by reference to performance or functional requirements admitted by the Directive?

F/C Did technical specifications exclude any reference to a specific make or source, to a particular process, to trade marks, patents, types or to a specific origin or production, thus preventing favouring or eliminating certain undertakings or products?

F/C When such references were made, was a precise description of the performance not otherwise possible and were those references accompanied by the words "*or equivalent*"?

F/C When technical specifications provided explicit review clauses to allow for a certain degree of flexibility for possible modifications of the contract during implementation, did those review clauses specify the scope and nature of possible changes in a clear and precise way and did they indicate the conditions under which they may be used?

F/C Except for the flexibility strictly allowed in the competitive dialogue and innovation partnership, did the performance description remain unchanged once the notices have been published?

FIG If the public authority has modified the performance description unilaterally:

Was the scope of change relevant and admissible?

Have the participants been informed in an equal manner?

- Was it conceivable that, under the assumption that the amended performance description had been the basis for the original competition, more bidders might have applied or submitted an offer?
- In that case, was the competition reopened or the application/submission deadline extended?

If negotiations or fine-tunings of the tenders have taken place, were these such that they were in accordance with the type of procedure used and were there no substantial changes to the performance specifications described in procurement documents?

When a competitive dialogue was used, did the contracting authority inform the participants when the dialogue was concluded and invite them to submit final tenders, describing the solution(s) and the elements required and necessary for the performance of the project?

Guidance

- **Directive:**
 - For preliminary market consultations, see article 40.
 - For division of contracts into lots, see articles 46 and 5 (8, 9 and 10).
 - For detailed information about admissibility of technical specifications, see article 42.
- For assessment of needs, market analysis, market consultations and justification of procurement, see *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.
- **Guideline for Auditors:**
 - See n.º 11 (Preparing the procurement).
- **Procurement Performance Model (PPM):**
 - For matching the goal of the procurement process with the users' needs see n. 15 of PPM.
 - For the planning of the public procurement process see nº 16 of PPM.
- **CJEU Case-Law:**
 - For admissible and inadmissible «*technical specifications*», see cases C-45/87, C-359/93, C-368/10, C-552/13 and C-278/14.
 - For «*amendment of technical specifications during the procedure*», see case C-278/14.
 - For «*discriminatory requirements*», see cases C-3/88 and C-243/89.

For «social protection of workers», see case C-115/14.

- **Audit reports and studies:**

Report	SAI
Performance Description	Germany

For a good preparation of procurement:

Report	SAI
IT Structures and Procurement in the Central Unit of the Federal Ministry of Agriculture, Forestry, Environment and Water Management	Austria
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	»
Reconstruction of the Salzburg Central Station	»
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	»
Refurbishment of the Parliamentary Building – Planning Project	»
Innsbruck Cable Railways Company – Reconstruction of the Hungerburgbahn and the Nordkettenbahnen Cable Railways	»
Planning and monitoring costs and benefits of information system procurement, 2017	Finland
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
	»
Construction of the Modlin Airport	Poland
Infrastructure investments of the Polish State Railways Polish Railway Lines (PKP PLK SA)	»
Implementation of selected tasks related to road construction and modernisation by local governments of the biggest cities in Poland	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For the lack of a clear definition of the main components of the contract:

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
Funds allotted for mending and maintaining of roads	Czech Republic
Funds earmarked for financing selected programmes in the competence of the Ministry of Labour and Social Affairs	»

For contracts based on poor projects and leaving many and important issues uncovered:

Report	SAI
Outsourcing of the data processing function at the Ministry of the Flemish Community	Belgium
Damage compensations in public works	»
Contract Variation Costs met by the Flemish Inland Waterway Agency "De Scheepvaart", 2016	»
Construction of the Brno Justice Palace and Facility	Czech Republic
Funds allotted for programmes of support for development of industrial zones and regeneration of brownfields	»
Funds earmarked for rehabilitation of old environmental burdens	»
Planning and implementation of selected ICT projects, aimed to improve the functioning of the police organisational units	Poland
Audit of a housing rehabilitation institute, 2014	Portugal

For justification of purchases/needs:

Report	SAI
Public Relations of the Federal Ministry of Agriculture, Forestry, Environment and Water Management	Austria
Investments in sport facilities in Flanders, 2014	Belgium
Decision-making process and justification of tram infrastructure projects by the Flemish Agency "De Lijn", 2014	»
Funds spent on acquiring- Czech Statistical Office headquarters	Czech Republic
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Implementation of public procurement related to external services by public sector entities	Poland
Consultancy services in public companies, 2010	Portugal
Audit Report on Public Procurement of the Municipalities of the Autonomous Community of La Rioja, 2014	Spain

For the use of social clauses:

Report	SAI
Social clauses in public procurement procedures conducted by the public administration	Poland

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.4. Were the procurement documents comprehensive, transparent and non-discriminating?

Background

In addition to the performance description, the procurement documents provide all the relevant conditions for the competition. Through the procurement documents, the contracting authority will explain its needs and its related objectives and requirements to the market, namely to those interested in tendering.

They inform the bidders about content and form of the documents they have to submit in order to verify their professional and financial ability and all the necessary declarations that the public authority requires. The public authority has some discretion concerning the requirements and verification it seeks, provided they are justified by the subject matter of the contract. Furthermore, the public authority should be aware that unnecessary strict requirements limit competition and reduce the scope for value for money.

In order to reduce procedural burdens, and as regards documents and certificates, the 2014 directive introduced the European Single Procurement Document (ESPD). The ESPD consists of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils conditions of non-exclusion, selection criteria and minimum levels of ability. The up-to-date supporting documents will ordinarily be required only to the tenderer to which the contract is awarded. Tenderers and candidates may, however, at any moment during the procedure, be requested to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

The tender documents also indicate the award criteria and the sub-criteria for the evaluation of the most advantageous offer and their weighting. Clear, objective and admissible criteria are crucial for impartial and transparent awards, reducing scope for arbitrary and corrupt decisions. The 2014 directives have put more emphasis on assessing quality of tenders, by encouraging the use of the best price-quality ration.

Questions

- F/C** Did the bidders have a clear understanding of which documents and declarations had to be presented with the tender?
- F/C** Could bidders learn all relevant information straight from the procurement documents? Did the public authority make sources of information beyond the procurement documents equally available for all the candidates?

Did the procurement documents clearly differentiate between exclusion grounds, selection criteria and award criteria?

F/C Did the procurement documents describe the requirements for the suitability of bidders, concerning:

- Minimum capacity levels of economical and financial standing?
- Minimum capacity levels of technical and/or professional ability?
- Required standards of quality assurance or environmental management?

F/C Were these requirements justified by objective reasons, related and proportionate to the subject matter of the contract and, thus, not overly demanding?

F/C Were means of proof required (registers, authorisations, memberships, turnovers, insurances, resources, proves of experience, certificates, standards, certifications or other) admissible under the directive?

F/C Was the extent of information required related and proportionate to the admissible requirements, avoiding unnecessary formalities?

Unless otherwise decided and justified, did the contracting authority clarify that, at the time of submission of requests to participate or of tenders, a self-declaration (ESPD) would be accepted as preliminary evidence in replacement of certificates confirming that the economic operator is not in a situation that would determine its exclusion and meets the relevant selection criteria or minimum levels of ability?

Did the public authority abstain from unnecessary verification in terms of the scope and deadline to prove the bidders capability?

F/C Where the contracting authority used methodologies to assess or weight selection criteria, did it publish those methods or weightings in the procurement documents? Were these methods objective and non-discriminatory?

F/C Has the public authority clearly defined the award criteria, in such a way that no unrestricted freedom of choice is conferred to the contracting authority?

Was the award criteria based on the most economically advantageous tender?

If the price-only criterion was chosen, were the technical specifications and quality minimum requirements clearly and sufficiently defined upfront?

In the case the assessment was not to be made on the basis of price alone, was the assessment of the most economically advantageous tender based on sub-criteria which:

- Were clearly indicated?
- Were suitable to determine cost-effectiveness?
- Did not reduce or distort competition?

- Were assessed according to a specified relative weighting of each one of the sub-criteria or to a range with an appropriate maximum spread specified?
- When weighting was not possible for objective reasons, were indicated in descending order of importance?
- Were different from those defined in the qualification of bidders?

FC Were those sub-criteria linked to the subject matter of the contract, reflecting the main focus and the importance of the elements of the performance?

FC Was the weighting set coherent, convincing and leaving little scope for arbitrary and random evaluation and ranking?

FC When the assessment is based in life-cycle costing, did the procurement documents indicate the method to determine the life-cycle costs and the data to be provided by the tenderers for that purpose?

FC When the award criteria included environmental, social and innovation related sub-criteria were these admissible under the directive?

FC Were set criteria and sub-criteria suitable to identify the tender that offers best value for money?

If a contract was divided into lots, was it specified how many lots may be awarded to each tenderer and the objective and non-discriminatory criteria for awarding more lots to each one?

FC Were there no inconsistencies between the several tender documents?

FC Were no changes introduced to selection and award criteria? In case changes were needed during the deadline for submission of tenders, was the deadline extended?

FC When the contracting authority set social or environmental conditions for the performance of the contract, were these compatible with EU law and was adequate information given to the candidates?

Guidance

- **Directive:**

For requirements and criteria concerning the suitability and selection of economic operators and correspondent means of proof, see articles 56 to 64.

For ESPD, see article 59.

For award criteria, see article 67. For the award of lots, see also article 46.

For performance conditions, see article 70.

- See also European Commission's *Buying Social - A Guide to taking account of social considerations in public procurement* and *Buying Green - A Handbook on green public procurement*.

For guidance and examples of good and bad practice in defining selection and award criteria and methods, see *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.

- **Guideline for Auditors:**

See n°s. 14 (Selection of suppliers) and 16 (Evaluation of tenders and award of contract).

- **Procurement Performance Model (PPM):**

See n° 16 of the PPM, about the implementation of the public procurement process and n° 17 about the compliance with EU law.

- **CJEU Case-Law:**

For «*grounds of exclusion*», see cases C-74/09, C-465/11, C-358/12, C-42/13, C-440/13, C-470/13, C-27/15, C-199/15, C-171/15 and C-387/14.

For «*criteria for qualitative selection*» and its weighting, see cases C-76/81, C-27-29/86, C-31/87, C-360/89, C-225/98, C-470/99, C-74/09, C-368/10, C-94/12, C-358/12, C-538/13, C-234/14, C-324/14, C-225/15 and C-387/14.

For «*reliance on the capacities of other economic operators*» or «*subcontractors*», see cases C-324/14, C-27/15, C-549/2013, C-298/15 and C-387/14.

For «*conditions or restrictions to the participation in the procurement procedures*» (protection of unemployed persons, specific or local undertakings, public sector participations, obligations imposed on economic operators), see cases C-31/87, C-21/88, C-272/91 and C-357 to C-359/10.

For «*discriminatory or disproportionate requirements or criteria*», see cases C- 3/88, C-16/98, C-203/14, C-425/14, C-552/13 and C-234/14.

For «*requirements concerning labour law*», see case C-549/2013.

For requirements on the «*qualifications of the staff assigned to the performance of the contract*», see case C-601/13.

For admissible and non-admissible «*award criteria*», see cases C-19/00, C-513/99, C-315/01, C-448/01, C-247/02, C-368/10 and C-538/13.

For the «*applicability, definition and weighting of the most advantageous tender award criteria*», see cases C-274/83, C-31/87, C-225/98, C-226/09 and C-6/14.

For the respect of the principles of «*equal treatment*» and «*transparency*», see cases C-94/99 (subsidised tenderers), C-340/02 (clear definition of subject matter and award criteria), C-226/09 and C-298/15 (changes on requirements or criteria during procedure), C-387/14 and C-131/16 (possibilities to clarify, correct or supplement the tender).

- **Audit reports and studies:**

For absence of information in the procurement process:

Report	SAI
Roads, Motorways and waterways maintenance leases	Belgium
Audit over a Rail Transport Institute	Portugal
Autonomous (regional) and local public sectors, financial year 1999. Item concerning "Public Procurement "	Spain

For clear and proportionate requisites of technical competence of tenderers:

Report	SAI
Funds earmarked for the construction of the ring road around the capital city of Prague	Czech Republic
Procurement management in the field of IT systems, software products and software services, 2004	Estonia
Audit of the Territorial Enhancement Operational Program, 2012	Portugal
Building works of the high speed line Madrid-Barcelona-1999 and 2000	Spain

For facilitating the access of SMEs to public procurement by simplifying requirements:

Report	SAI
The EU institutions can do more to facilitate access to their public procurement, 2016	ECA
Government's spending with small and medium-sized enterprises, 2016	UK

For the need of clear definition and detailing of the awarding criteria and its weighting:

Report	SAI
Bus line services: cost price and contract award to operators	Belgium
2000 Annual Report (§ 4.127.6), 2001 Annual Report (§ 4.129.65), 2002 Annual Report (§ 4.136.7(a))	Cyprus
Funds earmarked for housing support programmes	Czech Republic
Acquisition of cars in local governments, 2011	Estonia
Finnish state's payment traffic procurement	Finland
Audit over a Rail Transport Institute	Portugal
Public Private Partnerships in Health Sector	»
Integrated Project of the Northern Railroad	»

For relevancy of the award criteria towards the subject matter of the contract:

Report	SAI
Funds earmarked for railway infrastructure development	Czech Republic
Funds earmarked for the D3 motorway construction	»
Funds allotted for wastewater treatment	»
Simplified procurement procedures	Lithuania
Public Private Partnerships in Health Sector	Portugal
Integrated Project of the Northern Railroad	»
Audit of public hospitals, 2011	»
Audit of a housing rehabilitation institute, 2014	»

For possible award sub-criteria (excluding candidates' suitability requisites):

Report	SAI
Funds of the state budget allotted for organisation of the 2009 FIS Nordic World Ski Championships in Liberec	Czech Republic
Funds allotted for programmes of support for development of industrial zones and regeneration of brownfields	»
Integrated Project of the Northern Railroad	Portugal

For changes of requirements and criteria during the procedure:

Report	SAI
Rehabilitation works in schools, 2012	Portugal

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.5. Was the submission of variant tenders accepted and duly ruled?

