

**CHECKLISTS FOR USE IN 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, procurement represents between 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, not least because we had to produce a document which was 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 checklist was prepared on the basis of common principles and procedures having regard to:

- An analysis of the contributions received from several of the SAIs which led us to conclude that all of them focus on the robustness of the procurement function, meeting public needs, competition objectives and transparent procedures;
- EU Member States are bound to the basic precepts of the Treaty on the Functioning of the European Union (TFUE) and of the Directive 2004/18/EC¹;
- No matter which national or local regulation is followed, State authorities must respect the requirements of the competitive process and make its decisions in a transparent way which respects all participants equally. In particular it must not discriminate on the grounds of nationality;
- Procurement is a risk area for fraud and corruption and they 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 is 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, we have placed emphasis on aspects which we know from experience are prone to failure and irregular influence.

¹ Although there are other EU regulations on public procurement, this checklist refers always to Directive 2004/18/EC. ruling.

When using this checklist, the auditor should keep in mind that:

- 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;
- Depending on assessed risks, not all questions will be applicable to each audit;
- According to audit mandates and national systems, some items may have to be modified or questions 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 is 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;
- **Guidance**, identifying documents that the auditor should consider in relation to the item under analysis:
 - The relevant parts of the Directive 2004/18/EC;
 - The related sections of the Guideline for Auditors;
 - Questions included in the Procurement Performance Model;
 - Important judgements of the European Court of Justice (ECJ Case-Law);
 - Audit reports and studies produced by SAIs².

Since public procurement is one of the activities creating more opportunities for corruption, which originate damages estimated between 10% to 50% of the contract value, we have included a fraud and corruption perspective in these checklists. Where the audit emphasis is on fraud and corrupt 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 needed³.

² Summaries, details and links to these reports are included in “Supreme Audit Institutions Summaries of Procurement

³ 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 procurement (on request to AFROSAIE).

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” in: <http://www.asosai.org/guidelines/guidelines1.htm>. See also *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005.

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 tender documents comprehensive, transparent and free from restrictions or conditions which 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 and transparency?

4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

- 4.1. Did the public authority report procurement processes and results in compliance with the Directives and the TFUE?
- 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 exclusion causes duly considered before the actual evaluation of tenders?
- 5.4. Were bids properly evaluated?
- 5.5. Was the decision on the award process accurate and adequately communicated?

6. AUDITING ADDITIONAL WORKS OR DELIVERIES

- 6.1.** Were any additional works or deliveries admissible, without recourse to 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** • Are procedures conducted by electronic means sufficiently recorded and documented, making the audit trail easy to follow?
- Do staff involved in the various stages of the process have the appropriate skills and training to perform their duties effectively?
- F/C** • Are procurement proposals initiated, processed and approved by authorized officers, with no cases of overstepping?
- F/C** • Are there no cases of documents missing, altered, back-dated or modified or after-the-fact justifications?

Guidance

- **Directive⁴:**
For records of e-procedures see article 43
- **PPWG Procurement Performance Model (PPM):**
For procurement strategy see n° 7 of PPM.
For organization of the procurement function see n° 8 of PPM.
For organization of the procurement process see n° 9 of PPM.
For staff's skills, experiences and competencies see nos 10 and 16 of PPM.
For risks relating to internal and external environments see n° 13 of PPM.

⁴ It always refers to Directive 2004/18/EC

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	Estonia

For the need of guidelines:

Report	SAI
Contract marketing and promotion expenditure	Belgium
Flemish Broadcasting Corporation (VRTT)'s cooperation with external services for television programmes	“
Procurement of maintenance services	Estonia
Statistics Finland's service procurements	Finland
The Defence administration's procurement activities – supply procurement	“
Audit on the operation of the Hungarian Defence Forces public procurement systems projects	Hungary

For the organization, documentation and filing of procurement processes:

Report	SAI
Flemish Broadcasting Corporation (VRT)'s cooperation with external services for television programmes	Belgium
Consultancy contracts awarded by ministerial cabinets	“
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
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
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	UK

For competency issues:

Report	SAI
Contract marketing and promotion expenditure	Belgium
Roads, motorways and waterways maintenance leases	Belgium

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 financial regulations
- PPWG 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
Contract marketing and promoting expenditure	Belgium
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

Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System-1999 and 2000	Spain
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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

- 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 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?
- 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 e-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?
- 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?

Guidance

- **Directive:**
For records of e-procedures see article 43
- **PPWG Procurement Performance Model (PPM):**
For the organization 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
Contract marketing and promotion expenditure	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	“
Flemish Broadcasting Corporation (VRT)’s cooperation with external services for television programmes	“
Management of public procurement at the Ministry of Interior and its governing area	Estonia
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 Commercies’ initiatives on departments and suppliers in the delivery of major IT-enabled projects	“

For the need of clear segregation of duties:

Report	SAI
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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 (VRT)'s cooperation with external services for television programmes	Belgium
Procurement of consultancy services	Denmark

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** • 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?
- Are reports based on sound data available to those responsible for monitoring the performance of contracts?
- 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

- **PPWG 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 specialized 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
Improving public services through better construction	UK

For the need of clear description of responsibilities:

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	“
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
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 (VRT)'s cooperation with external services for television programmes	“
The procurement of public transport services	Finland
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 2004/18/EC and 2004/17/EC. 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 avoiding any kind of discrimination, including for reasons of nationality.

One further point of interest - the European Court of Justice (ECJ) has confirmed that the Internal Market rules of the EC Treaty apply also to contracts outside the scope of the Public Procurement Directives. According to ECJ's case law, an obligation of transparency exists for all contracts sufficient to enable the market to be opened up to competition through advertising contract details and by the application of fair and impartial procedures.

