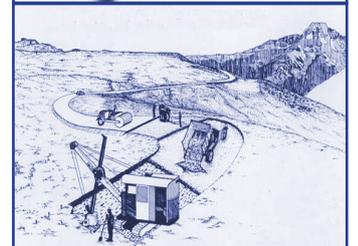




Guideline for Auditors



EU public sector procurement Directive 2004/18/EC

Guideline for auditors

June 2010

Disclaimer

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

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

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1. Introduction

The Treaty on the Functioning of the European Union, which succeeded the EC-Treaty, provides for free movement and non-discrimination on the grounds of nationality in the provision of goods and services. The Treaty expresses these provisions as basic principles. Procurement Directives adopted by the EU set out in law what Member States must do in exercising the public procurement function to give effect to the principles of the Treaty and to realise the benefits of the Internal Market.

Public procurement accounts for a significant proportion of EU expenditure. In 2008, the 27 EU Member States spent around €2155bn, or 17,2% of GDP on public procurement (works, goods and services).¹ The Public Procurement Directives and the principles derived from the TFEU Treaty are intended to ensure that contracts are awarded in an open, fair and transparent manner, allowing domestic and non-domestic firms to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by Awarding Authorities. In addition, in a market of this size it is clear that if the laws governing public procurement are not always being applied correctly, leading to some contracts being awarded to what is not the most economically advantageous or lowest bid, the financial consequences alone can be significant.

It is therefore very important for the Supreme Audit Institutions of the Member States of the European Union to audit (important) public procurement contracts.

Revision of Directives

A revision of the EU public procurement Directives was completed in 2004. Three former public sector Directives for works, supplies and services have been consolidated in one new text: Directive 2004/18/EC⁽²⁾, covering procurement procedures of public sector bodies. Also new is Directive 2004/17/EC, covering procurement procedures of entities operating in the utilities sector⁽³⁾. The Directives have been adapted to modern market conditions by providing for measures such as the use of electronic means of procurement and tendering (e-procurement)⁽⁴⁾, providing for framework agreements and for

⁽¹⁾ Source: European Commission, *Public Procurement Indicators 2008*, 27 April 2010.

⁽²⁾ The most recent (consolidated) version of this directive can be found at: <http://eur-lex.europa.eu>

⁽³⁾ The utilities Directive 2004/17/EC covers entities operating in the water, energy, transport and postal services sectors. Private sector entities which operate under special or exclusive rights in the utilities sector are also covered by the utilities Directive. Most features of the Directives are common to both sectors. However, the utilities Directive provides more flexibility in tendering procedures, reflecting the more commercial remit of the entities it covers. For example, higher thresholds apply to supplies and service contracts under the utilities Directive and there is wider scope to negotiate contracts.

⁽⁴⁾ The 12th consideration of Directive 2004/18/EC states that: "Certain new electronic purchasing

more flexible procedures for awarding complex contracts, such as public private partnership projects (PPP's), in the public sector.

This guideline summarises the principal features and provisions of the EU public sector procurement Directive 2004/18/EC.⁽⁵⁾ To aid comprehension, the user is invited to have regard to the additional information provided in the appendices.⁶

It is very important that the public procurement function is discharged honestly, fairly and in a manner that secures best value for public money. Contracting authorities must strive towards cost effectiveness while upholding high standards of probity and integrity. Procurement practices are subject to audit and scrutiny.

2. Scope of Directive 2004/18/EC

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

Firstly, the contract must be awarded by a *contracting authority*.

'Contracting authority' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A 'body governed by public law' means any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and
- (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

The definition of "bodies governed by public law" is not very clear and has been clarified by several judgments⁽⁷⁾ of the European Court of Justice⁽⁸⁾.

techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency".

⁽⁵⁾ This guideline has taken as format the publication of the "[Public Procurement Guidelines – Competitive Process, 2004](#)" by the Irish Department of Finance.

⁽⁶⁾ The appendices can be found in the CD-ROM which is annexed at the back of the booklet.

⁽⁷⁾ See the relevant case-law, mentioned in Appendix XII.