Background

As a rule, economic operators should prepare tenders on the basis of what is requested by the procurement documents. However, contracting authorities can decide to leave room for different approaches or alternative solutions. For this purpose, they may allow the submission of variants. In this case, the tender may vary from the performance description without being excluded only for this reason. However, the public authority may evaluate any submitted variant only in cases where certain requirements are met.

Questions

- Did the public authority permit tenderers to submit variants, thus offering space for creative solutions?
- Did the contract notice or, where a prior information notice was used as a means of calling for competition, the invitation to confirm interest explicitly indicate the admissibility of variants?
- Did the public authority describe the minimum requirements to be met by the variants in the procurement documents?
- Did it also specify the requirements for the presentation of variant tenders?
- Was the award criteria described in such a way that it can be applied both to conforming tenders which are not variants and to variant tenders meeting requirements?

Guidance

- **Directive:**
For detailed information about variants, see article 45.
- **Procurement Performance Model (PPM)**
See n° 16 of PPM, about procedures open to innovation.
- **CJEU Case-Law:**

For the «*need of informing tenderers about the minimum specifications of variants*», see case C-421/01.

- **Audit reports and studies:**

Report	SAI
Funds allotted for the waterways and ports development and modernization	Czech Republic

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.6. Where applicable, did the public authority adequately manage experts employed to assist in the procurement process?

Background

The 2014 directive envisages that contracting authorities may conduct market consultations before launching a procurement procedure with a view to prepare the procurement and informing economic operators of their procurement plans and requirements. For this purpose, they may seek or accept advice from independent experts or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

On the other hand, in many cases where a specific knowledge or expertise is required, a public authority will need to engage experts to prepare technical specifications and/or tender documents. Experts may also need to be employed to meet particular requirements of the directive.

Monitoring by the public authority is of particular importance in these cases. Care must be taken to ensure user requirements are defined and incorporated into contract performance. Care must also be exercised to ensure that the specifications defined do not give any advantage to economic operators who are in a position to influence the expert. Furthermore, all the key documentation must be given to the contracting authority, so that it effectively owns the process and is able to treat all candidates in an equal manner, including in what regards the distribution of all requested information.

The involvement of experts in procurement procedures raises risks to the principles of equal treatment/non-discrimination and transparency. For example, experts may use the opportunity to design requirements in their own favour or, at least, may have access to privileged knowledge or other advantages capable of distorting the normal conditions of competition. Risks of corruption are also increased. Many national rules exclude experts employed on any part of the process from subsequently participating in the competition.

The Court of Justice of the European Union has ruled that a provision to automatically exclude experts from submitting a tender in a competition where they were involved is precluded by the directives. The Court stated that those experts must be given the opportunity to prove that, in the circumstances of the case, the experience acquired was not capable of distorting competition. In any case, if the public authority accepts the participation of an expert it had engaged, it must be able to demonstrate that the expert gained no advantage from the engagement.

Questions

- F/C** Where preliminary market consultations were conducted by seeking or accepting advice from independent experts or authorities or from market participants, is it evident that such advice had no effect in distorting competition and did not result in a violation of the principles of non-discrimination and transparency?
- F/C** Where the public authority contracted an expert, was the contract awarded in compliance with procurement regulations?
- F/C** Were the specifications of the contract determined free from influence of particular interests of consultants, experts or other economic operators?
- F/C** Was all the key documentation given to the contracting authority?
- F/C** Has the public authority examined in detail the definition of performance?
- F/C** Is there no evidence that the expert has influenced the decisions taken by the public authority in his/her interest or in the interest of a specific contractor?
- F/C** Is there no evidence that any personal interest (financial, economic or other) of a procurement service provider acting on behalf of the contracting authority compromised or may have been perceived as compromising its impartiality and independence in the context of the procurement procedure?
- F/C** Was the expert likely to gain privileged knowledge from his activity that could be advantageous for him in a subsequent competition? If so, was his participation in the contract specifically excluded?
- In case of exclusion, has the candidate or tenderer been given the opportunity to prove that his involvement in preparing the procurement procedure was not able to distort competition?
- F/C** If the expert submitted a tender, was all the relevant information exchanged in the context of or resulting from the involvement of that expert in the preparation of the procurement procedure made available to the other bidders? If necessary, were time limits for the receipt of tenders extended?
- F/C** Is there no evidence that the consultants participating in the project design released information to contractors competing for the prime contract?
- Were the measures taken documented?

Guidance

- **Directive:**
For detailed information on conflicts of interests, see article 24.

For preliminary market consultations, see article 40.

For prior involvement of candidates or tenderers, see article 41.

- **Guideline for Auditors:**

See n.º 11 (Preparing the procurement).

- **CJEU Case-Law:**

For the «*principle of non-discrimination between tenderers and no privileged knowledge*», see cases C-21/03 and C-34/03.

- **Audit reports and studies:**

Report	SAI
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	Austria

3. AUDITING THE PROCEDURE CHOSEN TO PROCURE

3.1. Did the public authority decide for an appropriate and admissible procurement procedure?

Background

The selection of the procedure has consequences for the scope of competition.

The basic procurement procedures that contracting authorities may use are the open or restricted ones. An open procedure is the one where any interested economic operator may submit a tender in response to a call for competition. A restricted procedure is a two-stage process where only those parties who meet minimum requirements concerning professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

Traditionally, the European regulations and case law consider negotiated procedures as narrowing competition, equal treatment and transparency. Therefore, negotiations have only been admitted when exceptional conditions expressly described prevail. However, the 2014 directive allows more freedom to negotiate, by creating the competitive procedure with negotiation and by regulating the conditions for negotiations in several procedures such as the competitive dialogue and the innovation partnership. Anyhow, pre-conditions for the use of this possibility must be met.

The possibility of using negotiations and specific types of procedures (such as competitive dialogue and innovation partnership) aim at allowing adaptations to the description of performance during the procedures. They are intended for cases of complex purchases or services, where the products are not currently available in the market, where the buyer is unable to define the means of satisfying its needs or where an inexistent product, work or service must be developed. These procedures can be developed in successive stages.

Negotiated procedures without call for competition are only to be accepted in very exceptional circumstances, which are explicitly described in the directive and must be strictly interpreted by contracting authorities. It is a major violation of EU procurement regulations and international standards for public authorities to award contracts without following the applicable procedures.

Some procurement instruments, such as central purchasing, framework agreements, dynamic purchasing systems, joint procurement and electronic auctions, are envisaged to bring some procedural flexibility and savings' possibilities without comprising fair competition and transparency.

Questions

F/C Has the public authority taken a well-grounded decision about the procurement procedure chosen and was the decision process documented?

Is it clear which procurement procedure the public authority has opted for?

F/C Where the directive is not applicable, are there regulations or policies stating the procedures to be adopted for the procurement and were they complied with?

F/C Did the public authority opt for the procedure that offers fair and open competition under the given circumstances?

F/C If exceptional negotiated procedures without call for competition were used, did the contracting authority give sufficient and reasonable reasons for its option, providing a detailed explanation as to why an open or restricted procedure was not possible?

F/C In this case, did it use one of the possible exemptions set in the directive to justify the procedure without call for competition and did it clearly and adequately set forth that the conditions of that exemption are met?

F/C Did those conditions actually occur?

When a competitive procedure with negotiation or a competitive dialogue was used, did the contracting authority provide sufficient justification for the use of the procedure and did at least one of the following situations actually occur?

- The needs could not be met without adaptation of readily available solutions
- The meeting of needs required design or innovative solutions
- The nature or complexity of the contract, its legal and financial make-up or the risks attached required prior negotiations
- The technical specifications could not be established with sufficient precision against a reference or standard
- In a previous open or restricted procedure only irregular or unacceptable tenders were submitted

When an innovation partnership procedure was used, did the contracting authority provide sufficient justification by identifying the need for an innovative product, service or work that could not be met by purchasing products, service or works already available on the market? Did that circumstance actually occur?

Was the chosen procedure the most efficient and effective for the performance of the contract?

Guidance

- **Directive:**

For more details concerning procurement procedures see articles 25 to 32.

See description of circumstances that allow the use of exceptional negotiated procedures without a call for competition in article 32.

For procurement rules in the field of defence and security, see articles 4(b,c), 9(3), 10(h), 15, 16 and 17, Annex III, and Directive 2009/81/EC.

- **Guideline for Auditors:**

See n.º 8 (Tendering Procedures).

- **Procurement Performance Model (PPM):**

See nº 16 of PPM, about planning the public procurement process, and nº 17, about compliance with EU law.

- **CJEU Case-Law:**

According to the CJEU's extensive case law concerning exemptions to the application of the public procurement directives, the codified exemptions must be interpreted in a strict way and applied only under exceptional circumstances. This concerns especially those premises related to the use of direct award or negotiated procedures with no call for tenders.

For «*strict interpretation*» and the «*need of admissible and adequate justification and proof*» for the use of non-competitive procedures, see cases C-199/85, C-3/88, C-340/02, C-385/02, C-84/03, C-157/06, C-24/91, C-107/92, C-328/92, C-318/94, C-299/08, C-271/08, C-113/13, C-50/14 and C-221/12.

For «*reasons of extreme urgency*» and «*unforeseeable events*», see cases C-24/91, C-107/92, C-328/92 and C-318/94.

For «*non-admissible direct award of concessions*», see cases C-231/03 and C-458/03.

For «*in-house contracting*», see cases C-107/98, C-26/03, C-458/03, C-295/05, C-324/07, C-573/07, C-182 and 183/11, C-15/13, C-574/12 and C-553/15.

For «*direct awards to semi-public companies formed following competitive procedures*», see case C-196/08.

For «*contracts between public authorities*», see cases C-480/06 and C-159/11.

For «*non-admissible direct award of additional works*», see case C-423/07.

- **Audit reports and studies:**

For advantages of framework agreements:

Report	SAI
Framework contracts: the Federal Central Buying Office's operation examined in terms of sound management and legality	Belgium
Follow-up framework agreements	»
Framework agreements by the Flemish Agency for Facility Management, 2014	»
Audit of the main central purchasing body of the State, 2011	Portugal

For "stock contract technique":

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium

For the use of undue and less competitive procedures:

Report	SAI
Public Relations of the Federal Ministry of Agriculture, Forestry, Environment and Water Management	Austria
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	»
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	»
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Contract marketing and promotion expenditure	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»
Consultancy contracts awarded by ministerial cabinets	»
Dredging works	»
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Report on the Danish government's tendering of IT operations and maintenance, 2016	Denmark
Organisation of public procurement in Viimsi Municipality, 2013	Estonia
Organisation of public procurement in local governments, 2010	»
Statistics Finland's service procurements	Finland
Universities' procurement activities	»
Use of expert services by the Defence Administration	»
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece

Report	SAI
Compliance of the operation of a municipal joint-stock company "Daugavpils siltumtīkl" with the planned goals and requirements of regulatory enactments	Latvia
Construction of the Modlin Airport	Poland
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Poland
Audit over a Rail Transport Institute	Portugal
Public investment projects by public rail transport enterprise	»
High speed railway project	»
Integrated project of the Northern Railroad	»
Mafra Municipality and its enterprises	»
Sintra Municipal enterprise for parking management (including selection of private partner to a PPP arrangement)	»
Audit of public hospitals, 2011	»
Audit of the existing mechanisms for the control and reduction of CO 2 emissions, 2011	»
Audit of compliance with the Convention on Wetlands of International Importance (Ramsar Convention), 2012	»
Audits of municipalities, 2013	»
Direct award contracts in water public companies, 2017	»
Procurement awarded during the financial year 2002 by the state public sector	Spain
Autonomous (regional) and local public sectors, financial years 1999 and 2000. Items concerning "Public Procurement"	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For non-justification of used procedure:

Report	SAI
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Direct award contracts in water public companies, 2017	Portugal
Procurement awarded by the state public sector during the financial years of 1999, 2000 and 2001	Spain

For the use of restricted procedures:

Report	SAI
Restricted procedures (above and below thresholds)	Germany

For awards to companies controlled by the contracting authority:

Report	SAI
Audit conducted in municipalities, 2015	Lithuania

For the use of Public Private Partnerships:

Report	SAI
Public Private Partnerships in the EU: widespread shortcomings and limited benefits, 2018	ECA
Implementation of public-private partnership undertakings	Poland

3. AUDITING THE PROCEDURE CHOSEN TO PROCURE



3.2. Did the chosen procedure ensure competition, transparency and equal treatment?

Background





Besides the attainment of value, the principles of fair competition, transparency and equal treatment must also be respected. European regulations establish different levels for safeguarding these principles according to the relevant size of the contracts and the need to balance the function and weight of formalities with the associated costs. In an open procedure, all interested economic operators are given the opportunity to submit a tender, which is not necessarily the case with other procedures. According to the procedures chosen, certain minimums have yet to be considered. For reasons of equal treatment, economic operators who did not apply must not be separately invited by the public authority.

Questions

➤ When an open procedure was used:








-  Did the public authority publish a contract notice calling for competition all interested economic operators?
-  Were all the submitted tenders considered for analysis?

➤ When a restricted procedure was used:






-  Did the public authority publish a prior notification calling any interested candidate to request participation?
-  Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
 - The minimum and, where appropriate, maximum number of candidates it intends to invite?
 - The objective and non-discriminatory selection criteria to choose the candidates to invite?
-  Did the number of candidates invited respect the minimum set (usually 5), ensuring a genuine competition?
-  Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?

➤ When a competitive procedure with negotiation was used:

-  Were all interested operators allowed the opportunity to participate in the tender stage?

-  Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
 - The minimum and, where appropriate, maximum number of candidates it intends to invite?
 - The objective and non-discriminatory selection criteria to choose the candidates to invite?
-  Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?
-  Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?
-  Did the description of the procurement define the minimum requirements to be met by all tenders and were those requirements kept unchanged?
-  When successive stages were used, was that envisaged in the notice or procurement documents and were the number of solutions to be discussed reduced by application of the described award criteria?
-  Did contracting authorities ensure equality of treatment among all participants during the whole procedure, notably by providing information in a non-discriminatory manner and by informing all in writing of any changes to the technical specifications or other procurement documents?
-  Is it clear that negotiations did not involve change to the essential aspects of the tender or the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document?