Questions

- Is a contract being awarded for works, supply of products or provision of services?
- 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”?
- Has the public authority estimated that the value of the contract will exceed the thresholds of the Directive?
- Are contracts which have several component parts qualified according to the component of greatest value and were the correct thresholds used?
- Where the public authority cites exemptions pursuant to articles 12-18 of the Directive, have the special requirements for those exemptions been proved?

Guidance

- **Directive:**

For definitions of “public contract” and “contracting authority “ see articles 1(2) and (9) and Annex III. See also articles 1(3), 3 and 63 for other situations.

For exemptions see articles 12 to 18, 57 and 68.

For thresholds see articles 7 and 8, as amended by Commission Regulation ((EC) 1177/2009, of 30 November 2009, published in the OJEU L314, of 1 December 2009, and be aware that thresholds are set forth every two years by the European Commission. See articles 7 and Annexes II, IV and V for specific rules for products in the fields of defence and services in the field of research and development, telecommunications and others.

For contracts in the water, energy, transport and postal service sectors see Directive 2004/17/EC.

For qualification of contracts see articles 1, 10, 12-14, 16 and 20-22

For contracts in the field of defence and security see Directive 2009/81/EC.

- **See also Commission Interpretative Communication 2006/C 179/02 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.**

- **PPWG Guideline for Auditors:**

See n.ºs. 2 (Scope of Directive 2004/18/EC) and 8 (Thresholds) and Appendix II.

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

For compliance with EU law see n. 17 of PPM.

- **ECJ Case-Law:**

Case	Judgement	Issue
C-31/87, Beentjes	1988.09.20	Contracting authorities
C-44/96, Mannesmann	1998.01.15	“
C-323/96 Commission/Belgium	1998.09.07	“
C-360/96, Arnhem and Rheden/BFI	1998.11.10	“
C-353/96, Commission/Ireland	1998.12.17	“
C-275/98, Unitron Scandinavia	1999.11.18	“
C-380/98, University of Cambridge	2000.10.03	Contracting authorities/ Definition of public financing
C-237/99, Commission/France	2001.02.01	Contracting authorities
C-223 and 260/99, Agora and Excelsor	2001.05.10	“
C-470/99, Universale-Bau	2002.12.12	“
C-373/00, Adolf Truley	2003.02.27	“
C- 214/00, Commission/Spain	2003.05.15	“
C-18/01, Korhonen and others	2003.05.22	“
C-283/00, Commission/Spain	2003.10.16	“
C-84/03, Commission/Spain	2005.01.13	“
C-107/98, Teckal	1999.11.18	Contracting authorities/In
C-26/03, Stadt Halle and RPL Lochau	2005.01.11	Contracting authorities/In
C-295/05, Asemfo/Tragsa	2007.04.19	“
C-324/07, Coditel	2008.11.13	“
C-573/07, Sea Srl/Comune di Ponte Nossa	2009.09.10	“
C-29/04, Commission/Austria	2005.11.10	“
C-480/06,	2009.06.09	Administrative cooperation in

Commission/Germany		the performance of public tasks
C-331/92, Gestión Hotelera Internacional	1994.04.19	Mixed contracts
C-16/98, Commission/France	2000.10.05	Definition of public works contract
C-411/00, Felix Swoboda	2002.11.14	Qualification of services – Annex II A or II B/ Contract award procedures
C-126/03, Commission/Germany	2004.11.18	Applicability of public procurement procedures
C-458/03, Parking Brixen	2005.10.13	Public service concession
C-264/03, Commission/France	2005.10.20	Obligation to respect the fundamental rules of the Treaty for public contracts excluded from the scope of public procurement Directives

- Audit reports and studies:**

For the need of complying with the basic standards of the TFUE:

Report	SAI
Flemish Broadcasting Corporation (VRT)'s cooperation with external services for television programmes	Belgium

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 order to remain 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.

Questions

- Did the public authority identify the full contract value and include options and provisions for renewals?
- Was the estimation of contract value in accordance with the criteria fixed in the Directive?
- F/C** • Is there no evidence that the works or supply required was subdivided in order to remain below levels of authorisation or procedure?
- 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 contract awarded?

Guidance

- **Directive:**
For methods for calculating the contract value see articles 9 and 67(2)
- **PPWG Guideline for Auditors:**
See n.ºs 8 (Thresholds) and 9 (Estimation of Values)
- **ECJ Case-Law:**

Case	Judgement	Issue
C-16/98, Commission/France	2000.10.05	Artificial splitting of a single work

- **Audit reports and studies:**

For estimation of contract value:

Report	SAI
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	“
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
Public investment projects by public rail transport enterprise	Portugal
Integrated project of the Northern Railroad	“
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 as it is here that the public authority defines its needs and the requirements the tenders must meet. Unjustified or inaccurate needs assessment may lead to purchase unnecessary goods or services.

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.

In addition, from the time notices are published performance under the contract has to remain 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 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.

Questions

- F/C** • Was there reasonable justification for the need of the purchase, namely when made towards the end of the financial year?
- F/C** • Were the performance conditions under the contract comprehensive and unambiguous?
- F/C** • Was the public authority specific about the nature and scope of the performance before launching the procurement process?
 - Did the public authority consider and evaluate alternatives, like bundling needs with other departments or grouping supplies in separate lots with different characteristics?

- 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?
 - Could the bidders assess the economic risks the successful bidder would be responsible for, thus limiting the inclusion of extra charges for risk?
- F/C • Were technical requirements set strict enough to guarantee the desired performance without being unnecessarily tight to exclude favourable bids that don't 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
- 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 • Did the performance description remain unchanged once the notifications had been published?
- F/C • If the public authority has changed 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?
- F/C • 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 detailed information about admissibility of technical specifications see article 23 and Annex VI.