⁽⁸⁾ Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the crite-

Secondly, the estimated value of the contract placed by a public body must have reached the financial thresholds mentioned in the Directive. The thresholds applying from 1 January 2010 to 31 December 2011 are set out in Appendix II.

Regarding the principles that govern the tendering of public contracts that are not or only partially covered by the public procurement directive (e.g. contracts below the thresholds or public service concessions), see section 9.

3. Obligations imposed by Directive 2004/18/EC

Directive 2004/18/EC imposes obligations on contracting authorities to:

- advertise their requirements in the Official Journal of the European Union (OJEU);
- use procurement procedures that provide open and transparent competition;
- apply clear and objective criteria, notified to all interested parties, in selecting tenderers and awarding contracts;
- use broadly based non-discriminatory technical specifications;
- allow sufficient time for submission of expressions of interest and tenders.

It is a legal requirement that contracts with estimated values above the thresholds ⁽⁹⁾ set out in the Directive (apart from some defined exceptions) be advertised in the OJEU and awarded in accordance with the provisions of the Directive. Contracting authorities must also ensure that most works contracts and related services contracts, which they subsidise by 50% or more, are awarded in accordance with the provisions of the Directive. Any infringement of the terms of the Directive can give rise to serious legal or financial sanctions.

(9) The current value thresholds (applicable from 1 January 2010 to 31 December 2011) above which contracts are subject to the Directives are set out in Appendix II.

Directive 2004/18/EC covers contracts for

- Works - buildings and civil engineering contracts
- Supplies - purchasing of goods and supplies
- Services - all of the most commonly procured services, including advertising, property management, cleaning, management consultancy, financial and ICT related services. (See Section 11).

4. Criteria for awarding contracts ⁽¹⁰⁾

Contracting authorities may choose to award contracts on the basis of

- the most economically advantageous tender (specifying, in addition to price, various other criteria including running costs, servicing costs, after sales service, technical assistance, technical merit, environmental characteristics) or
 - the lowest priced tender

When a contract is being awarded on the most economically advantageous basis, the notice or the tender documents must state all of the criteria being applied in the award process, giving the relative weightings for each criterion.

If it is not technically possible to indicate criteria weightings in advance, they must be listed in descending order of importance. New or amended criteria must not be introduced in the course of the contract award procedure. If significant additional information or material is supplied to a candidate, on request or otherwise, it must be supplied to all candidates.

5. Advertising in the Official Journal of the European Union (OJEU) ⁽¹¹⁾

OJEU Notices must be drawn up in accordance with the standard forms set out in Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC.

Advertisements in the OJEU may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract. However, national ad-

⁽¹⁰⁾ Directive 2004/18/EC, article 53.

⁽¹¹⁾ Directive 2004/18/EC, articles 35 and 36.

vertisements must not appear before the date of dispatch to the OJEU and must not contain any information additional to that in the OJEU advertisement. Where supplementary national media advertising is considered necessary, contracting authorities are advised, in the interests of economy, to place abbreviated notices in the media referring interested parties to the OJEU notice for full details.

6. Common Procurement Vocabulary ⁽¹²⁾

The Common Procurement Vocabulary (CPV) is a classification code developed by the EU Commission to describe thousands of types of works, supplies and services. It is being adopted as the official code for classifying public contracts and is maintained and revised by the Commission as markets evolve and develop. The CPV can be accessed on the <http://simap.europa.eu> website and the appropriate code should be used for describing the subject of the contract on the standard forms when advertising in the OJEU.⁽¹³⁾

7. Prior Information Notices and Buyer Profiles ⁽¹⁴⁾

Contracting authorities with an aggregated procurement requirement in excess of €750,000 for any product area of supplies or category of services or for public works contracts in excess of €4,845,000⁽¹⁵⁾ are encouraged to publish an annual notice called a Prior Information Notice (PIN) in the OJEU. The PIN is normally submitted by the contracting authority at the start of the budgetary year and sets out the categories of products and services likely to be procured during the year.

According to the Directive, contracting authorities are also encouraged to publish 'buyer profiles' on their websites with general information on their procurement requirements and to publicise the existence of these profiles in a PIN.