➤ When a competitive dialogue was used:

-  Were all interested operators allowed the opportunity to participate?
-  Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
 - The minimum and, where appropriate, maximum number of candidates it intends to invite?
 - The objective and non-discriminatory selection criteria to choose the candidates to invite?
-  Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?
-  Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?
-  Did the description of the procurement define the minimum requirements to be met by all tenders?
Was the best price-quality ratio the sole basis of the award criterion?

F/C When successive stages were used, was that envisaged in the notice or procurement documents and were the number of solutions to be discussed reduced by application of the described award criteria?

F/C Did contracting authorities ensure equality of treatment among all participants during the whole procedure, notably by providing information in a non-discriminatory manner?

F/C Is it clear that negotiation, clarification, specification or optimisation of tenders or any additional information did not involve change to the essential aspects of the tender or the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document?

➤ When an innovation partnership was used:

F/C Did the public authority publish a prior notification calling any interested candidate to request participation and providing the information for qualitative selection?
Did the criteria for qualitative selection include candidates' capacity in the field of research and development and of developing and implementing innovative solutions?

F/C Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:

◦ The minimum and, where appropriate, maximum number of candidates it intends to invite?

◦ The objective and non-discriminatory selection criteria to choose the candidates to invite?

F/C Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?

F/C Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?

Was the best price-quality ratio the sole basis of the award criterion?

F/C Did the procurement documents describe how the partnership will work: one or several partners; how to agree on performance levels and maximum costs and on intermediate targets and remuneration; sequence of phases; conditions of termination and/or reduction of partners?

F/C When successive stages were used, was that envisaged in the notice or procurement documents and were the number of solutions to be discussed reduced by application of the described award criteria?

F/C Did contracting authorities ensure equality of treatment among all participants during the whole procedure, notably by providing information in a non-discriminatory manner and by informing all in writing of any changes to the technical specifications or other procurement documents?

F/C Is it clear that negotiations did not involve changes to the minimum requirements set out in the procurement documents?

F/C When a negotiated procedure without prior publication of a contract notice was used:

If possible, was a sufficient competitive environment created?

➤ When a framework agreement was used:

F/C Has the agreement been awarded in compliance with the general procurement regulations?

F/C To prepare the framework agreement, was there effective competition?

Have the special requirements pursuant to article 33 of directive been met?

Is the duration of the agreement less than the maximum term of four years? If not, is there a justification for the exceptional case?

F/C Did the procurement documents indicate the conditions and terms to reopen competition in framework agreements concluded with more than one economic operator?

F/C Did the procurement documents of the framework agreement concluded with more than one economic operator specify clear and objective award criteria for subsequent contracts?

F/C When awarding a single contract, were the public authority and the supplier original parties to the framework agreement?

F/C Did contracts based on a framework agreement respect the terms laid down in that agreement?

F/C When the competition was reopened, were contracts awarded on the basis of the criteria set out in the procurement documents for the framework agreement?

➤ When a dynamic purchasing system was used:

Was the dynamic purchasing system set up following the rules of restricted procedure? In the set up of the system and in the award of contracts were only electronic means used?

F/C Were the selection criteria clearly defined (for each category of products, works or services, if applicable)?

F/C Were all economic operators satisfying the selection criteria allowed admission throughout the entire period of the dynamic purchasing system?

Have the special requirements pursuant to article 34 of directive been met?

Was invitation to tender to each specific contract issued after the evaluation of the indicative tenders was completed?

F/C Were all admitted tenderers invited to submit a tender for each specific contract?

Were no charges billed to interested economic operators or the parties to the system?

➤ When an electronic auction was used:

F/C Was the auction announced in the contract notice or in the invitation to confirm interest and were the necessary details included in the procurement documents? Were all required specifications given equally to tenderers?

F/C Were all tenderers simultaneously invited to participate in the auction, informed on the instructions and connections and sent the outcome of the initial evaluation of the tender?

Was the auction solely based on prices and/or on new values of the features of the tenders indicated in the procurement documents?

Did the invitation included the formula to determine the automatic re-rankings on the basis of the new prices and/or new values submitted?

F/C Throughout each phase of the auction, did the contracting authority instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment?

F/C Is it clear that, during any phase of the auction, the identities of the tenderers were never disclosed?

F/C Did the auction comply with the applicable and announced rules?

➤ When electronic catalogues were used:

Was the presentation of tenders in the form of electronic catalogues announced in the contract notice or in the invitation to confirm interest and were the necessary details included in the procurement documents?

Have the special requirements pursuant to article 36 of directive been met?

Were catalogues compliant with requirements concerning electronic communication tools, as well as all additional requirements specified by the contracting authority?

➤ When the contracting authorities acquired works, supplies and/or services from central purchasing bodies:

Did they respect provisions set out in article 37 of the directive?

➤ When two or more contracting authorities agreed to jointly perform certain specific procurements:

If and in the extent where the conduct of the procurement procedure was carried out jointly or where the procedure was managed by one of them acting on behalf of all, did all of them fulfil their obligations pursuant the directive?

In the extent where the procedure was conducted on the name and behalf of a sole contracting authority, did this contracting authority fulfil its correspondent obligations pursuant the directive?

- When contracting authorities from different Member States acted jointly in the award of public contracts (notably by using central purchasing activities offered by central purchasing bodies located in another Member State) :

Did the contracting authorities comply with the respective and applicable national mandatory public law provisions?

Did the participating contracting authorities conclude an agreement defining:

- The responsibilities of the parties?
- The relevant applicable national provisions?
- The internal organisation of the procurement procedure (including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts)?

- When contracting authorities from different Member States have set up a joint entity:

Did the participating contracting authorities agree on the applicable national procurement rules (for an undetermined period, for a certain period of time, for certain types of contracts or for one or more individual contract awards)?

Guidance

- **Directive:**

For open procedure, see article 27.

For restricted procedure, see articles 28, 65 and Annex V.

For competitive procedure with negotiation, see articles 29, 65 and Annex V.

For competitive dialogue, see articles 30 and 65.

For innovation partnership, see articles 31 and 65.

For negotiated procedure without prior publication, see article 32.

For framework agreements, see article 33.

For dynamic purchasing systems, see article 34.

For electronic auctions, see article 35 and Annex VI.

For electronic catalogues, see articles 36 and 22.

For central purchasing, see article 37.

For occasional joint procurement, see article 38.

For joint cross-border procurement, see article 39.

- **Guideline for Auditors:**

See n.ºs 8 (Tendering procedures), 9 (Procurement instruments) and Appendix VI

- **Procurement Performance Model (PPM):**

See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **CJEU Case-Law:**

For «*limitation to a maximum number of tenderers*», see case C-225/98 and C-138/08.

For «*obligation to ensure genuine competition*», see case C-138/08.

For «*negotiation with a tenderer not complying with mandatory requirements*», see case C-561/12.

For «*publication of notices*», see cases C-20 and 28/01.

For «*equal treatment of economic operators*», see case C-396/14.

- **Audit reports and studies:**

For lack of transparency and competition:

Report	SAI
ASFINAG Bau Management GmbH (Highway and Road Construction Financing Company Construction Management Corporation) regarding the construction of the 2nd tube of the Tauern Road Tunnel	Austria
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Report on procurement at Danish institutions of higher education, 2015	Denmark
Organisation of public procurement in local governments, 2010	Estonia
Contracts and payments in health care provision, 2016	Slovak Republic

For centralised purchasing:

Report	SAI
Federal State - Procurement through the central purchasing body FOR CMS (171st Report of the Court of Audit), 2014	Belgium
Compliance with the joint procurement obligation, 2011	Finland
Centralised public procurement 2013	Lithuania

Report	SAI
Public procurement of goods and services typical for public administration	Poland
Audit of centralised purchasing in the National Health System, 2012	Portugal
Centralised purchasing at a school of tourism, 2016	»

4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

4.1. Did the public authority notify procurement processes and results in compliance with the Directive and EC Treaty?

Background

Notifying the intention to award a contract and publishing the rules that govern the procedure is crucial for a fair and open competition.

Directives comprise a series of rules which cover the form of notification and time frame for the procedure. Although these rules may seem merely formal, they are generally binding and ensure conditions for fair competition, adequate time for preparation of tenders, equal treatment and transparency. Also, the Court of Justice of the European Union has considered that their violation has serious consequences for the legitimacy of the procedure.

The directive specifies three different commitments to place notifications – prior information notice (PIN), contract notice and contract award notice. The means used to call for competition is the most crucial aspect. When the directive is applicable, all relevant publications must be made or announced in the Official Journal of the European Union (OJEU).

Questions

F/C When the directive is applicable, was the call for competition for contracts or framework agreements published in the OJEU?

F/C Did this notice follow the necessary form, including disclosure of all the required information?

Were notices published at national level no sooner than the publication in the OJEU?

Did national advertisements confine details to those contained in the notification sent to OJEU?

Did prior information notices follow the requirements mentioned in article 48 and Annexes V and VIII of the directive, particularly when they were used as a call for competition?

When the contracting authority made publications in its buyer profile, was a notice on that sent to the OJEU?

F/C Did time limits set to receive tenders and requests to participate comply with the minimum requirements established for the chosen procedure?

When minimum time limits were shortened on the ground that a prior information notice had been published, did this PIN include all the information required and was it sent for publication between 35 days and 12 months before the date on which the contract notice was sent?

F/C When minimum time limits were shortened on the ground of a state of urgency:

- Was the state of urgency duly substantiated?
- Is it clear that the concrete urgency circumstances would, in fact, render impracticable the normal minimum time limits?

When minimum time limits were shortened on the ground that tenders may be submitted by electronic means:

- Were tools, devices, file formats and technical characteristics required non-discriminatory, general available and interoperable with ICT products in general use (no proprietary licensing scheme)? Otherwise, were alternative means of access offered?
- Did they not involve any restriction of the economic operators' access to the procurement procedure?
- Were requirements mentioned in article 22 (6) and Annex IV of the directive respected, including in what respects security and the format of electronic signature?

In restricted procedures, competitive procedures with negotiation, competitive dialogue and innovation partnerships, were selected candidates invited to submit their tenders or take part in the dialogue, simultaneously and in writing?

Did the invitations include all the required information, as described in annex IX of the directive?

F/C For contracts below the thresholds, was an advertisement to open the award to competition published?

F/C In this case, were the means and content of advertising adequate having regard to the relevance of the contract to the internal market?

F/C Were the time limits set for submission of bids sufficient for the potential bidders to prepare and submit their bids?

F/C In particular, were time limits duly and proportionately fixed or extended in cases where:

- There was a need for visits to the site or on-the-spot inspection of documents?
- Additional information was required and not supplied in due time?
- Significant changes were made to procurement documents?
- Unrestricted and full direct access free of charge by electronic means to certain procurement documents could not be offered?

- F/C** When time limits were extended, were economic operators duly informed and was that published according to the requirements applying to the initial notice?
- Were results of the procurement procedures published through contract award notices, in line with deadlines and content described in article 50 and annex V of the directive?
- F/C** Were all candidates and tenderers informed of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system?
- F/C** When candidates or tenderers requested information on reasons for rejection, on decisions and their grounds and/or on the conduct and progress of negotiations and dialogues, did the contracting authority timely provide that information?

Guidance

- **Directive:**

For prior information notices, see article 48 and Annex V.

For forms and content of contract notices, see article 49 and Annex V.

For minimum time limits to receive tenders or requests to participate and shortening possibilities, see articles 27 to 3. For the extent of time limits, see articles 47 and 53.

For contract award notices, see article 50 and Annex V.

For form and manner of publication of notices, see article 51, Annex V and Annex VIII.

For content of the invitations to submit tenders, to participate in a dialogue or to confirm interest, see article 54 and Annex IX.

For publications at national level, see article 52.

For rules applicable to communication, notably electronic transmission and receipt of tenders and requests to participate, see article 22 and Annex IV.

For information to candidates and tenderers, see article 55.

- For notification of procurement in contracts not covered by the Directive, namely contracts below the thresholds, see Commission Interpretative Communication 2006/C 179/02.

- **Guideline for Auditors**

See n.ºs 5 (Contracts excluded from the scope of EU public procurement directives), 6 (Publications in the OJEU), 10 (Time limits), 16 (Disclosure of information) and Appendices IV and V.

- **Procurement Performance Model (PPM):**

For the need for proper communication between procurement staff and suppliers see n° 16 of PPM. For compliance with EU law see n° 17 of PPM.

- **CJEU Case-Law:**

For the «*need and purpose of rules regarding participation and advertising*», see cases C-76/81, C-324/98, C-399/98 and C-423/07.

For the need of «*prior information notices*», see case C-225/98.

For «*publication of notices*», see cases C-20 and 28/01.

- **Audit reports and studies:**

For publicity, notices or information to the bidders:

Report	SAI
Contract marketing and promoting expenditure	Belgium
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Organisation of public procurement in local governments, 2010	Estonia
Statistics Finland's service procurements	Finland
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education- financial years 1996 to 1998	Spain
Contracting awarded under the establishment of new ways of management of the National Health Service- financial years 1999, 2000 and 2001	»

4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

4.2. Was timely and equal access to contract documents and information provided to all candidates?

Background

The equal access to information by candidates is clearly and extensively protected by the European public procurement regulations and is a primary mechanism for guaranteeing fair competition and transparency and for reducing the scope of favouritism given to specific interests.

The use of information and communication technologies has brought wider possibilities of accessing and spreading information, for taking advantage of organised knowledge and for accelerating procedures. The 2014 directive introduces the principle of electronic communication throughout the procurement process. Accessibility and security have new significance in this context.

Questions

Did the contracting authority offer by electronic means timely, unrestricted and full direct access free of charge to the procurement documents and any supplementary documents (specifying the internet address in the notice or invitation)?