The requirements for product neutral performance descriptions are codified in article 23 (8).

- **PPWG 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 n° 16 of PPM.

- **ECJ Case-Law:**

Case	Judgement	Issue
C-45/87, Commission/Ireland	1988.09.22	Technical specifications defined according to national technical standards
C-3/88, Commission/Italy	1989.12.05	Forms of discrimination which lead to the same result as discrimination by reason of nationality
C-243/89, Commission/Denmark	1993.06.22	Discrimination based on the request to use the greatest possible extent of national products and labour
C-359/93, Commission/Netherlands	1995.01.24	Technical specifications defined by reference to a trade mark, without adding the words "or equivalent"

- **Audit reports and studies:**

Report	SAI
Performance Description	Germany

For the lack of a clear definition of the main components of the contract ("stock contract technique):

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels Belgium	Belgium

For contracts 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	"

For justification of purchases:

Report	SAI
Funds spent on acquiring- Czech Statistical Office headquarters	Czech Republic

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.4. Were the tender documents comprehensive, transparent and non-discriminating?

Background

In addition to the performance description the tender documents provide all the relevant conditions for the competition.

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 reduces the scope for value for money.

Most notably the tender documents 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.

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 tender documents? Did the public authority make sources of information beyond the tender documents equally available for all the candidates?
- F/C** • Did tender documents fix 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 standards, certifications and evidence required admissible under the Directive?
- F/C** • Were the extent of information, the levels of ability and the standards required related and proportionate to the subject matter of the contract, avoiding unnecessary restrictions and verifications?
 - Did the public authority abstain from unnecessary verification in terms of the scope and deadline to prove the bidders capability?
- F/C** • Where the public authority weighted selection criteria, did it publish the weightings in advance of the receipt of the tenders?

- F/C** • **Has the public authority defined clearly the award criteria?**
- F/C** • **Where the award criteria was the most economically advantageous tender, were:**
 - **Sub-criteria clearly indicated?**
 - **Relative weighting of each sub-criteria or a range with an appropriate maximum spread specified?**
 - **The sub-criteria listed in descending order of importance where is was not possible to state weighting values in advance?**
 - **The sub-criteria different from those defined in the qualification of bidders?**
- F/C** • **Are those sub-criteria linked to the subject matter of the contract, reflecting the main focus and the importance of the elements of the performance?**
- F/C** • **Is the weighing set coherent, convincing and leaving little scope for arbitrary and random evaluation and ranking?**
 - **Are criteria and sub-criteria set suitable to identify the tender that offers best value for money? Has price been given a reasonable weighting?**
 - **When the public 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?**
- F/C** • **Were there no inconsistencies between the several tender documents?**

Guidance

- **Directive:**
For document requirements see articles 40, 44 and 47 to 52
For requirements concerning the suitability of tenderers see articles 44 to 52
For award criteria see articles 40 and 53
For performance conditions see articles 26 and 27.
- See also **Interpretative Communications of the Commission COM (2001) 566** final from 15.10.2001, for integrating social considerations into public procurement and **COM (2001) 274** final from 04.07.2001, about the possibilities for integrating environmental considerations
- **PPWG Guideline for Auditors:**
See n°s. 4 (Criteria for awarding contracts) and 16
- **PPWG 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.

- **ECJ Case-Law**

Case	Judgement	Issue
C-76/81, Transporoute	1982.02.10	Criteria for qualitative selection
C-27-29/86, CEI and Bellini	1987.07.09	“
C-31/87, Beentjes	1988.09.20	Criteria for qualitative selection/ Requirements of the most advantageous tender

		criterion/ Condition related to the employment of long-term unemployed persons
C-360/89, Commission/Italy 1992.06.03	1992.06.03	Criteria for qualitative selection: prohibition of discrimination that favours companies with offices in the region where the works are to be carried out or establishes a preference for temporary associations including undertakings with their main activities in that region
C- 3/88, Commission /Italy	1989.12.05	Principle of non-discriminatory treatment: forms of discrimination which lead to the same result as discrimination by reason of nationality
C-21/88, Du Pont de Nemours	1990.03.20	Principle of non-discriminatory treatment: national rules cannot reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts
C-274/83, Commission/Italy	1985.03.28	Applicability of the most advantageous tender criterion
C-272/91, Commission/Italy	1994.04.26	Restriction of participation in a public procurement procedure to bodies the majority of whose capital is held by the public sector infringes common market fundamental freedoms
C-225/98, Commission/France	2000.09.26	Admissible criteria in the most advantageous tender criterion/ Criteria for qualitative selection: reference to classification of national professional organisations
C-16/98, Commission/France	2000.10.05	Principle of non-discrimination between tenderers
C-94/99, ARGE Gewässerschutz	2000.12.07	Principle of equal treatment: participation of tenderers receiving subsidies from contracting authorities enabling them to submit tenders of lower prices than the ones of their competitors
C-19/00, SIAC Construction	2001.10.18	Admissible criteria for the award of a public contract
C-513/99, Concordia Bus Finland	2002.09.17	Admissible criteria for the award of a public contract, depending on the subject-matter of the contract

C-470/99, Universale-Bau	2002.12.12	Weighting of criteria for qualitative selection of the candidates invited to tender in a restricted procedure
C-315/01, GAT	2003.06.19	Non admissible contract award criteria
C-448/01, EVN and Wienstrom	2003.12.04	Admissible “green” contract award criteria
C-247/02, Sintesi	2004.10.07	National rules cannot preclude the right of the contracting authority to choose between the criterion of the lower price and that of the more economically advantageous tender
C-340/02, Commission/France	2004.10.14	Principles of equal treatment and transparency: the subject-matter of each contract and the award criteria should be clearly defined