Insertion of a PIN does not commit contracting authorities to purchasing or proceeding with a project if circumstances change. It is intended as an aid to transparency and is for the benefit of suppliers. Publication of a PIN permits a contracting authority to reduce the minimum time for tendering if the PIN, with the necessary amount of information specified, has been dispatched to the OJEU at least 52 days before, and within twelve months of, dispatching the contract notice. ⁽¹⁶⁾

⁽¹²⁾ Directive 2004/18/EC, article 1 (14).

⁽¹³⁾ For references, see Appendix XI.

⁽¹⁴⁾ Directive 2004/18/EC, articles 35 and 36.

⁽¹⁵⁾ The attention of the user is brought to the fact that the thresholds are subject to change every two years. The thresholds mentioned in the guideline are valid for the period 2010-2011.

⁽¹⁶⁾ Directive 2004/18/EC, articles 35 and 38.

8. Thresholds ⁽¹⁷⁾

Any contract placed by a public body over the financial threshold set out in the Directive must be processed and awarded in accordance with the provisions of the Directive, unless it is covered by a clearly defined exception.

The thresholds applying from 1 January 2010 to 31 December 2011 are set out in Appendix II. The thresholds in the Directives are revised by the Commission, under the terms of the Directives, at two-yearly intervals and are published in the OJEU.

It is worth mentioning that according to Article 9(3) of the Directive, the process of segmentation of a public contract is forbidden: “No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive”.

9. The Principle of Non Discrimination

- *Principles governing the tendering of contracts under the European thresholds or excluded altogether from the scope of the Union directives*

While the full procedures of the Directives do not apply to the award of contracts under the thresholds, the European Court has ruled that Treaty principles such as non-discrimination, transparency, freedom of movement and freedom to provide goods and services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

The European Court of Justice (ECJ) has developed a set of basic standards for the award of public contracts which are derived directly from the rules and principles of the Treaty on the Functioning of the European Union (TFEU). The principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the ECJ case-law ⁽¹⁸⁾, consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed ⁽¹⁹⁾.

These standards apply to the award of services concessions, to contracts below the thresholds ⁽²⁰⁾, and to contracts for services listed in Annex II B to Directive 2004/18/EC

⁽¹⁷⁾ Directive 2004/18/EC, articles 7 and 78.

⁽¹⁸⁾ Cases C-324/98, *Telaustria*, [2000] ECR I-10745, paragraph 62, C-231/03, *Coname*, judgment of 21.7.2005, paragraphs 16 to 19 and C-458/03, *Parking Brixen*, judgment of 13.10.2005, paragraph 49.

⁽¹⁹⁾ *Telaustria* case, paragraph 62 and *Parking Brixen* case, paragraph 49.

⁽²⁰⁾ See Cases C-59/00, *Bent Moustén Vestergaard* [2001] ECR I-9505, paragraph 20 and C-264/03, *Commission v France*, judgment of 20.10.2005, paragraphs 32 and 33.

in respect of issues not dealt with by this Directive⁽²¹⁾.

The ECJ has stated explicitly that although certain contracts are excluded from the scope of the Union directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty ⁽²²⁾.

The standards derived from the Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered that in individual cases, because of special circumstances, such as a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case, the effects on the fundamental freedoms are to be regarded as too uncertain and indirect' to warrant the application of standards derived from primary Union law ⁽²³⁾.

It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance.

If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Union law. ⁽²⁴⁾

According to the ECJ ⁽²⁵⁾, the principles of equal treatment and of non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition.

The obligation of transparency requires that an undertaking located in another Member

⁽²¹⁾ Case C-234/03, *Contse*, judgment of 27.10.2005, paragraphs 47 to 49. The Public Procurement Directives provide only a limited set of rules for these contracts, see Article 21 of Directive 2004/18/EC and Article 32 of Directive 2004/17/EC.

⁽²²⁾ *Bent Moustén Vestergaard* case, paragraph 20.

⁽²³⁾ *Coname* case, paragraph 20.