F/C When that type of access was not offered, were all specifications, documents and additional information made available by alternative means and on a timely basis to economic operators?

F/C Were the documents describing the requirements and performance accessible to all bidders in the same way and was it not easier for domestic bidders to obtain specific documents?

F/C Was additional significant information supplied to all interested parties in an equal basis?

F/C When economic operators asked for clarifications during the period of submission, was that foreseen in the applicable rules or in the procurement documents, was the communication held in writing and has it been documented and was the additional information made available to all potential tenderers?

Were the means of communication and information exchange used free from barriers and did they allow economic operators' equal access to the procurement procedure?

When communication and information exchange were conducted by electronic means:

◦ Were tools, devices, file formats and technical characteristics required non-discriminatory, general available and interoperable with ICT products generally used (no proprietary licensing scheme)? Otherwise, were alternative means of access offered?

- Did they not involve any restriction of the economic operators' access to the procurement procedure?

Were requirements mentioned in article 22 (6) and Annex IV of the directive respected, including in what respects security and the format of electronic signature?

If an electronic auction or a dynamic purchasing system was used, did the tender documents specify details on access to information, electronic equipment used and connection specifications?

Did the contracting authority respect the proportionality principle between the security level of electronic communications means used and the risk related to identification of senders and integrity of message (for instance risk that the information was sent by another sender), in line with article 22 (6) of the directive?

Guidance

- **Directive:**

For electronic and non-electronic communication and access to documents, including levels of security, see articles 22 and 53 and Annex IV.

For dynamic purchasing systems, see article 34.

For electronic auctions, see article 35 and Annex VI.

- **Guideline for Auditors:**

See n. °s 1 (Main changes introduced by the directive) and 13 (Documents and communication).

- **Procurement Performance Model (PPM):**

See n° 16 (implementing the public procurement process) and n° 17 (compliance with EU law).

- **CJEU Case-Law:**

For the «*information to be included in tender notices*», see case C-359/93.

- **Audit reports and studies:**

For the need of providing all the bidders with complete information about the contract performance:

Report	SAI
The procurement and commercial use of multipurpose icebreakers	Finland

4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

4.3. Was confidentiality ensured when necessary?

Background

Transparency should not undermine the importance of not giving any advantage to bidders when submitting their offers. Confidentiality in critical moments is essential to ensure that the public interest is protected and to preserve business confidence. Preventing access to privileged information is also a cornerstone to deter corrupt opportunities.

Questions

F/C Did communication, exchange and storage of information ensure confidentiality of tenders and requests to participate?

F/C Was the content of tenders and requests to participate examined only after expiration of the time limit set for submitting them?

- Did the contracting authority abstain from disclosing information forwarded by economic operators that they have designated as confidential?

F/C During an electronic auction, did the identity of tenderers remain undisclosed at all times?

In competitive procedures with negotiation, competitive dialogues and innovation partnerships, did the contracting authority ensure that solutions proposed or confidential information provided by candidates during negotiations, dialogue and partnership, were not revealed to others without their explicit agreement?

When the procurement documents included information of confidential nature, has the contracting authority:

- Identified the confidential information?
- Indicated in the notice or in the invitation to confirm interest the requirements imposed on economic operators to protect that information?
- Mentioned in those documents how the economic operators could obtain access to that information?
- Extended the time limit for the submission of tenders?

Were national laws on confidentiality respected?

F/C When an economic operator has undertaken to obtain confidential information that may confer upon it undue advantages in the procurement procedure, did the contracting authority exclude it from participating in the procurement procedure? Did the decision of

exclusion follow an opportunity to, despite the fact, provide evidence of measures taken to demonstrate its reliability?

Guidance

For confidentiality requirements see articles 21, 22(3), 29(5), 30(3), 31(4) and (6), 53(1) and 57(4).

- **CJEU Case-Law:**

For «*relationship between tenderers*», see case C-538/07

5. AUDITING THE AWARD PROCEDURES

Background

During the awarding phase, tenders are analysed and selected against the rules and criteria established in the procurement documents.

The awarding procedures are typically conducted in five separate steps:

- Formal review of bids
- Assessment of:
 - Inexistence of exclusion causes for bidders
 - Suitability of bidders
- Confirmation of exclusion causes for tenders
- Evaluation of tenders and award decision
- Conclusion of the contract

In some procedures, like restricted procedure, competitive procedure with negotiation, competitive dialogue, innovation partnership and dynamic purchasing system, completely autonomous stages are devoted to the selection of the economic operators allowed to submit a tender. Those who, having requested that possibility, are not selected as suitable bidders are, from that moment, outside of the competition and are not required to prepare a tender.

For other procedures, such as the open one, the suitability of candidates is assessed after they have submitted their tenders. However, the qualitative assessment of candidates must be undertaken separately and performed prior or independently to the evaluation of tenders, a practice that is sometimes overlooked by contracting authorities.

Evaluation steps must be done in accordance with the framework of each specific procedure.

Exclusion grounds and selection and award criteria must never be modified during the assessment.

Even if exclusion grounds and selection and award criteria are transparent and objective, it is good practice that the assessment is conducted by more than one person. It is common to use an evaluation committee or panel that will issue a recommendation to the contracting authority on the results of the assessment and on the selected tender to be awarded. Contracting authorities must verify potential conflicts of interest affecting the people involved in the assessment and recommendation.





5. AUDITING THE AWARD PROCEDURES

5.1. Was a formal review of tenders received undertaken?

Background

Before the assessment of bidders takes place there should be a formal verification about the compliance of tenders with basic requirements, such as adherence to deadlines and enclosure of the information requested.

Questions

-  Is there a record maintained of the procedures followed in the opening of tenders together with the reasons for the acceptance or rejection of tenders received?
-  Were at least 2 officials employed to work together in the opening of the documents?
Did the contracting authority verify compliance with the basic requirements of the competition?
-  Were tenders rejected for due cause such as:
 - Were not received within the prescribed time limit?
 - Did not meet the formal requirements?
 - Did not include the required certifications and information?
-  Were no tenders presented after the time limit accepted?

Guidance

- **Directive:**
For the content of the report on the tendering and evaluation process, see article 84.
For formal review of tenders, see article 56.
- **Guideline for Auditors:**
See n.º 12 (Receipt, opening and clarification of tenders).
- **Procurement Performance Model (PPM):**
See n.º 16 of PPM (implementing the public procurement process).

- **CJEU Case-Law:**

For «*lack of required documents*», see case C-336/12.

For «*possibilities to clarify, correct or supplement the tender*», see cases C-336/12, C-387/14 and C-131/16.

For «*non-compliance with technical specifications or requirements*», see cases C-561/12, C-538/13, C-278/14 and C-27/15.

5. AUDITING THE AWARD PROCEDURES

5.2. Was the suitability of candidates accurately assessed?

Background

At this stage, the contracting authority should establish whether there are grounds to exclude bidders from participating in the procurement and, if not, whether they meet the established requirements to be selected as tenderers.

The contracting authority should admit only those bidders who have not committed certain offences or participated in criminal organisations (the new directive enlarged the grounds for exclusion) and who demonstrate eligibility, including minimum capacity levels set in the procurement documents.

As we have seen in 2.4, the public authority has some discretion concerning the requirements and verification it seeks, provided they are justified by the subject matter of the contract and don't unnecessarily limit competition.

When assessing the suitability of bidders, the principles of equal treatment and transparency must be observed.




The contracting authority must document the process followed in the selection of candidates, stating the reasons for selection and rejection.

In some procedures it is possible to shortlist a limited number of qualified tenderers. In these cases, shortlisting must be carried out by non-discriminatory and transparent rules and criteria made known to candidates.

The selected bidders will then be invited to submit tenders, to negotiate or to participate in a dialogue. In open procedures, the tenders that bidders have already submitted will be evaluated.

When a bidder is not selected, the tender submitted by this bidder should not be evaluated.

Questions

-  Was the qualitative assessment of submissions received undertaken independent of and previously to the evaluation of tenders?
-  When, in open procedures, a contracting authority decided to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria, was the verification of these aspects ensured and carried out in an impartial and transparent manner?
-  Was the selection process documented, including the reasons for selection and rejection?

F/C Did the contracting authority assess suitability of bidders exclusively on the basis of the requirements previously announced and in a transparent, objective and non-discriminatory manner?

F/C Unless otherwise provided by national law, when contracting authorities requested economic operators to submit, supplement, clarify or complete information or documentation, did they fix an appropriate time limit for that purpose and did they comply with the principles of equal treatment and transparency?

At the time of submission of requests to participate or of tenders, and unless otherwise decided and justified, did the contracting authority accept the ESPD as a preliminary evidence of the inexistence of exclusion causes and the fulfilment of selection criteria or minimum ability levels?

Did the ESPDs accepted include a formal statement by the bidder:

- Committing that the relevant grounds for exclusion do not apply and that the relevant selection criteria or minimum ability levels are fulfilled?
- Providing the relevant information required by the contracting authority?
- Identifying the public authority or third party responsible for establishing the supporting documents?
- Stating the ability to provide those supporting documents, upon request and without delay?
- Confirming that other entities in whose capacities the bidder relies fulfil the same conditions?

F/C In case the contracting authority considered it necessary for the proper conduct of the procedure to ask candidates or tenderers to submit all or part of the supporting documents, were these documents submitted and did they provide the necessary evidence?

F/C In case the candidate or tenderer seriously misrepresented in supplying the information required, withheld such information or was not able to submit the supporting documents required, did the contracting authority exclude it from the procedure, after giving it the opportunity to provide evidence that, despite the fact, it has taken sufficient measures to demonstrate its reliability?

Did the contracting authority abstain from demanding documentary evidence where it already possessed the documents or where it could directly and free of charge access a database containing the relevant information or certificates (see list of databases and repository of certificates in e-Certis)?

F/C Did the contracting authority verify that candidates or tenderers:

- (and/or their representatives) Were not convicted of participation in a criminal organisation, corruption, fraud, terrorist offences or offences linked to terrorist activities,

money laundering, terrorist financing, child labour or other forms of trafficking in human beings?

- Have not infringed obligations related to the payment of taxes and social security contributions?
- Have not violated applicable obligations in the fields of environmental, social and labour law?
- Were not bankrupt, insolvent or in an analogous situation?
- Were not guilty of grave professional misconduct?
- Have not entered into agreements with other economic operators aimed at distorting competition?
- Were not in a situation of conflict of interests?
- Have not been previously involved in the preparation of the procurement procedure?
- Have not shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract?
- Have not undertaken to unduly influence the decision-making process, to obtain confidential information conferring undue advantages in the procurement procedure or to negligently provide misleading information that might have a material influence on decisions concerning exclusion, selection or award?

F/C In case one or more of those situations occurred, did the contracting authority give a serious consideration to that? Is it documented that the contracting authority has taken a grounded decision on excluding or not the economic operator from participating in the procurement procedure, after verifying if, despite the fact, the economic operator has taken sufficient measures to demonstrate its reliability?

F/C Did the contracting authority verify that candidates:

- Were suitable to pursue the professional activity as admissibly required?
- Had technical and/or professional ability in accordance with the references specified in either the notice or invitation to tender?
- Had economic and financial standing in accordance with the references specified in either the notice or invitation to tender or other appropriate documents?

F/C Where required, did the contracting authority verify that candidates complied with quality assurance standards and environmental management standards, in line with the criteria of the directive?

F/C Where required, were candidates registered as approved contractors, suppliers or service providers or certified by relevant bodies? Did the contracting authority recognise equivalent certificates from bodies established in other Member States or accept other equivalent means of proof?

F/C Where the economic operator intended to rely on the capacities of other entities, did it prove to the contracting authority that it would have at its disposal the necessary resources, by, for instance, producing a commitment by those entities to that effect?

F/C In that case, did the contracting authority verify whether the entities on whose capacity the economic operator intended to rely fulfilled the relevant selection criteria and whether there were grounds for their exclusion? For this purpose, did the subcontractors provide their self-declarations?

F/C When the contracting authority shortlisted a limited number of qualified tenderers:

- Was that possible within the followed procurement procedure?
- Was that indicated in the contract notice with the necessary details?
- Were the criteria and method priority established?
- Were the established criteria and method respected?

F/C Did the contracting authority require that the economic operator replaced an entity that did not meet a relevant selection criterion, or in respect of which there were grounds for exclusion?

Where required, did the economic operator and subcontractors provide documents of joint liability for the execution of the contract?

F/C Is it evident that the contract was not awarded to a tenderer that should have been excluded or that did not meet the selection criteria or minimum ability levels?

F/C Has the tenderer to which the contract was awarded been requested to submit and has it submitted up-to-date supporting documents proving the absence of grounds for exclusion and the fulfilment of the selection criteria and, if applicable, certificates of quality assurance and environmental management standards?

When the participation in the procurement was reserved to support social inclusion, did at least 30% of the workforce of the organisation consist of people with disabilities or disadvantaged people?

F/C Is there no evidence of false certifications?

Were candidates from States covered by AGP Agreement included and evaluated in like manner to all other submissions received?

Guidance

- **Directive:**

For suitability of economic operators (exclusion grounds and selection criteria), see articles 56 to 58.

For conflict of interests, see article 24.

For ESPD, see article 59.

For admissible means of proof, see article 60.

For online repository of certificates and databases (e-Certis), see article 61.

For reliance on capacities of other entities, see articles 63 and 71.

For admissible quality assurance and environmental management assessment, see article 62.

For non-discriminatory provisions about lists or certifications, see article 64.

For reserved contracts, see article 20.

For AGP Agreement, see article 25.

- **Directive 2009/81/EC:**

In defence and security procurement, candidates may be required to submit specific guarantees ensuring security of information and security of supply.

- **Guideline for Auditors:**

See n.º 14 (Selection of suppliers).

- **Procurement Performance Model (PPM):**

See n.º 16 of PPM (implementing the public procurement process) and n.º 17 (compliance with EU law).

- **CJEU Case-Law:**

For «*exclusion causes*», see cases C-376/08, C-74/09, C-465/11, C-358/12, C-42/13, C-440/13, C-470/13, C-387/14, C-396/14, C-425/14, C-27/15, C-199/15 and C-171/15.