- 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 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
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
Public Private Partnerships in Health Sector	Portugal
Integrated Project of the Northern Railroad	“

For possible award sub-criteria (excluding candidates’ suitability requisites):

Report	SAI
Integrated Project of the Northern Railroad	Portugal

For clear requisites of technical competence of tenderers:

Report	SAI
Procurement management in the field of IT systems, software products and software services (2004)	Estonia
Building works of the high speed line Madrid-Barcelona-1999 and 2000	Spain

2. AUDITING THE PREPARATION OF THE PROCUREMENT

2.5. Was the submission of variant tenders accepted and duly ruled?

Background

Where the criteria for award are that of the most economically advantageous tender, the public authority may allow the submission of variants. This might prove beneficial in case the authority is not absolutely certain about the detailed solution for the performance, especially if they want to benefit from innovation. 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 and added value?**
- **In that case, was the award criteria that of the most economically advantageous tender?**
- **Was the admissibility of variants displayed in the contract notice?**
- **Did the public authority state the minimum requirements to be met by the variants in the tender documents?**
- **Did it also specify the requirements for the presentation of variant tenders?**

Guidance

- **Directive:**
For detailed information about variants see article 24
- **PPWG Procurement Performance Model (PPM):**
See n° 16 of PPM, about procedures open to innovation.
- **ECJ Case-Law**

Case	Judgement	Issue
C-421/01, Traunfellner	2003.10.16	Need of informing tenderers about the minimum specifications of variants

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

In many cases where a specific knowledge or expertise is required, a public authority will 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, it must be ensured that all the key documentation is given to the contracting authority, so that it effectively owns the process and is able to treat all candidates in like manner including the distribution of all requested information.

The involvement of experts in competitions introduces the danger of violating the basic principles of equal treatment/non-discrimination and transparency. Experts may be given 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 European Court of Justice has recently ruled that a provision to automatically exclude experts from submitting a tender in a competition where he had an involvement is precluded by the Directives, stating 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

- Where the public authority engaged 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** • 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** • Was all the key documentation given to the contracting authority?

- F/C** • Was the expert likely to gain privileged knowledge from his activity which could be advantageous for him in a subsequent competition? If so, was his participation in the contract specifically excluded?
- F/C** • If the expert was allowed to submit a tender, was all the relevant information the expert had gained from his earlier involvement made available to the other bidders?
- F/C** • Is there no evidence that the consultants participating in the project design released information to contractors competing for the prime contract?

Guidance

- **ECJ Case-Law:**
See cases C-21/03 and C-34/03, “Fabricom SA”, 3. March 2005

Case	Judgment	Issue
C-21/03 and C-34/03, “Fabricom SA”	2005.03.03	Principle of non-discrimination between tenderers/ privileged knowledge

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. Public authorities have the option to follow an open or a restricted procedure but must not conduct a negotiated procedure unless exceptional conditions expressly described prevail. This section of the Directive should be strictly interpreted and assumed only under exceptional circumstances (European Court of Justice).

The Directives introduce the possibility of using new types of procedures, like competitive dialogue, framework agreement and dynamic purchasing system, aimed at bringing some procedural flexibility and savings possibilities without comprising fair competition and transparency. Note: EU Member States may opt to allow, or not, these types of procedure in their countries.

In practice negotiated procedures are frequently used, the consequences of which are a restricted competition and negotiations about performance and prices which make it more difficult for the public authority to adhere to the principles of equal treatment and transparency. It is a major violation of EU procurement regulations and international standards for public authorities to award contracts without following the applicable procedures.

Questions

- Has the public authority taken a well-grounded decision about the procurement procedure chosen and has it documented the process?
- Is it clear which procurement procedure the public authority has opted for?
- F/C** • Where 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 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 negotiated procedure and did it clearly and adequately set forth that the conditions of that exemption are met?
- F/C** • Did those conditions actually occur?
 - When competitive dialogue was used, did the contracting authority provide sufficient justification for the use of this procedure and was the contract actually “particularly complex”?
- F/C** • 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 28 to 34, see description of circumstances that allow the use of exceptional negotiated in articles 30 and 31.
- **Directive 2009/81/EC:**
Procurement rules for defence and security contracts.
- **PPWG Guideline for Auditors:**
See no. 11 (Tendering Procedures)
- **PPWG Procurement Performance Model (PPM):**
See n° 16 of the PPM, about planning the public procurement process, and n° 17 about compliance with EU law.
- **ECJ Case-Law:**
In the case-law of the European Court of Justice the codified exemptions are restrictively interpreted and assumed only under exceptional circumstances. This concerns especially those premises given under article 30 (1,c) and article 31 (1,b and c).

Case	Judgement	Issue
C-199/85, Commission/Italy	1987.03.10	Exceptional circumstances that enable direct award must be proved
C-3/88, Commission/Italy	1989.12.05	Use of restricted procedure without adequate justification
C-157/06, Commission/Italy	2009.10.02	“