⁽²⁴⁾ In its *Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives* of 24 July 2006 (OJ C 179/4 of 1 August 2006) the European Commission has stated that when it becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case. Infringement proceedings under Article 258 TFEU will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market.

⁽²⁵⁾ *Telaustria* case, paragraph 62 and *Parking Brixen* case, paragraph 49.

State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract ⁽²⁶⁾.

The European Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of 'passive' publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising. Still according to the European Commission, the only way that the requirements laid down by the ECJ can be met is by publication of a sufficiently accessible advertisement prior to the award of the contract. This advertisement should be published by the contracting entity in order to open the contract award to competition. ⁽²⁷⁾

10. Estimation of Contract Values ⁽²⁸⁾

The estimation of contract values for OJEU publication purposes must be realistic and credible and take account of the total amount, including any form of option and any renewals of the contract. Problems are fairly often found in those last cases.

No project or purchase may be sub-divided to prevent it coming within the scope of the Directives. Where a project or purchase involves separate lots the value of all lots must be included in estimating the value of the contract.

If a contract, not advertised in the OJEU, attracts tenders in excess of the EU thresholds, there is a risk that the award could be subject to infringement proceedings. ⁽²⁹⁾

In such an event, a contracting authority would be required to justify the original estimation.

Another important purpose of the cost estimate is its use as a tool of comparison with

⁽²⁶⁾ Coname case, paragraph 21.

⁽²⁷⁾ European Commission, *Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*, Section 2.1.1. Regarding the means to ensure the obligation of adequate advertising, see Section 2.1.2 of the Interpretative Communication.

⁽²⁸⁾ Directive 2004/18/EC, article 9.

⁽²⁹⁾ The infringement procedure is a procedure conducted before the European Court of Justice by the European Commission. Its purpose is to establish whether a Member State has failed to fulfill an obligation imposed on it by Union law (see articles 258 and 260 TFEU).

tenders received which may assist in the prevention of collusion or monopolistic exploitation. Its importance is amplified in the case of Restricted or Negotiated procedures and Framework Agreements where the possibility of collusion is greater as compared to an open procedure. Determination of the cost estimate must take place before tenders are opened or negotiations commenced. The basis of the cost estimate can vary with the product or service sought and can be based on market prices (e.g. machinery, plant), previous tenders (e.g. medicines), the Internet, (e.g. spare parts) or the Contracting Authority's own data bank (e.g. the construction projects). In the latter case, where tenders are invited on the basis of Bills of Quantities and the contract is to be admeasured or remeasured, it is recommended that the estimate be derived from the individual quantities and unit rates or prices which reflect competitive market conditions.. It is good practice to report, together with the cost estimate, any revisions and amendments made because of factors contributing to price changes e.g. labour and fuel cost fluctuations together with any assumptions made and the source of information used to extrapolate the estimate.

11. Priority and Non-Priority Services ⁽³⁰⁾

Under the procurement Directives, services are divided into two categories described as 'priority' and 'non-priority' services (set out in Annex IIA and Annex IIB of the public sector Directive 2004/18/EU). The two categories of services are listed in Appendix IIIA and Appendix IIIB of this guideline.⁽³¹⁾

Only the 'priority' services are subject to the full provisions of the Directive...

While the full procedures of the Directives do not apply to the award of contracts for 'non-priority' services⁽³²⁾, the European Court has ruled that Treaty principles such as non-discrimination, transparency, freedom of movement and freedom to provide services must be observed. This implies a requirement to advertise such contracts of significant value to a degree which allows parties in other Member States the opportunity to express an interest or to submit tenders.

12. Tendering Procedures ⁽³³⁾

⁽³⁰⁾ Directive 2004/18/EC, article 1 (2) (d).

⁽³¹⁾ As *ratio legis* for the distinction, the 19th consideration of the Directive states: "As regards public service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information".

(32) 'Non-priority' services shall be subject solely to Article 23 and Article 35(4) of Directive 2004/18/EC.

⁽³³⁾ Directive 2004/18/EC, articles 28 to 34.