For «*qualitative selection*», see cases C-199/07, C-368/10, C-94/12, C-358/12, C-234/14, C-324/14, C-387/14 and C-298/15.

For the «*assessment of economic and financial standing*», see cases C-94/12 and C-225/15.

For «*registration in official lists and certifications*», see cases C-94/12 and C-203/14.

For «*reliance on the capacity of other economic operators and subcontractors*», see cases C-389/92, C-176/98, C-5/97, C-425/14, C-234/14, C-324/14, C-387/14 and C-27/15.

For «*non-profit organisations*», see case C-305/08.

- **Audit reports and studies:**

For illegal admission of bidders:

Report	SAI
Compliance of the operation of municipal joint-stock company "Daugavpils siltumtīklī" with the planned goals and requirements of regulatory enactments	Latvia
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Poland
Audit over a Rail Transport Institute	Portugal

5. AUDITING THE AWARD PROCEDURES

5.3. Were the documents received scrutinised for completion and adherence to stated conditions before the tenders were evaluated?

Background

Once suitability has been established, the next step is to evaluate the tenders received. The public authority may first exclude tenders that cannot be accepted for reasons such as not meeting performance conditions or quoting too low a tender sum to enable the contract to be properly performed.

Abnormally low tenders refer to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be carried out properly. A very low priced tender cannot be rejected unless the bidder is first given the opportunity to explain the basis of his cost estimates.

Questions

- F/C** Did the contracting authority verify whether the tenders were admissible and suitable:
 - Relevant to the contract?
 - With a price that does not exceed the contracting authority's budget as determined and documented prior to the launching of the procurement?
 - Capable of meeting the contracting authority's needs and requirements as specified in the procurement documents?
 - In conformity with the technical specifications?
 - With no evidence of collusion or corruption?
- F/C** When special conditions relating to the performance of a contract were detailed in the procurement documents, did the contracting authority verify if the tenders received met those requirements?
- F/C** If required, did tenders indicate the share of the contract that is intended to be subcontracted to third parties and subcontractors?
- F/C** In case variant tenders were submitted, were they authorised by procurement documents?
- F/C** Were submitted variant tenders linked to the subject matter of the contract?
- F/C** Did variants taken into consideration meet the requirements for their presentation?
- F/C** Is there no evidence of a quotation priced too low?

F/C In the case of a quotation priced too low, did the contracting authority require the bidder to explain the price or costs proposed?

Did the bidder comply with this request within the deadline set?

F/C Were the reasons for the estimation verified and was it possible to clear doubts?

F/C In open and restricted procedures, did the contracting authority make sure that there is no substantive change to the bid due to this clearing process?

F/C When the contracting authority established that the tender was abnormally low because it didn't comply with legal environmental, social and labour obligations, did it reject the tender?

When the contracting authority established that the tender was abnormally low because of state aid, was the tenderer able to prove that the aid was compatible with the internal market within the meaning of article 107 of the TFEU?

In the case the tenderer was not able to prove it, was the tender rejected and did the contracting authority inform the European Commission?

F/C When tenders were actually rejected because they were abnormally low, were reasons for this decision given and were they sufficiently grounded?

Guidance

- **Directive:**

For conditions for the performance of contracts, see article 70.

For subcontracting, see article 71.

For abnormally low tenders, see article 69.

For variants, see article 45.

- **Guideline for Auditors:**

See n.º 15 (Evaluation of tenders and award of contract).

- **Procurement Performance Model (PPM):**

See n.º 16 of PPM (implementing the public procurement process) and n.º 17 (compliance with EU law).

- **CJEU Case-Law:**

For «*social, labour and sustainability requirements*», see cases C-368/10, C-549/2013 and C-115/14.

For «*qualifications of staff assigned to the performance of the contract*», see case C-601/13.

For «*abnormally low tenders*», see cases C-76/81, C-103/88, C-285 and 286/99, C-568/13 and C-318/15.

For «*non-admissibility of tenders not complying with defined conditions*», see cases C-243/89 and C-561/12.

5. AUDITING THE AWARD PROCEDURES

5.4. Were bids properly evaluated?

Background

The final evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. The public authority has to consider all the published criteria, pursuant to the indicated weighting. Admissible variants which meet the requirements must be evaluated in the same way as the other bids.

The award decision will be based on the result of the evaluation of tenders.

In open and restricted procedures, any dialogue with candidates that could be considered as “post tender negotiation” on price or other tender elements is not permissible.

However, for other procedures, such as competitive procedure with negotiation, competitive dialogue and innovation partnership, negotiations are admissible within certain rules and may result in changes in the tenders. Electronic auctions may be considered as a special negotiation means, since they allow, in strict conditions, a change in tenders.

Contracting authorities must, under no circumstances, modify a tender.

Questions

F/C Is the evaluation process documented in a transparent, plausible and convincing manner?

Did the contracting authority draw up a written report on the procurement procedure, including information on the outcome of the selection and evaluation, in accordance with article 84 of the directive?

F/C Is there no evidence of collusion between bidders?¹⁰⁰

¹⁰⁰ Collusive bidding involves agreements or informal arrangements among competitors, limiting competition and usually concerning price fixing.

Situations and practices that may evidence collusion include: withdrawal of bids with no evident reason, fewer competitors than normal submitting bids, certain competitors always or never bidding against each other, bidders appearing as subcontractors to other bidders, patterns of low bids suggesting rotation among bidders, differences in prices proposed by a company in different bids with no logical cost differences, large number of identical bid amounts on line items among bidders, mainly when they are service-related, identical handwritings, company paper, telephone numbers or calculation or spelling errors in two or more competitive bids, submission by one firm of bids for other firms, reference to any type of price agreements, statements by contractors about any kind of market divisions or turns to receive jobs.

Collusive practices are usually very secret and, although indicators such as those mentioned are usually not sufficient to prove the anti-competitive activity, they are enough to alert appropriate authorities for investigation.

- F/C** Is there no evidence of unauthorized release of information or seemingly unnecessary contacts with bidders' personnel during the negotiation/dialogue and evaluation processes?
- F/C** Is there no evidence of favouritism towards a particular contractor during the negotiation and evaluation processes?
- F/C** Is there no evidence of any individual on the evaluation panel being biased?
- F/C** Is there no evidence of any external or superior pressure to reach a specific result?
- F/C** Was the award based on published and admissible criteria (see item 2.4. above)?
- F/C** When open and restricted procedures were used, were no negotiations or alterations to tenders allowed, namely on price?
- F/C** When negotiation/dialogue of the tenders did take place, were these permitted within the adopted procedure and did they follow the correspondent rules?
- F/C** When negotiation/ dialogue took place in successive stages, was this practice stated in the procurement documents and was the reduction of tenders made according with the described award criteria?
- F/C** Is it clear that, when admissible, negotiations did not involve change to the essential aspects of the tender or the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document?
- F/C** When an electronic auction was conducted:
- Before proceeding with the auction, did the contracting authority make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them?
 - Were the tenderers informed on the outcome of that evaluation when invited to the auction?
 - Was the auction solely based on prices and/or on new values of the features of the tenders indicated in the procurement documents?
 - Were the automatic re-rankings based on the announced formula?
- F/C** Were tenders evaluated and ranked against all and only those criteria, and relative weighting, which have been published in the procurement documents? Is it clear that no modification whatsoever to the defined criteria was introduced during the evaluation process?
- F/C** Was the scoring method and rationale decided before the evaluation started, was there a sound basis for the scorings applied to the criteria and was the scoring well balanced?
- Were calculations used in evaluation adequate and correct?
- F/C** Did the evaluated and awarded tenders qualify in the former 3 evaluation steps (formal review of bids, suitability of bidders and verification of exclusion causes)?

EIC In competitive dialogue, if negotiations to finalise the terms of the contract did take place with the tenderer submitting the best ranked tender, is it clear that they did not have the effect of materially modifying essential aspects of the tender or of the public procurement and did not risk distorting competition or causing discrimination?

When awarding contracts under a framework agreement, did the contracting authority comply with the terms laid down in that agreement?

Guidance

- **Directive:**

Articles 67 and 67 are the central provisions for the evaluation of tenders.

For admissible negotiations, see articles 29, 30, 31 and 32.

For electronic auctions, see article 35.

For individual reports on the procedures for the award of contracts, see article 84.

For guidance on evaluation of tenders, see *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.

- **Guideline for Auditors:**

See n.ºs. 8 (Tendering procedures), 9 (Procurement instruments), 15 (Evaluation of tenders and award of contract) and 16 (Disclosure of information).

- **Procurement Performance Model (PPM):**

See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **CJEU Case-Law:**

For «*award criteria*», see cases C-226/09, C-368/10, C-538/13, C-601/13 and C-6/14.

For «*equal treatment during the award procedure*», see cases C-19/00 and C-396/14.

For the «*powers of juries to detail award criteria*», see case C-331/04.

For «*amendments to tenders*», see cases C-87/94 and C-324/14.

- **Audit reports and studies:**

For formalisation of consolidated tenders in negotiated procedures:

Report	SAI
The North Wastewater Treatment Plant in Brussels. Award and funding of the concession contract	Belgium

For the need of a document comparing the bids and stating the grounds of the award:

Report	SAI
Public procurement and internal control within the Federal State Departments, 2017	Belgium
Statistics Finland's service procurements	Finland
Audit over a Rail Transport Institute	Portugal

For a fair and transparent evaluation of bids, according to the award criteria:

Report	SAI
Bus line services: cost price and contract award to operators	Belgium
2000 Annual Report (§ 4.127.6), 2001 Annual Report (§4.129.65) and 2002 Annual Report (§ 4.136.7(a))	Cyprus
Ex-ante audit and also on the request of the Public Accounts Committee of the House of Representatives	»
State Budget funds provided for investment to the industrial zones	Czech Republic
Annual Report 2004 on federal financial management, Part II, items 3, 17, 18 and 42	Germany
Autonomous (regional) and local public sectors, financial year 1997. Item concerning "Public procurement".	Spain

For awarding a contract not complying with the contract documents:

Report	SAI
Acquisition of cars in local governments, 2011	Estonia
Public investment projects by a public rail transport enterprise	Portugal
Public investment projects by the National Laboratory for Civil Engineering	»

For collusion among bidders:

Report	SAI
Rental of aircrafts to fight forest fires	Portugal

5. AUDITING THE AWARD PROCEDURES

5.5. Was the outcome of the award process properly reached and communicated?

Background

Having concluded the procurement process and award decision, the contracting authority has obligations of reporting and notification. These obligations reflect public accountability, transparency, control and the rights of candidates.

The contract may be awarded after the expiry of a standstill period if no complaint has been filed.

Questions

- F/C** Was the award decision based on the result of the evaluation of tenders?
- F/C** Has the award included no items different from those contained in bid specifications?
- F/C** Did the chosen bid meet user needs?
- F/C** Did the contracting authority draw up a comprehensive written report about progress and outcome of the procurement process?
Was that report communicated to national authorities and to the European Commission, when requested?
- F/C** Were tenderers notified in writing and on a timely basis of decisions concerning the rejection of tenders or applications, the conclusion of the procurement procedure, the name of tenderer(s) selected, the characteristics and relative advantages of the chosen tender(s) and the standstill period for contestation of the award decision?
In case of decisions not to conclude a procurement or award a contract, were tenderers informed in writing and on a timely basis of those decisions and their grounds?
If information was withheld, was there reasonable justification for this decision?
Was there a reasonable interval (at least 10 days) between dates of award and contract to allow unsuccessful tenderers to seek a review of award decision (e.g. price, nature of performance, completion period, terms of payment, materials to be used)?
- F/C** Did the conditions of contract comply with the detail provided in the procurement documents and with the outcome of the procurement procedure followed? Were no essential components negotiated or modified after the award?

F/C Did the conditions included in the contract protect the risk of non-performance by the supplier and were there no conflicting provisions?

Did the contract include provisions on applicable regulation, subject matter, price, delays, misconduct, liability, dispute resolution, revision clauses, intellectual property rights, confidentiality obligations and any other relevant aspects?

F/C Were there no material changes in the contract shortly after award?

Were results of the procurement procedures published through contract award notices, in line with deadlines and content described in article 50 and annex V of the directive?

Guidance

- **Directive:**

Article 84 outlines the content of the report on the tendering and evaluation process.

For information to tenderers and reasons to withhold it, see article 55.

For contract award notices, see article 50 and Annex V.

- For standstill period, see Directives 89/665/EEC, 92/13/EEC and 2007/66/EC (Remedies Directives)

- **Guideline for Auditors:**

See n.ºs 15 (Evaluation of tenders and award of contract) and 16 (Disclosure of information).

- **Procurement Performance Model (PPM):**

See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **CJEU Case-Law:**

For «*decision not to award contract*», see case C-27/98.

For «*standstill period*», see case C-455/08.

- **Audit reports and studies:**

For the need of formal consolidated tenders after negotiations:

Report	SAI
Wastewater treatment plant in northern Brussels- Award and funding of the concession contract	Belgium

For the need of written contracts:

Report	SAI
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education, financial years 1996 to 1998	Spain

For contract clauses inconsistent with awarded tenders:

Report	SAI
Performance audits of state owned companies' public procurement 2011-2016	Croatia

For lacking or insufficient notifications:

Report	SAI
Public procurement and internal control within the Federal State Departments, 2017	Belgium
Performance audits of state owned companies' public procurement 2011-2016	Croatia

For performance conditions:

Report	SAI
Social clauses in public procurement contracts awarded by the public administration	Poland

For too long periods of contracts:

Report	SAI
Federal State - Long term procurement contract (171st Report of the Court of Audit), 2014	Belgium
Federal State - Awarding and execution of public service contracts (172nd Report of the Court of Audit), 2015	»
Public procurement and internal control within the Federal State Departments, 2017	»
Audits of municipalities, 2013	Portugal
Audit of expenses in a Dentist University, 2014	»

For post awarding changes in the contract:

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	»
Building works of the high speed line Madrid-Barcelona- 1999 and 2000	Spain
Reports mentioned in 6.2	

6. AUDITING THE CONTRACT IMPLEMENTATION

6.1. Is the execution of the contract adequately managed and monitored?

Background

The goal of the contract implementation stage is to ensure that the contract is satisfactorily implemented and that both the contractor and contracting authority meet their obligations.