C-24/91, Commission/Spain	1992.03.18	Use of restricted procedure without adequate justification: reasons of extreme urgency
C-107/92, Commission/Italy	1993.08.02	“
C-328/92, Commission/Spain	1994.05.03	“
C-318/94, Commission/Germany	1996.03.28	Use of restricted procedure without adequate justification: reasons of extreme urgency and unforeseeable event
C-231/03, Coname	2005.07.21	Direct award of a concession is not permissible without appropriate transparency
C-458/03, Parking Brixen	2005.10.13	Direct award of a public service concession is not admissible
C-107/98, Teckal	1999.11.18	In-house providing exception
C-26/03, Stadt Halle	2005.01.11	“
C-458/03, Parking Brixen	2005.10.13	“
C-295/05, Asemfo/ Tragsa	2007.04.19	“
C-324/07, Coditel	2008.11.13	“
C-573/07, Sea Srl/ Comune di Ponte Nossa	2009.09.10	“
C-196/08, Acoset SpA	2009.10.15	Possibility of awarding a public service to a semi-public company formed specifically for the purpose of providing that service, when the private participant in that company has been selected by means of a public and open procedure.
C-480/06	2009.06.09	Cooperation between local authorities
C-299/08, Commission/France	2009.12.10	Single procedure for the award of the contract

- 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	“

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
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Contract marketing and promotion expenditure	“
Flemish Broadcasting Corporation (VRT)’s cooperation with external services for television programmes	“
Consultancy contracts awarded by ministerial cabinets	“
Dredging works	“
Statistics Finland’s service procurements	Finland
Universities’ procurement activities	“
Use of expert services by the Defence Administration	“
Audit over a Rail Transport Institute	Portugal
Public investment projects by public rail transport enterprise	“
Parliament’s 2005 account	“
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)	“
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”	“

For non justification of used procedure:

Report	SAI
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

3. AUDITING THE PROCEDURE CHOSEN TO PROCURE

3.2. Did the chosen procedure ensure competition and transparency?

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. Companies who did not apply must not be separately invited by the public authority for reasons of equal treatment.

Questions

➤ **When a restricted procedure was used:**

- F/C** • Did the public authority publish a prior notification calling any interested candidate to request participation?
- When the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
 - The minimum and maximum number of candidates it intends to invite?
 - The objective and non-discriminatory selection criteria to be used to choose that number of candidates?

- F/C** • Did the number of candidates invited respect the minimum set (usually 5), 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?

➤ **When a negotiated procedure with publication of a contract notice was used:**

- F/C** • 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 maximum number of candidates it intends to invite?
 - The objective and non-discriminatory selection criteria to be used to choose that number of candidates?

- 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?
- When a negotiated procedure without prior publication of a contract notice was used:
- F/C** ● Was a sufficient competitive environment created?
- When a competitive dialogue was used
- F/C** ● Were all interested operators allowed the opportunity to participate?
- When the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
 - The minimum and maximum number of candidates it intends to invite?
 - The objective and non-discriminatory selection criteria to be used to choose that number of candidates?
- 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 award criterion only the most economical advantageous tender?
- When a framework agreement was used
- F/C** ● Has the agreement been awarded in compliance with the general procurement regulations?
- Have the special requirements pursuant to Article 32 of Directive been met?
- Is the duration of the agreement less than the maximum term of four years?
- F/C** ● When awarding a single contract, were the public authority and the supplier the original parties to the framework agreement? When not, was the competition reopened?
- When a dynamic purchasing system was used
- Was the dynamic purchasing system set up following the rules of open procedure?
- In the set up of the system and in the award of contracts were only electronic means used?
- F/C** ● Were all economic operators given the opportunity of submitting indicative tenders and allowed admission throughout the entire period of the dynamic purchasing system?
- Have the special requirements pursuant to Article 33 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?
- Is the duration of the system less than four years?
- Were no charges billed to interested economic operators or the parties to the system?

Guidance

- **Directive:**
For open procedure see article 1(11/a)
For restricted procedure see articles 1(11/b), 44(3) and Annex VIIA
For negotiated procedures see article 1(11/d), 2, 30, 31 and 44
For competitive dialogue see articles 1(11/c), 29 and 44
For framework agreements see articles 1(5) and 32
For dynamic purchasing system see articles 1(6), 33, 35(3,4), 42(2-5) and Annex VIIA
- **PPWG Guideline for Auditors**
See no. 11 and Appendix V, VI and VII
- **PPWG Procurement Performance Model (PPM):**
See n° 16 of the PPM (implementing the public procurement process) and n° 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-225/98, Commission/France	2000.09.26	Limitation to a maximum of five tenderers within a restricted procedure is not admissible
C-20 and 28/01, Commission/Germany	2003.04.10	Possibility of a negotiated procedure without prior publication of a contract notice
C-385/02, Commission/Italy	2004.09.14	Strict interpretation and need of proof of derogations regarding the existence of exceptional circumstances
C-340/02, Commission/France	2004.10.14	Use of negotiated procedure without justification/ need of proof about the existence of exceptional circumstances
C-84/03, Commission/Spain	2005.01.13	Strict interpretation of derogations/ Unjustified use of negotiated procedure
C-138/08, Hochtief and Linde	2009.10.15	Negotiated procedures, obligation to ensure genuine competition, minimum number of suitable candidates

- **Audit reports and studies:**
For lack of transparency and competition:

Report	SAI
Flemish Broadcasting Corporation (VRT)'s cooperation with external services for television programmes	Belgium

4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

4.1. Did the public authority notify procurement processes and results in compliance with the Directive and TFUE?

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 European Court of Justice has considered that their violation has serious consequences for the legitimacy of the procedure.

The Directive discriminates between three different commitments to place notifications – prior information notice, call for tender and post award notification – of which the call for tender is the most crucial aspect.

Questions

- When the contracting authority shortened the time limits for the receipt of tenders, had it published a prior information notice about the intended awards in the Official Journal of European Union (OJEU)?
- F/C** • When under the scope of the Directive, was the call for tenders for contracts or framework agreements published in the OJEU?
- Did this notice follow the necessary form, including disclosure of all the required information?
- Were national advertisements published after the day when the official notification was sent to OJEU?
- Did national advertisements confine details to those contained in the notification sent to OJEU?
- F/C** • Did time limits set to receive tenders and requests to participate comply with the minimum requirements established for the chosen procedure?
- 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** • Was the time limit set for submission of bids sufficient to the potential bidders to prepare and submit their bids?
- Were results of the award procedures published?