The EU Public Sector Directive permits four tendering procedures:

(i) **Open** ⁽³⁴⁾. Under this procedure all interested parties may submit tenders. Information on tenderers' capacity and expertise may be sought and only the tenders of those deemed to meet minimum levels of technical and financial capacity and expertise are evaluated. If there are minimum requirements it is important that they be made clear in the notice or the request for tenders (RFT) to avoid unqualified bidders incurring the expense of preparing and submitting tenders.

(ii) **Restricted** ⁽³⁵⁾. This is a two-stage process where only those parties who meet minimum requirements in regard to professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

- As a first step, the requirements of the contracting authority are set out through a contract notice in the OJEU and expressions of interest are invited from potential tenderers. The contract notice may indicate the relevant information to be submitted or the information may be sought via a detailed questionnaire to interested parties.
- The second step involves issuing the complete specifications and tender documents with an invitation to submit tenders only to those who possess the requisite level of professional, technical and financial expertise and capacity. It is important to note that, as a basis for pre-qualifying candidates, only the criteria relating to personal situation, financial capacity, technical capacity, relevant experience, expertise and competency of candidates set out in the Directive⁽³⁶⁾ are permissible. The European Court of Justice and the EU Commission have ruled clearly on this.

Contracting authorities may opt to shortlist qualified candidates if this intention is indicated in the contract notice and the number or range of candidates indicated. Shortlisting of candidates who meet the minimum qualification criteria must be carried out by non-discriminatory and transparent rules and criteria made known to candidates. The Directive requires that a number sufficient to ensure adequate competition is invited to submit bids and indicate a minimum of five (provided there is at least this number who meet the qualification criteria) and up to a total of 20.

(iii) **Competitive Dialogue** ⁽³⁷⁾. This is a new procedure designed to provide more flexibility in the tendering process for more complex contracts, for example public private partnerships (PPP's). Contracting authorities must advertise their requirements and enter dialogue with interested parties, (pre – qualified on the same basis as for restricted procedure). Through the process of dialogue with a range of candidates, a contracting authority may identify arrangements or solutions which meet its requirements. Provided its intention is indicated in the contract notice or in descriptive documents supplied to candidates, a contracting authority may provide for the procedure to take place in suc-

⁽³⁴⁾ Directive 2004/18/EC, article 28.

⁽³⁵⁾ Directive 2004/18/EC, article 28.

⁽³⁶⁾ Directive 2004/18/EC, articles 45 to 48

⁽³⁷⁾ Directive 2004/18/EC, article 29, and see Appendix VIII.

cessive stages in order to reduce the number of solutions or proposals being discussed. The reduction must be achieved by reference to the award criteria for the contract.

In conducting the dialogue, contracting authorities must ensure equality of treatment and respect for the intellectual property rights of all candidates. When satisfied about the best means of meeting its requirements, the contracting authority must specify them and invite at least three candidates to submit tenders. The most economically advantageous tender will then be selected. Aspects of tenders may be clarified or fine tuned provided that there is no distortion of competition or discrimination against any tenderer.

(iv) **Negotiated** ⁽³⁸⁾. This is an exceptional procedure that may be used only in the limited circumstances set out in Articles 30 and 31 of Directive 2004/18/EC. There are two types of negotiated procedure:

(a) Contracting authorities advertise and negotiate the terms of the contract. This process should normally involve the submission of formal tenders by at least three candidates (pre-qualified on the same basis as for the restricted procedure, provided there are at least this number who meet the minimum qualification criteria) with negotiation on final terms in a competitive process. This procedure may be used mainly:

- where an open, restricted or competitive dialogue procedure has not attracted acceptable tenders;
- where the nature of the requirement does not permit overall pricing;
- where it is not possible to specify requirements for a service with sufficient precision to enable tenderers to respond with priced tenders;

(b) Contracting authorities negotiate, without advertising, the terms of the contract directly with one or more parties. This is a departure from the core principles of openness, transparency and competition and is a very exceptional procedure. The main instances where this procedure may be used are:

- in cases of extreme urgency;
- when, for technical or artistic reasons or due to the existence of special or exclusive rights, there is only one possible supplier or service provider;
- when an open or restricted procedure has not attracted appropriate tenders (provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially);

⁽³⁸⁾ Directive 2004/18/EC, articles 28, 30 and 31.