At this stage:

- The execution of the contract should be managed and monitored
- The payments should be made and controlled
- Modifications must be dealt with
- Termination of contract must be considered and compliant with applicable rules
- Closing of the contract must be prepared.

It is beneficial to create and maintain an open and constructive relationship and communication between the contracting authority and the contractor during the whole process.

Questions

F/C Is the implementation process documented?

Is the documentation kept for the established period or, when there is no rule in this respect, for a reasonable period?

F/C Are key decisions justified?

Are there regular meetings between the contracting authority and the contractor during the implementation of the contract?

F/C Is there timely reporting on the progress of the actual implementation and on compliance against the implementation plans?

Were risks to the execution of the contract identified, analysed, monitored and dealt with?
Is a follow-up of those risks conducted at key stages of the contract implementation?

For complex contracts, is there a contingency plan?

In complex contracts, is the completion of key steps of the implementation reviewed by the contracting authority before moving on to next stages?

F/C Are performance requirements and service level agreements monitored by the contracting authority?

F/C Is there evidence that the works, goods or services have been properly delivered or performed?

F/C Was it confirmed that deliveries were in accordance with the contract terms, as regards both cost and technical specifications?

F/C Were payments verified and approved?

F/C Were payments in line with contract terms and actual deliveries?

F/C Were any measures put in place to avoid risks of poor, biased or false control?

F/C Is there appropriate segregation of duties between those verifying the performance of the contract and approving payments?

F/C Is there no evidence of materials provided to contractors who, according to the contracts, are supposed to provide them (such as office space, furniture, IT equipment) and of employees from the contracting authority performing parts of the contracted work?

F/C In case the contractor failed to meet the contract terms, were there measures taken to enforce compliance?

F/C Where justified, were compensations for no compliance sought by the contracting authority?

Where it was later identified that mandatory grounds for exclusion applied to any contractor at the time of the contract award or that a contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive, were contracts terminated?

Was the contract closed only when the contracting authority formally accepted the final deliveries and paid the related invoices?

Guidance

- **Directive:**
 - For conditions for performance of contracts, see article 70.
 - For termination of contracts, see article 73.
- **Audit reports and studies:**
 - For contract management and performance:

Report	SAI
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	Austria
Contract Variation Costs met by the Flemish Inland Waterway Agency "De Scheepvaart", 2014	Belgium
Performance audits of state owned companies' public procurement 2013-2016	Croatia
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Poland
Investments of local government units, including projects co-financed by the EU budget»	»
Transforming government's contract management, 2014	UK
Paying government suppliers on time, 2013	»

For poor monitoring over execution and deliveries:

Report	SAI
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Audit of the Technological Education Plan, 2012	Portugal
Audit of a housing rehabilitation institute, 2014	»
Audit of Underground construction works in Lisbon, 2014	»

For overpayment and non-delivery of agreed work and supplies:

Report	SAI
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Audits over additional public works in polytechnic and university institutions and rehabilitation works in schools	Portugal

6. AUDITING THE CONTRACT IMPLEMENTATION

6.2. Were any identified modifications to contracts or additional works or deliveries admissible without the need for a new procurement procedure?

Background

Usually, the need for a modification to a contract during its implementation or the need for additional works, supplies or services may be avoided by good planning, by comprehensive specifications and by a well-designed contract.

Even though flexibility to modify performance during its execution or additional deliveries, without the need to disrupt and going through a new procurement procedure, might be necessary to fulfil needs and achieve savings.

However, it might also be a means of disrespecting the rules, favouring or rewarding a supplier, avoiding an open procurement or overcoming budgetary constraints. Therefore, modifications or additions to contracts should only be admissible in exceptional cases. Modifications of contracts or direct award of additional tasks to the same contractor is a recurrent error in public procurement procedures.

The new directives extend the scope of procurement rules beyond the award and conclusion of the public contract, by including provisions to regulate the modification of contracts during their term, accepting those modifications in certain circumstances.

In principle, a new procurement procedure is required in cases of material or substantial changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties. This is particularly the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure. Thus, modification to a contract, without the need to carry out a new procurement procedure, is not acceptable where it results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement.

Similar conditions apply to concession contracts, according to the respective directive.

Questions

F/C Did the modification provide no alteration to the overall nature of the contract or framework agreement?¹⁰¹

F/C Is the value of the modification to a service or supply contract:

¹⁰¹ A modification that changes the nature of the overall procurement is never possible.

- Below the EU thresholds? And

F/C Is the value of the modification to a works contract:

- Below the EU thresholds? and
- Cumulated with the value of former modifications, no more than 15% of the initial contract?
- Cumulated with the value of former modifications, no more than 10% of the initial contract?

F/C Was the modification non-substantial?¹⁰²

F/C Where the modification has been provided for in the initial procurement documents by a review clause, is the review clause clear, precise and unequivocal, stating the scope and nature of possible modifications or options as well as the conditions under which they may be used?

F/C In this case, have the assumptions and conditions described in the review clause actually occur?

F/C Where additional works, services or supplies were strictly necessary for the completion of performance under the contract, would a change of contractor:

- Oblige the contracting authority to acquire material having different technical characteristics resulting in incompatibility or disproportionate technical difficulties in operation and maintenance?
- Cause significant inconvenience or substantial duplication of costs for the contracting authority?

F/C In this case, did the additional works, services or supplies amount to no more than 50% of the value of the original contract?

Where more than one of such additions occurred, is it clear that they were not aimed at circumventing the application of public procurement rules?

Was a notice about these modifications published in the OJEU?

F/C Where the need for the modification has been brought about by unexpected circumstances, is it evident that a diligent contracting authority could not have foreseen them?

¹⁰² A modification is substantial when it renders the contract materially different in character from the one initially concluded. A modification is always substantial when: conditions were introduced which had they been part of the initial procurement procedure would have allowed for the admission of other candidates than those initially selected, for the acceptance of a tender other than that originally selected or would have attracted additional participants in the procurement procedure; changes were produced to the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract; the scope of the contract was considerably extended; a new contractor replaced the initial one in other cases than the ones allowed.

- F/C** In this case, was the increase in price resulting from the modification no higher than 50% of the value of the original contract?
- F/C** Where more than one of such unforeseen modifications occurred, is it clear that they were not aimed at circumventing the application of public procurement rules?
- Was a notice about these modifications published in the OJEU?
- F/C** Where a new contractor replaced the one to which the contracting authority had initially awarded the contract, was that a consequence of either:
- An unequivocal review clause or option?
 - Succession into the initial contractor following corporate restructuring (e.g. takeover or merger)?
 - The contracting authority assuming the contractor's obligations towards its subcontractor?
- F/C** Where a new contractor replaced the one to which the contracting authority had initially awarded the contract due to succession into the initial contractor, following corporate restructuring:
- Is it clear that this does not entail other substantial modifications to the contract?
 - Is it clear that this was not aimed at circumventing the application of public procurement rules?
 - Does the new contractor fulfil the criteria for qualitative selection initially established?
- F/C** Where a new contractor replaced the one to which the contracting authority had initially awarded the contract as a result of the contracting authority assuming the contractor's obligations towards its subcontractor, was this possibility provided for under the national legislation in line with the directive's rules on subcontracting?
- F/C** Where additional deliveries were a partial replacement of supplies or installations or an extension of existing supplies or installations:
- Would a change of supplier oblige the contracting authority to acquire material having different technical characteristics resulting in incompatibility or disproportionate technical difficulties in operation and maintenance?
 - Was the duration of original and recurrent contracts no longer than 3 years?
- F/C** Where new works or services were the repetition of similar works or services previously awarded to the same economic operator pursuant to a competitive procedure:
- Was the possibility of this additional award disclosed in the first project put up for tender?
 - Did that project indicate the extent of the possible additional works or services?
 - Did it describe the conditions under which they would be awarded?

- Was the total estimated cost of subsequent works or services taken into consideration when holding the initial procedure?
- Has the award of the additional works or services taken place within 3 years following the conclusion of the original contract?

F/C Were additional works charged at the unit prices agreed in the initial contract?

F/C Where a contract has been subject to a substantial modification that would have required a new procurement procedure, was it terminated?

Guidance

- **Directive:**

For modification of contracts during their term, see article 72.

For additional deliveries, see article 32(3/b).

For new works or services, see article 32(5).

For termination of contracts, see article 73.

- **Guideline for Auditors:**

See n.º 17 (Contract performance).

- **CJEU Case-Law:**

For «*substantial changes in the scope of the contract or in the scope of the competition as a new award*», see cases C-337/98, C-496/99 and C-454/06.

For «*subsequent replacement of a subcontractor*», see case C-91/08.

For «*non-admissible direct award of additional works or services*», see cases C-423/07 and C-601/10.

For «*material amendment to contract*», see case C-549/14

- **Audit reports and studies:**

For jeopardizing competition through delivering additional works:

Report	SAI
Procurement of the Troop Radio System CONRAD, 2015	Austria
Final payment on some large-scale public works contracts	Belgium
Dredging works in Flanders, 2016	»
Final statement of public road and motorway contracts in the Walloon Region.	»
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Organisation of public procurement in local governments, 2010	Estonia

Report	SAI
Construction of the Modlin Airport	Poland
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	»
Additional public works contracts	Portugal

For reasons leading to the delivery of additional works or supplies:

Report	SAI
General Refurbishment and Extension of the Museum of Contemporary Art (21er Haus)	Austria
ASFINAG Bau Management GmbH (Highway and Road Construction Financing Company Construction Management Corporation) regarding the construction of the 2nd tube of the Tauern Road Tunnel	»
Innsbruck Cable Railways Company – Reconstruction of the Hungerburgbahn and the Nordkettenbahnen Cable Railways	»
Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEU, C181, 31Jul2003)	ECA
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Simplified procurement procedures	Lithuania
Expo 98	Portugal
Euro 2004	»
Large public works financial slippage	»
Additional public works contracts	»

For undue delivery of additional works:

Report	SAI
Dredging works in Flanders	Belgium
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Poland
Port Maritime Institute	Portugal
Rail Transport Institute	»
Additional public works contracts	»
Autonomous (regional) and local public sectors, financial years 1999 and 2000. Itens concerning "Public Procurement"	Spain

For deviations to the price of the initial contract:

Report	SAI
Reconstruction of the Salzburg Central Station	Austria

Report	SAI
Construction of the “Deurganckdock” (Antwerp Container Terminal Complex)	Belgium
Final statement of public road and motorway contracts in the Walloon Region	»
Contract Variation Costs met by the Flemish Inland Waterway Agency “ <i>De Scheepvaart</i> ”	»
Contract variation costs met by the Flemish Agency for Sea and Shores Services	»
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Poland
Rail Transport Institute	Portugal
Public-owned company	»
Large public works financial slippage	»
Additional public works contracts	»
Ministry of Defence: major Projects report 2004	UK
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For extension of contracts’ time limits:

Report	SAI
Final statement of public road and motorway contracts in the Walloon Region.	Belgium
Procurement procedures and inventory management of the Athens General Hospital “Hippocrateion”, 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
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	Spain
Building works of the high-speed line Madrid-Barcelona-years 1999 and 2000	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

For modification of contractors:

Report	SAI
Compliance of the operation of municipal joint-stock company “ <i>Daugavpils siltumtīklī</i> ” with the planned goals and requirements of regulatory enactments	Latvia

LIST OF SUPREME AUDIT INSTITUTIONS' PUBLIC PROCUREMENT AUDIT REPORTS

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¹⁰³The summaries or texts of these audit reports can be found in the version of the 2010 guidance (http://www.tcontas.pt/eventos/public_procurement/docs/9.pdf), in the EUROSAI database of audit reports (<http://www.eurosai.org/en/databases/audits/>), in the websites of the concerned SAIs or by direct contact with those SAIs.

¹⁰⁴Additional information on SAI's activities regarding public procurement can also be found in the following link: http://www.tcontas.pt/pt/publicacoes/public_procurement.shtm.