Guidance

- Directive:**
 For prior information notice obligation see articles 35, 36, 38 and Annexes VIIA and VIII.
 For forms and content of contract notices see articles 35, 36, Annexes VIIA and VIII. See also Annex II to Commission Directive 1564/2005, from 7 September 2005.
 For minimum deadlines to receive tenders or requests to participate and shortening possibilities see articles 36(2) and 38. For notices on award results see article 35(4).
- For notification of procurement in contracts not covered by the Directive, namely contracts below the thresholds, see **Commission Interpretative Communication 2006/C 179/02**
- PPWG Guideline for Auditors**
 For prior and contract notices see n.ºs 5 and 7.
 For time limits see n.º 12.
 For notices on award results see n.º 18.
- PPWG Procurement Performance Model (PPM):**
 For the need for proper communication between procurement staff and suppliers see nº 16 of PPM.
 For compliance with EU law see nº 17 of PPM.

- ECJ Case-Law**

Case	Judgement	Issue
C-76/81, Transporoute	1982.02.10	The purpose of rules regarding participation and advertising is to protect tenderers against arbitrariness
C-225/98, Commission/France	2000.09.26	Situations where the publication of a prior information notice is compulsory
C-324/98, Teleaustria Verlag	2000.12.07	Principles of non-discrimination and transparency: need for advertising in a public service concession awarding procedure
C-399/98, Ordine degli Architetti	2001.07.12	Need for contract notices

- Audit reports and studies:**

-

For notices or information to the bidders:

Report	SAI
Contract marketing and promoting expenditure	Belgium
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 being 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. Accessibility and security have new significance in this context.

Questions

- **Did the contracting authority offer unrestricted and full electronic access to the contract documents and any supplementary documents (specifying the internet address in the notice)?**
- F/C** • **When that type of access was not offered, were all specifications, documents and additional information made available on a timely basis or issued in hard copy to economic operators?**
- F/C** • **Were the documents describing the requirements and performance accessible to all bidders in the same way or were specific documents easier to obtain for domestic bidders?**
- F/C** • **Was additional significant information supplied to all interested parties?**
- F/C** • **Were the means of communication and information exchange used free from barriers and did they allow economic operators' access to the tendering procedure?**
- **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?**

Guidance

- **Directive:**
For electronic and non-electronic access to documents see articles 38(6), 38(7), 39(1,2), 40(1-4), 42 and Annex X.
For electronic auctions see article 54(3).
For dynamic purchasing systems see article 33.
- **PPWG Guideline for Auditors**
See n. ° 13
- **PPWG Procurement Performance Model (PPM):**
See n° 16 (implementing the public procurement process) and n° 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgment	Issue
C-359/93, Commission/Netherlands	1995.01.24	Information to be included in tender notices

- **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 making 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 only known after expiration of the time limit set for submitting them?
- F/C** • During an electronic auction, did the identity of tenderers remain undisclosed at all times?
 - In a competitive dialogue, were solutions proposed or confidential information given by a candidate not revealed to others without his/her express agreement?

Guidance

- **Directive:**
For confidentiality requirements see articles 29(3), 42(3) and 54(6)
- **ECJ Case-Law**

Case	Judgment	Issue
C-538/07, Assitur	2009.05.19	Companies linked by a relationship of control or significant influence as competing tenderers

5. AUDITING THE AWARD PROCEDURES

Background

The awarding procedures are typically conducted in five separate steps:

- Formal review of bids
- Assessment of the 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, negotiated procedure with advertising, competitive dialogue 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 to the evaluation of tenders, a practice that is sometimes overlooked by contracting authorities.

It follows that evaluation steps must be done in accordance with the framework of each specific procedure.

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 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?**
- F/C** • **Were at least 2 officials employed to work together in the opening of the tender documents?**
- **Did the contracting authority verify compliance with the basic requirements of the competition?**
- F/C** • **Were tenders rejected for due cause such as:**
 - **Were not received within the prescribed time limit?**
 - **Were not submitted in a closed envelope?**
 - **Did not meet the formal requirements?**
 - **Did not include the required certifications and information?**
- F/C** • **Were no tenders presented after the time limit accepted?**

Guidance

- **Directive:**
For formal review of tenders see articles 26 and 41(2)
- **PPWG Guideline for Auditors:**
For tender opening and formal review see n.º 14
- **PPWG Procurement Performance Model (PPM):**
See n.º 16 of PPM (implementing the public procurement process).

5. AUDITING THE AWARD PROCEDURES

5.2. Was the suitability of candidates accurately assessed?

Background

The contracting authority should admit only those bidders which 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.

In addition, a public authority should ensure that contracts are not awarded to operators who have committed certain offences or participated in criminal organisations.

When assessing the suitability of bidders, the principles of equal treatment and transparency must also be observed.

The contracting authority must document the process followed in the selection of candidates, stating the reasons for selection and rejection.

Questions

- F/C** • Was the qualitative assessment of submissions received undertaken independent of and prior to the evaluation of tenders?
- F/C** • Are the processes followed 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 non-discriminatory manner?
- F/C** • Did candidates prove their suitability to pursue the professional activity as admissibly required?
- F/C** • Did candidates give evidence of their technical and/or professional ability in accordance with the references specified in either the notice or invitation to tender?
- F/C** • Did candidates give evidence of their 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 the economic operator intends to rely on the capacities of other entities, did it prove their ability to access the necessary resources?
 - Where required, did candidates give evidence of complying with quality assurance standards?
 - Where required, did candidates give evidence of complying with required environmental management standards?
 - Where required, were candidates registered as approved contractors, suppliers or service providers or certified by relevant bodies?