- extension of existing contracts and repeat contracts subject to certain conditions⁽³⁹⁾;
- for the purchase of supplies on particularly advantageous terms, from either a supplier definitively winding up a business or the receiver or liquidator of a bankruptcy, an arrangement with creditors or similar legal or regulatory procedure.

Contracting authorities should ensure that the precise circumstances justifying negotiation, as set out in the public sector Directive, exist before deciding on the use of this procedure. It should be noted that definitions of ‘exceptions’ and ‘urgency’ are strictly interpreted by the Commission and the Courts. Factors giving rise to urgency must be unforeseeable and outside the control of the contracting authority. Where one of these exemptions is invoked, the contracting authority must be able to justify the use of the exemption.⁽⁴⁰⁾ Candidates must always be treated fairly and objectively in negotiations.

Framework Agreements ⁽⁴¹⁾

The public sector Directive provides for “framework agreements” under which contracting authorities enter into arrangements with suppliers or service providers to supply goods or services under agreed conditions for a period of time, normally not more than four years.

Framework agreements can be with one supplier or service provider, selected following a competitive process, to fulfil orders or supply services over the period of the agreement. Alternatively, they may be with a number of (at least three) pre-qualified suppliers or service providers. In the latter case, a contract may be awarded to one party to the agreement if the terms of the agreement so permit, or a contract may be the subject of a sub-competition between parties to the framework agreement.

Contracting authorities have to follow the rules of procedure referred to in the directive for all phases up to the award of contracts based on the framework agreement. Under framework agreements, some elements of the requirement, for example quantity, price, precise product specification, will generally not be fully established at the start of the agreement. Advertising for framework agreements should set out the precise nature of the proposed procurements to the highest degree possible.

Dynamic purchasing systems⁽⁴²⁾

A dynamic purchasing system is defined as a completely electronic process for making

⁽³⁹⁾ As a general rule the provisions confine extension of contracts to 50 pct. of the original value of the contract. See Directive 2004/18/EC, article 31 (2, b) concerning supply contracts and article 31 (4, a) concerning public works and service contracts.

⁽⁴⁰⁾ See the illustrative case law of the Court of Justice in Appendix XII.

⁽⁴¹⁾ Directive 2004/18/EC, article 32, and see Appendix VII.

⁽⁴²⁾ Directive, 2004/18/EC, article 33, and see Appendix X.

commonly used purchases. In order to set up a dynamic purchasing system, contracting authorities have to follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system.

All the tenderers satisfying the qualitative selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents are admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification.

Contracting authorities invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded. The contract is awarded to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system.

A dynamic purchasing system may not last for more than four years ⁽⁴³⁾, except in duly justified exceptional cases.

13. Time-limits for Replies ⁽⁴⁴⁾

Directive 2004/18 defines the time limits for receipt of requests to participate and for receipt of tenders. Minimum time-limits are set down for the different stages of the particular contract award procedure chosen. In all cases, the times specified in days relate to calendar days. When fixing the timescale for submitting expressions of interest / requests to participate or tenders, contracting authorities should take account of the complexity of the contract and allow sufficient time for submitting the necessary information and preparing tenders.

The main **minimum** time-limits, which are reckoned from the date of dispatching the notice to the OJEU, are as follows.

Open Procedure

- for receipt of tenders: 52 days
- if a Prior Information Notice (PIN) has been published: as a general rule the minimum time may be reduced to 36 days but in no circumstances less than 22 days.

Restricted, Negotiated and Competitive Dialogue Procedures

- for receipt of expressions of interest / requests to participate: 37 days;

⁽⁴³⁾ Directive 2004/18/EC, article 33, paragraph 7.

⁽⁴⁴⁾ Directive 2004/18/EC, article 38, and see Appendix V.