Court of Audit, Austria

Report	Main issues
Innsbruck Cable Railways Company - Reconstruction of the Hungerburgbahn and the Nordkettenbahnen Cable Railways, 2012	Compliance – Performance - PPP- Comparative analysis- Additional contracts
ASFINAG Bau Management GmbH (Highway and Road Construction Financing Company Construction Management Corporation) regarding the construction of the 2nd tube of the Tauern Road Tunnel, 2012	Compliance – Performance - Additional contracts and expenses- Lack of quality
The award of gambling concessions of the Federation	Procurement documents
Refurbishment of the Parliamentary Building – Planning Project, 2012	Compliance – Performance - Project design – Preparation of the tendering
IT Structures and Procurement in the Central Unit of the Federal Ministry of Agriculture, Forestry, Environment and Water Management, 2013	Compliance – Performance - Framework contract
Public Relations of the Federal Ministry of Agriculture, Forestry, Environment and Water Management, 2013	Compliance – Performance - Direct awards – Objectives
Vienna City Extension Fund (Wiener Stadterweiterungsfonds), 2013	Compliance – Performance - Purchase of properties
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio, 2013	Compliance – Performance – Procurement volume – Prices assessment – Additional costs - Documentation – Direct awards – Termination of contract – Lack of transparency
General Refurbishment and Extension of the Museum of Contemporary Art (21er Haus), 2014	Compliance – Performance - Overall costs - Funding – Poor planning- Modifications
HAUSCOMFORT GmbH, 2014	Compliance – Performance
BEGAS Energie AG, 2014	Compliance – Performance - Planning of investments - Awards
Vienna International Airport Company – Vehicle Procurement and Fleet Management, 2015	Compliance – Performance - Documentation gaps – Accounting deficiencies – Internal controls – Violation of regulations
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria), 2015	Compliance – Performance - Preparation of procurement – Funding - Monitoring
The Internal Control System in Cases of Direct Awards in the Selected Ministries of the Federal Ministry for Transport, Innovation and Technology and the Federal Ministry of Science, Research and Economy, 2015	Compliance – Performance - Direct awards – Internal controls – Comparative offers

Report	Main issues
Reconstruction of the Salzburg Central Station, 2015	Compliance –Performance - Cost overruns – Poor planning
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria), 2016	Compliance –Performance – Direct awards – Contract value – Documentation – Lack of training
Hallstatt Wasserkraft GmbH, 2017	Compliance –Performance
Development of Selected Federal Research Programmes, 2018	Compliance –Performance

Court of Audit, Belgium

Report	Main issues
<i>Bus line services : cost price and contract award to operators</i>	Subcontracting process - Competition rules - Criteria Weighting - Amalgamation of market players - Cost price
<i>Contract marketing and promotion expenditure</i>	Legality - European publication of a notice - Advertising campaigns - Internal control
<i>Framework contracts: The Federal Central Buying Office's operation (abbreviated in FOR/CMS) examined in terms of sound management and legality</i>	Legality - Framework contracts
<i>Execution of economic compensations associated with the purchase of specific military equipment</i>	Economic compensations – Military programme contracts – Legality – Internal Control
<i>Control of Public Contracts covering the Road Transport Infrastructure in Brussels</i>	The "stock" contract technique – Implementation of the contracts
<i>Construction of the «Deurganckdock» (Antwerp container terminal complex)</i>	Public works – Cost increase – Damage claims
<i>Damage compensations charged on the budget of the Flemish infrastructure fund</i>	Damage claims – Damage compensations
<i>Introduction of double entry accounting at the Ministry of the Flemish Community</i>	Unclear project requirements – Negotiation procedure – Tight budget – Tight time planning – System flaws
<i>The Outsourcing of the Data processing function at the Ministry of the Flemish Community</i>	Legality – Outsourcing contract – Vaguely termed contract
<i>The North Wastewater Treatment Plant in Brussels. Award and funding of the concession contract</i>	Contract award – Contract funding
<i>Roads, motorways and waterways maintenance leases</i>	General terms of procurement – Implementation of leases – Renewal of leases

Report	Main issues
<i>Final payment on some large-scale public works contracts</i>	Changes to the initial project
<i>The "Ilot Ecluse" building construction works (public works contract)</i>	Legality – Qualitative selection – Publication rules
<i>Complying with public procurement regulation</i>	Legality – Execution of public works – Qualitative selection – Service contracts – Renewal contracts
<i>Public service contracts providing mainly intellectual services</i>	Intellectual services procurements
<i>The dematerialisation of public procurements in Walloon public service department</i>	Electronic procurement
<i>Public procurement of the Walloon Agricultural Research Centre, 2013</i>	Compliance – Internal controls - Limited competition - Contract splitting - Poor implementation control
<i>Investments in sport facilities in Flanders, 2014</i>	Compliance - Performance – Justification of investments – Award procedures
<i>Framework agreements by the Flemish Agency for Facility Management, 2014</i>	Compliance – Performance – Framework agreements – Customer-supplier management
<i>Decision-making process and justification of tram infrastructure projects by the Flemish Agency "De Lijn", 2014</i>	Compliance - Performance – Justification of needs – PPPs – Preparation of the projects – Modifications – Cost increases
<i>Federal State - Internal control of procurement in the Chancellery of the Prime Minister and the Department of Public Health (171st Report of the Court of Audit), 2014</i>	Compliance – Financial - Internal controls – Procurement procedures
<i>Federal State - Procurement of consultancy services (171st Report of the Court of Audit), 2014</i>	Justification and communication of awards - Duration of contracts – Implementation of contracts- Penalties - Modification of contracts
<i>Federal State - Long term procurement contract (171st Report of the Court of Audit), 2014</i>	Duration of contracts – Extension of contracts – Irregular invoicing
<i>Federal State - Procurement through the central purchasing body FOR CMS (171st Report of the Court of Audit), 2014</i>	Framework agreements – Compliance to agreed terms
<i>Federal State - Internal control of procurement in the Department of Personnel and Organisation, the Department of Foreign Affairs and the Department of Information and Communication Technology (Fedict) (172nd Report of the Court of Audit), 2015</i>	Compliance-Financial – Internal controls – Preparation of procurement – Procurement procedures
<i>Federal State - Awarding and execution of public service contracts (172nd Report of the Court of Audit), 2015</i>	Compliance-Financial – Documentation – Justification and communication of award – Duration of contracts – Implementation of contracts

Report	Main issues
<i>Public procurement of the autonomous ports of the Walloon region, 2015</i>	Compliance – Responsibilities in managing contracts - Identification of needs- Centralised procurement – Lack of competition – Poor monitoring
<i>Flemish Community/Region - Innovative Calls for Tender, 2015</i>	Performance – Poor innovation programme results
<i>Dredging works in Flanders, 2016</i>	Modification of contracts
<i>Public procurement and internal control within the Federal State Departments, 2017</i>	Compliance – Preparation and management of procurement – Internal controls – Justification and communication of awards – Qualitative selection – Tender analysis – Duration of contracts
<i>Public procurement of the Fire and Medical Emergency Service of the Brussels-Capital Region, 2017</i>	Compliance – Internal controls- Lack of competition, equal treatment, non-discrimination and transparency
<i>Contract variation costs met by the Flemish Agency for Sea and Shores Services</i>	Contracts costs – Procurement documents – Additional works and deliveries
<i>Contract Variation Costs met by the Flemish Inland Waterway Agency "De Scheepvaart"</i>	Management of the procurement function – Additional works and deliveries
<i>Catering Operations in the Federal Government Departments, 2017</i>	Compliance – Financial – Cost control – Budgetary transparency – Procurement procedures
<i>Walloon Region - Final statement of public road and motorway contracts in the Walloon Region.</i>	Internal controls – Modification of contracts

State Audit Office, Croatia

Report	Main issues
Performance audit of public procurement system at the state owned companies in the Republic of Croatia (for the period from 2011 to 2013)	Performance – compliance - procurement planning process - implementation of procurement procedures - conclusion of contracts - monitoring of contract implementation- control system
Performance audit of public procurement system at the state owned companies in the Republic of Croatia (for the period from 2012 to 2014)	Performance – compliance - procurement planning process - implementation of procurement procedures - conclusion of contracts - monitoring of contract implementation- control system
Performance audit of public procurement at the state owned companies in the Republic of Croatia (for the period from 2014 to 2016)	Performance – compliance - procurement planning process - implementation of procurement procedures - conclusion of

Report	Main issues
	contracts - monitoring of contract implementation - control system
Performance audit of public procurement system in companies (including state owned companies and companies of local and regional self-government units in the Republic of Croatia for the period from 2013 to 2015)	Performance – compliance - procurement planning process - implementation of procurement procedures - conclusion of contracts - monitoring of contract implementation- control system

Audit Office, Cyprus

Report	Main issues
Provision of Consultancy Services for the Sewerage Conveyance and Treatment of the Greater Nicosia Area	Ex-ante audit and later - Consultancy Services - Technical evaluation criteria - Method of tender pricing
Provision of Services	Ex-ante audit - Provision of Services - Selection of advertising firm – Award of tender
IT procurement	Value for money - IT procurement

Supreme Audit Office, Czech Republic

Report	Main issues
Funds earmarked for projects designated for repair and maintenance of roads	Award procedures – Transparency - Competition
Funds spent on acquiring of the Czech Statistical Office headquarters	Regularity – Performance - Special category of purchase - Preparatory phase of the investment project – Urgent need - Form of public tender – Price and Funding - The building phase
State Budget funds provided for investment to the industrial zones	Performance - Assessment of the declared benefits of the programme – Implementation of the programme
State Budget funds and the management of the state property under the authority of the Ministry of Transport	Performance – Regularity - Management of the state property – Selected expenditures
Funds spent on the National Infrastructure for Electronic Public Procurement (NIPEZ) and its utilisation for purchase of selected commodities, 2016	Performance – Electronic procurement – Procurement documents

Report	Main issues
Funds earmarked for financing of selected programmes that are in the competence of the Ministry of Justice, 2016	Compliance – Poor planning
State property and funds allotted to the state-funded organisation "Zařízení služeb pro Ministerstvo vnitra" (Services for the Ministry of the Interior), 2016	Compliance – Non-competitive procedures – Splitting of contracts
Funds spent on settlement of expenses related to operation of selected ministries, 2016	Compliance – Bookkeeping - Awards
Funds earmarked for ICT and crisis management systems of units of the Integrated Emergency System, 2016	Performance
Management of state property and funds allotted to the National Security Authority, 2017	Compliance
State funds spent by the Ministry of Education, Youth and Sports on the development and renewal of the material-technical base of sports, 2017	Compliance – Lack of transparency and equality
Funds spent on development of education in the Czech Republic, 2017	Performance
Funds earmarked for the interoperability on the current railways, 2017	Compliance – Excessive qualifications requirements-

National Audit Office, Denmark

Report	Main issues
Untitled	Value for Money - Consultancy services
Danish Government's tendering of IT operations and maintenance	Modification of contracts
Procurement at Danish Institutions of higher education	Award procedures - Publicity
Procurement under the Ministry of Culture, 2016	Performance – Market consultations
Basis for decision prepared by the Danish Ministry of Defence concerning procurement of 27 F-35 combat aircraft, 2017	Performance – Life-cycle costs

State Audit Office, Estonia

Report	Main issues
Management of public procurement at the Ministry of Interior and its governing area, 2002	Legality - Management of public procurement

Report	Main issues
Management of procurement at the Ministry of the Environment, 2002	Procurement of environmental services – Risk management
Organisation of public procurement related to road repair, 2004	Performance - Procurement of road repair works
Procurement management in the field of IT systems, software products and software services, 2004	Legality - Management of procurements
Procurement of maintenance services, 2005	Legality - Procurement of maintenance services
Organisation of public procurement in local governments, 2010	Non-competitive procedures – Internal controls - Contracting authorities – professional expertise
Acquisition of cars in local governments, 2011	Award criteria- Additional services – Prices – Conflict of interests
Organisation of public procurement in <i>Viimsi</i> Municipality, 2013	Compliance – Publicity – Conflict of interests

European Court of Auditors

Report	Main issues
Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEC – C 181 – Volume 46 31 July 2003)	Infrastructure work - European Development Fund - Performance of infrastructure work - Compliance
Annual Report concerning the financial year 2000 para (OJEC page 318-328, 15-12-2001)	Internal control - Procurement procedures - Compliance
Efforts to address problems with public procurement in EU cohesion expenditure should be intensified, 2015	Public procurement errors – Measures to avoid them
Errors in rural development spending: what are the causes, and how are they being addressed?, 2014	Non-compliance with public procurement rules – Intentional infringements by private beneficiaries - Non-compliance with farming commitments for area-related aid
The EU institutions can do more to facilitate access to their public procurement, 2016	Management and control arrangements - Access of economic operators (SMEs) – Simplification of rules - Removing unnecessary hurdles
Non-compliance with the rules on public procurement	Types of irregularities and basis for quantification
Public Private Partnerships in the EU: widespread shortcomings and limited benefits, 2018	PPPs – Cost/benefits – Prior comparative analysis - Competition – Risk allocation - Delays – Overruns – Long duration

Report	Main issues
Access of small and medium enterprises to award procedures	Procurement documents

State Audit Office, Finland

Report	Main issues
Statistics Finland's service procurements	Performance – Compliance - Transparency - Non-discrimination
The Defence administration's procurement activities – Supply procurement	Performance - Defense
The Finnish state's payment traffic procurement	Performance – Compliance – Principle of equality and non-discrimination - Principle of transparency
The procurement and commercial use of multipurpose icebreakers	Performance – Preparation of the procurement - Principle of equality
The procurement of public transport services	Performance – Management of the procurement – Preparation of the procurement
Universities procurement activities	Performance – Compliance – Preparation of the Procurement
Use of expert services by the defence administration	Performance – Preparation of the procurement - Implementation of the procurement
Procurements of system work and ADP consulting services by the tax administration	Performance – Compliance - Preparation of the procurement
Compliance with the joint procurement obligation (section 22.a of the State Budget Act), 2011	Compliance- Centralised procurement- Joint procurement obligation- Monitoring and reporting
Military crisis management, 2013	Performance
Management of administrative procedures within the Ministry of Transport and Communications, 2014	Performance
Management of administrative procedures within the Ministry of Finance, 2014	Performance
Innovative public procurement procedures, 2017	Performance – Procurement as an instrument of innovation – Market dialogue – Incentive contract provisions – Risk managing methods
Implementation of innovation strategy in public procurement, 2017	Performance – Innovation policies – Innovation friendly micro level strategies
Planning and monitoring costs and benefits of information system procurement, 2017	Performance - Costs and benefits of central government information system investments – Cost estimates – Monitoring

Cour des comptes, France

Report	Main issues
Purchases by the Public Health Hospitals, 2017	Performance – Compliance – Planning – Centralised procurement – Procurement procedures – Conflicts of interests

Bundesrechnungshof, Germany

Report	Main issues
Annual Report 2004 on federal financial management	Performance and regularity - Cross-boundary examinations – Preparation of the procurement – Award procedures

Court of Audit, Greece

Report	Main issues
Procurement procedures and inventory management of the Athens General Hospital " <i>Hippocrateion</i> ", 2013	Financial- Compliance – Procurement procedures – Assets safeguarding
Annual Reports 2014 (p. 522-545), 2013 (p. 547-569), 2012 (p. 479-539), 2011 (p. 432-483) and 2010 (p.552-594)	Pre-contractual legality audit on public works - Supplies and provision of services' award procedures - Draft contracts
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	Financial-Compliance- Eexpropriations- Delays-Public Works-Termination of contracts –Cost overruns – Poor planning

State Audit Office, Hungary

Report	Main issues
Operation of the Hungarian Defence Forces Public Procurement System projects	Performance – Public procurement management
Summaries of the reports on the activity of the State Audit Office in 2002-2004	Annual reports