- F/C** • **Did the contracting authority request and verify evidence that candidates:**
 - (and/or their representatives) were not convicted of participation in a criminal organisation, corruption, fraud or money laundering?
 - Were not bankrupt or in an analogous situation?
 - Were not guilty of offences of professional conduct?
 - Have fulfilled obligations related to the payment of social security contributions and taxes?
- 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 to pursue the professional activity see article 46.
 - For admissible means of proving technical and/or professional ability see article 48(1-6)
 - For admissible means of proving economic and financial standing see article 47(1-5)
 - For the use of capacities of other entities see articles 47(2,3), 48(3,4) and 52(1)
 - For admissible quality assurance assessment see article 49
 - For admissible environmental management assessment see article 50
 - For non-discriminatory provisions about lists or certifications see article 52
 - For exclusion causes see article 45
 - For AGP Agreement see article 5
 - For documentation and communication procedures see articles 41 and 43
- **Directive 2009/81/EC:**
 - In defence and security procurements candidates may be required to submit specific guarantees ensuring security of information and security of supply.
- **PPWG Guideline for Auditors:**
 - See n.º 18
- **PPWG Procurement Performance Model (PPM):**
 - See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).
- **ECJ Case-Law**

Case	Judgement	Issue
C-389/92, Ballast Nedam Groep I	1994.04.14	Considering the resources of companies belonging to a holding in assessing suitability of dominant legal person of the group
C-5/97, Ballast Nedam Groep I	1997.12.18	“
C-176/98, Holst Italia	1999.12.02	Service provider relying on the standing of another company as proof of its own standing
C-305/08, CoNISMa/ Regione Marche	2009.12.23	Entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market (such as universities

		and research institutes) are allowed to take part in public tendering procedures for the award of service contracts
C-199/07, Commission/ Greece	2009.11.12	Qualitative selection, criteria for automatic exclusion
C-376/08, Serrantoni and Consortio stabile edili	2009.12.23	A permanent consortium and one of its member companies as competing tenderers

- **Audit reports and studies**

For illegal admission of bidders:

Report	SAI
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 was 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.

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

- When performance conditions were detailed in the tender documentation, did the contracting authority verify if the tenders received met those requirements?
- 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 that case, did the contracting authority write to the bidder seeking disclosure of the basis of his cost estimate?
 - 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 a tender was considered abnormally low because of state aid, is there no verifiable clue/indication that the aid was granted illegally?
- 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 performance conditions see articles 26 and 27
 - For subcontracting see article 25
 - For abnormally low tenders see article 55
 - For variants see article 24.
- **PPWG Guideline for Auditors:**
 - See n.º 17
- **PPWG Procurement Performance Model (PPM):**
 - See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-76/81, Transporoute	1982.02.10	Obligations of the contracting authority regarding an abnormally low tender
C-103/88, Fratelli Costanzo	1989.06.22	Obligations of Member States when defining rules regarding abnormally low tenders
C-243/89, Commission/Denmark	1993.06.22	Principle of equal treatment: prohibition of negotiating with a tenderer on the basis of a tender not complying with the tender conditions
C-285 and 286/99, Lombardini and Mantovani	2001.11.27	Obligations of Member States and contracting authorities regarding abnormally low tenders

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 construed as “post tender negotiation” on price or other tender elements is not permissible. However, for other procedures, such as negotiated or competitive dialogue, negotiations are permissible within certain rules and may result in changes in the tenders. These negotiations may even take place through an electronic auction.

Questions

- F/C** • Is the evaluation process documented in a transparent, plausible and convincing manner?
- F/C** • Did the contracting authority evaluate only those tenders that qualified in the former 3 steps?
- F/C** • When open and restricted procedures were used, no negotiations or alterations to tenders were permitted, namely on price?
- F/C** • When negotiations or fine-tunings of the tenders did take place, were these permitted within the procedure followed?
- F/C** • In those cases, was equality of treatment and distribution of information provided to all tenderers during the dialogue or the negotiations?
 - When negotiation took place in successive stages, was this practice stated in the procurement documents and was it done in accordance with the award criteria stated?
 - Where an electronic auction was used to bid, were all required specifications given equally to tenderers?
 - In this case, did the contracting authority make a full initial evaluation of the tenders according to the award criteria and the weighting set, did it invite all bidders simultaneously to submit new prices and/or new values and did it provide the necessary information to them to enable them to continue bidding?
- F/C** • Did the contracting authority evaluate and rank bids against all and only those criteria, and relative weighting, which it had published in the procurement documents?
 - When awarding contracts under a framework agreement, did the contracting authority comply with the terms laid down in that agreement?

- 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 • Is there no evidence of collusion between bidders?⁵
- F/C • Is there no evidence of unauthorized release of information or seemingly unnecessary contacts with bidders' personnel during the evaluation and negotiation processes?
- F/C • Is there no evidence of favouritism towards a particular contractor during the evaluation and negotiation 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?
- Did the contracting authority draw up a report in writing of the outcome of the evaluation in accordance with article 43 of the Directive?