- for receipt of tenders under restricted procedures: 40 days from date of issue of invitation to tender;
- if a PIN has been published: as a general rule the minimum time for receipt of tenders under the restricted procedure may be reduced to 36 days but in no circumstances less than 22 days (no reduction in times for receipt of expressions of interest).
- Under a negotiated procedure or in competitive dialogue the time allowed for receipt of tenders may be agreed between the parties involved.

Where genuine urgency renders these time limits impracticable, shorter time-limits may be applied as follows

- for receipt of expressions of interest, not less than 15 days from the date of dispatching the notice and
- for receipt of tenders, not less than 10 days from the date of issue of invitation to tender.

The use of the urgent procedures must be justified and have been caused by unforeseeable events outside the control of the contracting authority. The European Commission and the European Court of Justice interpret 'urgency' very strictly.⁽⁴⁵⁾ Delay or inaction on the part of the contracting authority is not sufficient reason for applying exceptional procedures.

Electronic / online transmission: minimum times for responses may be reduced where contract notices are transmitted electronically to the OJEU and all tender documentation is made available electronically in accordance with the provisions of the Directives. The reduction can be up to a cumulative 12 days, reflecting the potential for time saving if up-to-date technological methods of communication and transmission are used at the various stages of the process. Conditions for availing of these potential time reductions are set out in Article 38 (5) and (6) of the public sector Directive.

14. Issue of Documents ⁽⁴⁶⁾

Responses to requests for information, requests for tender documents and other supporting documentation (if not made available electronically) must be issued without delay and in any event within a maximum of six days of the request. Additional information,

(45) Illustrative case law of the Court of Justice: Case 194/88 R, Commission v. Italy (Solid urban waste in La Spezia); Case C-24/91, Commission v. Spain (Universidad Complutense of Madrid); Case C-107/92, Commission v. Italy (Avalanche barrier in Colle Isarco/Brennero); Case C-328/92, Commission v. Spain (Pharmaceutical products and specialities); Case C-318/94, Commission v. Germany (Dredging of the lower Ems); Case C-385/02, Commission v. Italy (Overflow basin in Parma); Case C-394/02, Commission v. Greece (Thermal-electricity generation plant at Megalopolis).

(46) Directive 2004/18/EC, articles 39 and 40.

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

15. Receipt and Opening of Tenders

Contracting authorities should ensure that proper procedures are in place for opening tenders to prevent abuse or impropriety at this stage. All tenders should be opened together as soon as possible after the designated latest time and date set for receipt of tenders. Internal procedures should require that opening of tenders takes place in the presence of at least two officials of the contracting authority. The procedure adopted should ensure that, in the case of any dispute, there is a clear and formal independently vouched report of the tenders received. Tenders received after the closing time for receipt of tenders should not be accepted.

16. Clarification of Tenders

Contracting authorities may seek additional information in clarifying submitted tenders. However, alterations to bids after the deadline for submission has passed are not permissible under the open or restricted procedures. In particular, any adjustment to price which could improve the competitive position of a bid is not permitted ⁽⁴⁷⁾⁽⁴⁸⁾.

17. Evaluation of Tenderers and Tenders and Award of Contract ⁽⁴⁹⁾

Concerning the verification of the suitability and choice of participants the articles 44 to 52 of directive 2004/18 give clear instructions regarding the qualitative criteria which can be asked to be fulfilled by tenderers (personal, technical, economic and financial).

Evaluation of tenderers and tenders should be carried out by a suitably competent team which may include independent representation. The evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. This is best achieved by the use of a scoring system based on all the relevant and weighted criteria, indicating a comparative assessment of tenders under each criterion.

(47) In regard to the open and restricted procedures, the EU Council and Commission have stated that “all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, in particular on prices, shall be ruled out”.

⁽⁴⁸⁾ See the relevant case-law mentioned in Appendix XII and in particular case C-87/94.

⁽⁴⁹⁾ Directive 2004/18/EC, articles 44 to 52 (qualification and evaluation of tenderers) and 53 to 55 (evaluation of tenders).

Tenders which do not comply with the requirements specified in the contract notice or the tender documentation should be rejected.