Office of the Comptroller and Auditor General, Ireland

Report	Main issues
Development of an ICT Human Resource Management System	Value for Money – Management of the procurement
Primary Routes Improvement Programme	Value for Money – Implementation of the procurement - Cost increase
Waste Management in Hospitals	Value for Money - Environmental standards
Purchasing of tyres by <i>An Garda Síochána</i> (Police Force)	Value for Money – Management of the procurement – Preparation of the procurement - Procurement procedures
Interview Recording Systems	Value for Money – Preparation of the procurement – Procurement procedures – Award procedures

State Audit Office, Latvia

Report	Main issues
Compliance of Operation of Municipality Joint-Stock Company " <i>Daugavpils siltumtīkli</i> " with the Planned Goals and Requirements of Regulatory Enactments	Direct award – Selection of contractors – Subcontractors – Lack of competition
Parallel regulatory audit on "Analysis (of types) of errors in EU and National public procurement within the Structural Funds programmes"	Selection of tenderers - Unequal treatment of tenderers - Reasons for errors – The procedure for data entering and classification of errors in the EU funds management information system is inaccurate

National Audit Office, Lithuania

Report	Main issues
Public procurement overview, 2011	Functioning of the public procurement system
Simplified procurement procedures, 2012	Efficiency of procurement
Centralised public procurement, 2013	Efficiency of centralised public procurements
Municipalities of the Republic of Lithuania, 2015	Financial – Non-competitive procedures – Late payments

Report	Main issues
Organisation of Public Procurements in National Defence System, 2017	Effectiveness of the national defense procurement system
Functioning of Public Procurement System, 2018	Effectiveness of the public procurement system

National Audit Office, Malta

Report	Main issues
Maintaining and Repairing the Arterial and Distributor Road Network in <i>Gozo</i> , 2017	Performance – Planning – Procurement – Contracts – Performance of contracts
Landscaping maintenance through a Public-Private Partnership, 2017	Performance – Competition - Service delivery – Contract - Monitoring
Procuring the State Schools' Transport Service, 2017	Performance – Procurement procedure – Collusive behaviour - Negotiations

Court of Audit, Netherlands

Report	Main issues
Seeking an insight into socially responsible government procurement, 2017	Financial – Performance - Environment, social return and international social conditions

Supreme Audit Office, Poland

Report	Main issues
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Flexibility of proceedings - Selection of contractors - Cost estimates - Additional contract
Outsourcing legal services by entities of the public finance sector in the Lower Silesia Province, 2015	Compliance – Legal services
Use of external services by public hospitals, 2015	Compliance – Delegation of the provision of healthcare services - Anticompetitive selection of service providers.
Performance of public tasks by companies founded by local government units, 2015	Performance – Business and organisational analysis -

Report	Main issues
Assignment of the basic tasks of public authorities, 2015	Compliance – Use of services under civil law agreements – Non-competitive procedures
Performance of public procurement contracts for external services by public sector entities	Public procurement plans – Splitting contracts – Prior information notices – Tender committees
Social clauses in public procurement procedures conducted by the public administration	Preparation of procurement - Social clauses – Market research – Procurement procedures
Infrastructure investments of the Polish State Railways Polish Railway Lines (PKP PLK SA)	Pre-project documentation – Professional skills
Public procurement financed by the European Regional Development Fund	Compliance with public procurement rules
Public procurement of goods and services typical for public administration	Centralised procurement- Prices
Construction of the <i>Modlin</i> Airport	Direct award – Tender documents – Additional contracts – Implementation of contract
Investments of local government units, including projects co-financed by the EU budget	Compliance – Documentation – Selection of contractors – Contractual penalties
Planning and implementation of selected ICT projects, aimed to improve the functioning of the police organisational units	Copyrights – Implementation of systems
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Modifications to contracts – Contractual penalties – Unauthorised expenses
Implementation of selected tasks related to road construction and modernisation by local governments of the biggest cities in Poland	Preparation of projects – Due diligence
Securing interests of the State Treasury and users of paid highways by means of concession agreements and enforcement of compliance with the agreement obligations from concessionaires	Preparation of the procurement
Securing interests of the State Treasury and sub-contractors of road investment construction contracts executed by the General Directorate of Roads and Motorways	Preparation of the procurement
Purchases over EUR 30 thousand made by selected entities of the public finance sector	Execution of contracts

Tribunal de Contas, Portugal

Report	Main issues
Euro 2004, 1st stage	Performance – Preparation of the procurement – Implementation of the procurement
EXPO`98	Performance - Management of the procurement - Implementation of the procurement
Centralised Public Tenders in the Health sector	Performance - Centralisation of public purchases
Additional works, 2010 and 2016	Modification to contracts- Poor planning – Non-competitive procedures – Increase in costs
Procurement practices in hospitals, 2010 and 2011	Procurement procedures – Non-competitive procurement – Cost-benefit analysis – Technical specifications – Award criteria - Illegal payments - Monitoring - Penalties
Waterway transport in the Tagus River, 2010	Public service provision - Compensations
Water Resources Management Regulators, 2010	Direct awards – Preparation of the procurement – Budget allocation
National Laboratory of Energy and Geology, 2010	Direct awards – Documentation – Justification of the procurement
Beja Airport, 2010	Preparation and implementation of the investment
Consultancy services in public owned companies, 2010	Non-competitive procurement – Lack of guidance – Identification of needs – Documentation - Monitoring
Port of Sines, 2010	Direct award – Allocation of risks
Several Universities, 2010 - 2017	Financial - Direct awards – Monitoring of contract implementation – Additional works
Outsourcing of medical services, 2010	Non-competitive procurement - Documentation - Monitoring
Portuguese Agency for Centralised Procurement, 2011	Framework agreements - Savings
Territorial Enhancement Operational Program, 2012	Non-competitive procurement – Technical specifications – Criteria for the selection of contractors
Supply to hospitals of the National Health Service, 2012	Performance - Centralised procurement – Savings
Plan for the modernisation of schools, 2012-2016	Additional works – Splitting of contracts – Selection of contractors - Modification of tender documents - Delays in implementation - Non-delivery of agreed

Report	Main issues
	services and materials – Overpayments – arbitration decisions
Planning Department in the Ministry of Education, 2012	Monitoring of contract execution - Penalties
<i>Fertagus</i> Concession, 2012	PPP performance assessment
Procurement in municipalities, 2013	Non-competitive procedures – excessive duration of contracts
Air company to combat fires, 2014	Poor contract planning – Funding and budget procedures- Modification to contracts – Modification of contracts – Inadmissible changes in pricing - Penalties
Implementation of public works contracts by the Lisbon underground company, 2014	Procurement documents – Projects review – Monitoring of contracts
Project “Rehabilitation of Social Housing” of the Institute for Housing and Urban Renewal, 2014	Award procedures – Transparency – Competition – Deficient projects - Award criteria – Monitoring of contracts – Subcontracting – Compliance with labour law - Additional works
Procurement in water supply companies, 2017	Non-competitive procurement - justification of procurement

Audit Office, Slovak Republic

Report	Main issues
Report on the results of the check of compliance with the act on public procurement by <i>Slovenská pošta, š. p. Banská Bystrica</i>	Compliance - Principles of competition and economy – Procedures chosen to procure
Contracts and payments in health care provision	Award procedures – Transparency - Competition

Court of Audit, Slovenia

Report	Main issues
Maintenance of motorways in Slovenia, 2010	Performance- Concession – Poor planning and maintenance – Splitting of contracts
Provision of office and work space for the Ministry of Interior, 2011	Performance- PPP – Promise of purchase without the due procedure – duplication of contracts

Report	Main issues
Countertrade agreements for military and defence equipment, 2011	Performance – Confidential procurements – Inadequate regulations
Municipality of Maribor – Pohorje cable-car, 2011	Compliance – PPP – Concession – Direct award-
Municipalities Dol pri Ljubljani, Lenart, and Slovenska Bistrica – financing of the construction of kindergarten, 2012	Compliance- PPP – Direct award – Distribution of risks
Municipality of Maribor – Traffic automatisation project, 2013	Compliance- PPP – Modification to tender documents – Financial arrangements
Ljubljana Pharmacy - procurement of medicinal products and medical devices, 2013	Compliance – Direct award – In-house exemption
National Institute of Public Health, 2014	Compliance – IT audit – Award criteria different from announced - Lots - Price
Information System of Customs Administration of Slovenia, 2014	Performance- IT audit- Contract management- Efficiency – Effectiveness - COBIT
Operation of 15 non-governmental and jurisdictional bodies, 2014	Compliance- Estimated value – Choice of procedure – Principles not met – Discrimination – Splitting of contracts – Unpublished criteria – Competition - Documentation
Municipality Mokronog-Trebelno, 2015	Compliance– PPP- Concession - Indirect incurring of debt – Financial capability
Kranj kindergartens, 2015	Compliance – Estimation of the value of contracts – Procurement procedures – Subcontractors – Changes in contracts - Guarantees
Ministry of Defence Integral Information System for logistics and HR, 2015	Performance- IT audit – Planning – Project management – Implementation – Costs -
Management of real-estate, current transfers and investments of Municipality Kranj, 2015	Compliance – PPP – Alternatives – Procedure – Valuation -
Procurement of medicaments by pharmacies and reimbursement by Health Insurance Institute of Slovenia, 2016	Compliance – Competition - Procedures
Investments into kindergarten facilities – collective report, 2016	Compliance – Procedures – Competitive dialogue - Subcontractors – Additional works

Tribunal de Cuentas, Spain

Report	Main issues
Autonomous (Regional) and Local public sectors, financial year 1996.	Compliance – Implementation of the procurement
Contracts of assistance, consultancy and services awarded by the <i>Fundación para la Formación Continua</i> (FORCEM), Foundation for Further Education, financial years 1996 to 1998	Compliance – Effectiveness - Private non-profit foundation
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	Regularity and performance – Management of the procurement - Preparation of the procurement - Principles of publicity, concurrence, objectivity and transparency
Procurement awarded by the foundations of the state public sector. Financial years 1999, 2000, 2001 and 2002	Regularity and compliance - Efficiency – Management of the procurement – Award procedures
Autonomous (Regional) and Local public sectors, financial year 1997.	Preparation of the procurement – Implementation of the procurement
Acquisitions of medications and pharmaceutical products -1999 and 2000	Compliance - Efficiency and economy – Management of the procurement - Preparation of the procurement – Procedure chosen to procure
Contracts awarded in 1999 and 2000 by hospitals of the National Health System, with special reference to contracts referring to the realisation of clinical tests	Regularity - Regime of economic compensations – Preparation of the procurement
Procurement awarded during 2002 by entities of the State public sector	Compliance - Efficiency and economy – Procedure chosen to procure - Award procedures
Autonomous (regional) and local public sectors, financial year 1998.	Compliance - Annual Report – Preparation of the procurement - Award procedures – Implementation of the procurement
Autonomous (regional) and local public sectors, financial year 1999.	Preparation of the procurement - Award procedures – Implementation of the procurement
Procurement subscribed by the State public sector during the financial years 1999, 2000 and 2001	Preparation of the procurement - Award procedures – Implementation of the procurement
Procurement awarded by the Provincial Delegations, financial year 2002, services of Home Assistance	Preparation of the procurement - Award procedures – Implementation of the procurement
Highspeed line Madrid-Barcelona- 1999 and 2000	Preparation of the procurement - Award procedures – Implementation of the procurement

Report	Main issues
File, storage, safekeeping or management of medical histories in hospitals: procurement on this activity	Management of the procurement - Preparation of the procurement - Implementation of the procurement
Autonomous (regional) and local public sectors. Financial year 2000.	Management of the procurement - Preparation of the procurement - Implementation of the procurement
Audit Report on Public Procurement of the Municipalities of the Autonomous Community of La Rioja, year 2012	Procurement documents
Procurement conducted by Museo Nacional del Prado, Museo Nacional Centro de Arte Reina Sofía and Fundación Colección Thyssen-Bornemisza, 2017	Justification of the procurement – Procurement procedures – Award criteria – Control of the contract implementation

National Audit Office, Sweden

Report	Main issues
State investments in public fairways, 2016	Performance – Planning – Cost/benefit analysis – Investment alternatives - Monitoring
Experiences of the PPP solution for the Arlanda rail link, 2016	Performance – PPP – Cost/benefit analysis – Risk distribution – Financing – Follow-up – Design of contracts
Road and rail investments in Sweden – lacking an EU perspective?, 2017	Performance – Planning infrastructures – Cost/benefit analysis – Investment alternatives – EU objectives
The Swedish Transport Administration's road Maintenance, 2017	Performance – Planning – Monitoring – Budget appropriations

National Audit Office, United Kingdom

Report	Main issues
Non-Competitive Procurement in the Ministry of Defence	Value for money - Defence equipment procurement - Non-competitive procurements
Improving IT Procurement – Progress by the Office of Government Commerce in improving departments' capability to procure cost - effectively	Value for money - Department's Procurement - Management of the procurement

Report	Main issues
Ministry of Defence: Major Projects Report 2004	Value for money - Defence equipment procurement – Project performance
Improving Public Services through better construction	Value for money - Construction projects
Purchasing and Managing Software licences	Value for money - Management of the procurement
Procurement of Vaccines by the Department of Health	Value for money - Management of the procurement
Modernising Procurement in the Prison Service	Value for money - Management of the procurement
Ministry of Defence: The Rapid Procurement of Capability to Support Operations	Value for money - Defence procurement - Management of the procurement
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	Value for money - Management of the procurement
Addressing the environmental impacts of government procurement, 2009	
Paying government suppliers on time, 2013	Prompt payment policy - Subcontractors benefit - Role of the centre of government
Managing government suppliers, 2013	Relationship with strategic suppliers
Improving government procurement, 2013	Procurement reform strategy - Governance and accountability arrangements
Sustainable procurement in government, 2013	
Transforming government's contract management, 2014	
Government's spending with small and medium-sized enterprises, 2016	Access of SMEs to public sector market
Improving value for money in non-competitive procurement of defence equipment, 2017	Value for money