F/C

Guidance

- **Directive:**
Article 53 is the central provision for the evaluation of tenders
For electronic auctions see article 54
- **PPWG Guideline for Auditors:**
See no. 16 and Appendix to Section 4
For electronic auctions see Appendix VIII
- **PPWG Procurement Performance Model (PPM):**
See n° 16 of PPM (implementing the public procurement process) and n° 17 (compliance with EU law).
- **ECJ Case-Law**

Case	Judgement	Issue
C-87/94, Commission/Belgium	1996.04.25	Taking into account amendments submitted after the opening of tenders, awarding a contract not

⁵ 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.

		complying with the contract documents or consider cost-saving features not referred in the contract documents offend principles of equal treatment and transparency
C-19/00, SIAC Construction	2001.10.18	Equal treatment of tenderers during the contracting procedure
C-331/04, ATI EAC and others	2005.11.24	Conditions allowing a jury to attach a specific weight to the subheadings of an award criterion

• **Audit reports and studies:**

For formalization 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
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
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.

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 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 and characteristics and relative advantages of the chosen tender(s)?
 - 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 between dates of award and contract to allow unsuccessful tenderers to seek a review of award decision?
- 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?
- F/C** • Did the conditions included in the contract protect the risk of non-performance by the supplier and were there no conflicting provisions?
- F/C** • Were there no material changes in the contract shortly after award?

Guidance

- **Directive:**
 - Article 43 outlines the content of the report on the tendering and evaluation process.
 - For information to tenderers and reasons to withhold it see article 41.
- **PPWG Guideline for Auditors:**
 - See no. 18

- **PPWG Procurement Performance Model (PPM):**
See n° 16 of PPM (implementing the public procurement process) and n° 17 (compliance with EU law).

- **ECJ Case-Law**

Case	Judgement	Issue
C-87/94, Commission/Belgium	1996.04.25	Taking into account amendments submitted after the opening of tenders, awarding a contract not complying with the contract documents or consider cost-saving features not referred in the contract documents offend principles of equal treatment and transparency
C-27/98, Fracasso and Leitschutz	1999.09.16	Contracting authorities are not obliged to award the contract to the sole tenderer considered as suitable
C-455/08, Commission/Ireland	2009.12.23	Guarantee of effective review. Minimum period to be ensured between notification to the unsuccessful tenderers of the decision to award a contract and the signature of the contract concerned.
C-337/98, Commission/France	2000.10.05	A substantial change in the scope of the contract or in the scope of the competition behind it is to be considered as a new award and a new contract for the purpose of Directive
C-496/99, Commission/CAS Suchi di Frutta	2004.04.29	
C-454/06, Pressetext	2008.06.19	

- **Audit reports and studies:**

For post awarding changes in the contract:

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
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 6.1	“

For the need of written contracts:

Report	SAI
Wastewater treatment plant in northern Brussels- Award and funding of the concession contract	Belgium

For the need of formal consolidate tenders after negotiations:

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

6. AUDITING ADDITIONAL WORKS OR DELIVERIES

6.1. Were any additional works or deliveries admissible without the need for a new procurement procedure?

Background

Public authorities often choose to complement the works or deliveries procured and contracted, during their execution and without a new procurement procedure.

These changes in the content of the awarded performance may result from several circumstances:

- Unexpected technical reasons, as geological surprises or new legal requirements
- Suggestions for replacement of technical solutions or materials
- Changed ideas about the defined needs and possible improvements, as changing a basement into a parking area
- Adding needs to the ones described, as including a garden to a building, making a road longer than planned or buying more computers than the quantity tendered for.

Flexibility to change performance without the need to disrupt and going through a new procurement procedure might be necessary to fulfil needs and achieve savings. On the other hand it might also be a means of disrespecting the rules, favouring or rewarding a supplier, avoiding an open procurement or overcoming budgetary constraints.

Additions to contract should only be admissible in exceptional cases.

Questions

- F/C** • Did the additional works introduce minor or non-substantial changes to performance, as described in the contract documents?
- F/C** • Were additional works brought about by a cause which had not previously existed?
- F/C** • Were additional works strictly necessary for the completion of performance under the contract?
- F/C** • Is it that additional works could not be technically or economically separated from the original contract without major inconvenience?
 - Did additional works amount to no more than 50% of the initial contract?
 - Were additional works charged at the unit prices agreed in the initial contract?
- F/C** • Were additional deliveries a partial replacement for normal supplies or installations or an extension of existing supplies or installations?
- F/C** • 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 length of original and recurrent contracts less than 3 years?

Guidance

- **Directive:**

For additional works see Article 31(4/a) and for additional deliveries see Article 31(2/b) .

- **ECJ Case-Law**

Case	Judgement	Issue
C-337/98, Commission/France	2000.10.05	A substantial change in the scope of the contract or in the scope of the competition behind it is to be considered as a new award and a new contract for the purpose of Directive
C-496/99, Commission/CAS Suchi di Frutta	2004.04.29	
C-454/06, Presstext	2008.06.19	

- **Audit reports and studies:**

For jeopardizing competition through delivering additional works:

Report	SAI
Final payment on some large-scale public works contracts	Belgium

For reasons leading to the delivery of additional works:

Report	SAI
Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEU, C181, 31Jul2003)	ECA
Expo 98	Portugal
Euro 2004	“
Large public works financial slippage	“
Additional public works contracts from 2006 to 2008	“

For undue delivery of additional works:

Report	SAI
Dredging works	Belgium
Port Maritime Institute	Portugal
Rail Transport Institute	“
Additional public works contracts from 2006 to 2008	“
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
Construction of the “Deurganckdock” (Antwerp Container Terminal Complex)	Belgium
Rail Transport Institute	Portugal
Public-owned company	“
Large public works financial slippage	“
Additional public works contracts from 2006 to 2008	“
Ministry of Defence: major Projects report 2004	UK

For extension of contracts' time limits:

Report	SAI
Contracts awarded in 1999 and 2000 on the	Spain

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	
Building works of the high-speed line Madrid-Barcelona-years 1999 and 2000	“