- (i) Where price is the sole criterion, the contract will be awarded to the lowest priced bid complying with the specified requirements.
- (ii) Where 'most economically advantageous tender' is the basis, the contract must be awarded to the tender which best meets the relevant criteria. In addition to price they will include other criteria relevant to the subject of the contract. For example, they may include running costs, servicing costs, level of after sales service, technical assistance, technical merit, environmental characteristics. The criteria, with the relevant weighting, will have been pre-established and made known to the tenderers, either in the contract notice or the tender documentation..

The evaluation of tenders is an area where subjective judgement is used and therefore care and diligence should be exercised during the audit of this stage of the process.

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

The criteria may be subdivided for the purpose of scoring if it assists in the evaluation but this must not involve a departure from the pre-established criteria and weighting.

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

In open or restricted procedures, the most competitive or advantageous tenderers are frequently asked to make a presentation on their proposals for technical or consultancy projects. These presentations are used as an aid to understanding and for purposes of elaboration and clarification. Any dialogue with tenderers that could be construed as "post tender negotiation" on price, or result in significant changes to criteria or tender specifications, is to be avoided. Such negotiations, outside the exceptional and clearly defined circumstances where EU rules permit, could contravene the EU procurement Directives.

18. Abnormally Low Tenders ⁽⁵⁰⁾

A tender which might be regarded as abnormally low may not be rejected without investigation and consideration of the relevant elements that gave rise to a particularly low bid. Such elements might include an innovative technical solution or exceptionally favourable conditions available to the tenderer. The tenderer should be given the opportunity to explain the basis of the tender.

19. Disclosure of information: Notifying Tenderers ⁽⁵¹⁾ and Contract award notice ⁽⁵²⁾

Unsuccessful candidates and tenderers for any public contract should be informed of the results of their candidature or a tendering process without delay and must have the opportunity to have a contract award decision rescinded if their rights have been infringed or an award decision is deemed unlawful ⁽⁵³⁾. The review procedure is organized by directive 89/665/EEC, which is not analyzed in this guideline.

This requires that unsuccessful tenderers for contracts covered by the EU Directives be notified promptly of the outcome of a tendering procedure and that a contract is not formally awarded before an interval, during which an unsuccessful tenderer can seek a review of the decision if s/he feels that the process has been unfair or unlawful, has elapsed. This implies that any notification to the tenderer deemed successful during this interval must be provisional and not constitute a contractual arrangement. Tender documentation should include a statement indicating the need for an appropriate interval after the award decision is notified and before a formal contract is put in place.

Proposals in a tendering process are normally submitted on a conventional basis. In order to preserve the integrity of the process and to respect the commercial and competitive positions of tenderers, details of tenders must be kept confidential at least until the evaluation process is concluded. After the award of a contract certain information must be disclosed. Under the public procurement Directives, contracting authorities are required to provide certain information on contracts above the EU thresholds.

Two particular provisions on disclosure of information in the procurement Directives require that:

⁽⁵⁰⁾ Directive 2004/18/EC, article 55.
⁽⁵¹⁾ Directive 2004/18/EC, article 41.
⁽⁵²⁾ Directive 2004/18/EC, article 35, § 4.
⁽⁵³⁾ Case C-81/98, Alcatel.

- any eliminated candidate or tenderer who requests it must be informed promptly (within 15 days) of the reasons for rejection and of the characteristics and relative advantages of the successful tenderer as well as the name of the successful tenderer.
- contracting authorities publish certain information on contracts awarded (or framework agreements concluded) within 48 days of the award in the OJEU. Particulars, including the type of contract, the procedure and award criteria used, the number of tenders received, the name of the successful tenderer, the value of the contract or the range of tender prices, justification for the negotiated procedure, if used, are published. The necessary information can be submitted online to the OJEU on the standard 'Contract Award Notice'.

However, information may be withheld from publication if release

- would impede law enforcement or would otherwise be contrary to the public interest,
- would prejudice the legitimate commercial interests of particular undertakings or
- might prejudice fair competition.

The contracting authorities are required to prepare a written report containing fundamental information, as outlined in Article 43 of the public sector procurement Directive 2004/18/EC, on the award procedure adopted. This report, or the main features of it, may be requested by the EU Commission at any time.

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