

# CHECKLISTS FOR FINANCIAL AND COMPLIANCE AUDIT OF PUBLIC PROCUREMENT

## INTRODUCTION

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

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

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

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

- Following the analysis of the contributions received from several SAIs, it was concluded that all of them focus their review on the robustness of the procurement function, on how public needs were met and on how competition objectives and transparent procedures were followed;
- EU Member States are bound to the basic precepts of the Treaty on the Functioning of the European Union (TFEU) and of the Directive 2014/24/EU<sup>1</sup>;
- No matter which national or local regulation is followed, State authorities must respect the requirements of a competitive process and make its decisions in a

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<sup>1</sup> Although there are other EU regulations on public procurement, this checklist mostly refers to Directive 2014/24/EC ruling.

transparent way that 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 these usually result in the misuse of public resources.

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

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

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

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

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

- **Background**, explaining the importance and giving some relevant information;
- **Questions**, detailing the areas and directions in which that item should be investigated;
- **Guidance**, identifying documents that the auditor should consider in relation to the item under analysis:
  - The relevant parts of the Directive 2014/24/EU;

- The related sections of the Guideline for Auditors;
- Questions included in the Procurement Performance Model;
- Important judgements of the Court of Justice of the European Union (CJEU Case-Law);
- Audit reports and studies produced by SAIs<sup>2</sup>.

Since public procurement is one of the public activities most vulnerable to corruption, originating costs commonly estimated around 20-30% of the project value<sup>3</sup>, a fraud and corruption perspective is included in these checklists. Where the audit emphasis is on fraud and corrupt risks or practices, then the auditor should take special note of those questions highlighted with the following red flag: **F/C**. If the answer to those questions is “**No**” increased risks of fraud and corruption are probable and further analysis is needed<sup>4</sup>.

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<sup>2</sup> Summaries, details and links to these reports are included in “*Supreme Audit Institutions Summaries of Procurement Studies*”, in the EUROSAI database of audits (<http://www.eurosai.org/en/databases/audits/>) or can be obtained by contact with the concerned SAI.

<sup>3</sup> See *Preventing Corruption in Public Procurement*, OECD, 2016, in <http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf>

<sup>4</sup> See AFROSAI-E guideline “*Detecting fraud while auditing*” for a global approach, for fraud checklist and for audit procedures, risks and suggested controls for selected audit areas, including public procurement).

For types of fraud and corruption in contracts and warning signs of possible fraud and corruption in contracts see “*ASOSAI Guidelines for Dealing with Fraud and Corruption*”.

## **1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION**

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

## **2. AUDITING THE PREPARATION OF THE PROCUREMENT**

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

## **3. AUDITING THE PROCEDURE CHOSEN TO PROCURE**

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

## **4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED**

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

## **5. AUDITING THE AWARD PROCEDURES**

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

## **6. AUDITING THE CONTRACT IMPLEMENTATION**

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

# 1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

## 1.1. Are procurement processes well organised and documented?

### Background

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

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

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

### Questions

- F/C** • Are the functions and responsibilities of those involved in the procurement function clearly established and documented?
- Have guidelines incorporating the principles and objectives of a robust procurement practice been established?
- F/C** • Are procurement processes organised and documented and include: needs to be addressed, contract performance description, documentation, notifications, award procedure and decision, draft and concluded contract, physical execution and payments made?
- F/C** • In procurement procedures are electronic means of communication and information exchange set up and functional (transmission of notices in electronic form, electronic availability of procurement documents, possibility of electronic submission of requests for participation and tenders)?
- F/C** • Are procedures conducted by electronic means sufficiently recorded and documented, making the audit trail easy to follow?
- F/C** • Do these electronic procedures provide adequate level of security, notably as regards validation of signatures?
- 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?
- Are there established and clear procedures for reporting and decision making and are they duly implemented?
- F/C** • Are there no cases of documents missing, altered, back-dated or modified or after-the-fact justifications?

## Guidance

- **Directive<sup>5</sup>:**

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

For rules applicable to communication, see article 22

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

For procurement strategy see n° 7 of PPM.

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

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

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

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

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

- **Audit reports and studies:**

**For clear identification of functions:**

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

**For the need of guidelines:**

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

**For the organisation, documentation and filing of procurement processes:**

Report	SAI
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	Austria
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Consultancy contracts awarded by ministerial cabinets	»
The dematerialisation of public procurements in Walloon public service department, 2014	»
Funds of the state budget allotted for organization of the 2009 FIS Nordic World Ski championships in Liberec	Czech Republic
Funds allotted for mending and maintaining of roads	»
Management of public procurement at the Ministry of Interior and its governing area	Estonia

<sup>5</sup> Unless otherwise explicitly mentioned, it always refers to Directive 2014/24/EU

Report	SAI
Statistics Finland's service procurements	Finland
Universities' procurement activities	»
Procurements of system work and ADP consulting services by the tax administration	»
Annual report on federal financing management, Part II	Germany
Centralised public procurement, 2013	Lithuania
Audit conducted in municipalities, 2015	»
Investments of local government units, including projects co-financed by the EU budget	Poland
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education, financial years 1996 to 1998	Spain

**For qualification of procurement staff:**

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

**For competency issues:**

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



# 1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

## 1.2. Are proper financing arrangements taken?

### Background

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

### Questions

- F/C • **Has the procurement under review and the related funding been approved at the appropriate level (e.g. government, ministry, board, head of body)?**
- **Is this funding legal or otherwise in compliance with relevant national laws or procedures governing the financing of this type of contract?**
- **Have the funding arrangements been agreed where payments take place over several financial periods?**
- F/C • **Does the approved level of funding correspond to the estimated value of the contract calculated for the purpose of the procurement process?**
- **Is funding made available for payments under the contract at the appropriate time and in accordance with the relevant national/public financial procedures?**
- **Where funding is being arranged by borrowings, do these have the necessary approval and legal authority?**

### Guidance

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

#### For budgetary funding issues:

Report	SAI
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	Austria
Railroad Project: Brenner Base Tunnel	»
Contract marketing and promoting expenditure	Belgium
Catering Operations in the Federal Government Departments, 2017	»
Funds earmarked for construction of a new building of the National Technical Library in Prague 6 - Dejvice	Czech Republic
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	»
The Finnish state's payment traffic procurement	Finland
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	Greece

<b>Report</b>	<b>SAI</b>
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Poland
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System-1999 and 2000	Spain



# 1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

## 1.3. Are internal control systems in place?

### Background

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

### Questions

- Has any authority, body or structure been established to monitor the application of public procurement rules, to assist and provide guidance on the interpretation and application of public procurement law and to support contracting authorities in planning and carrying out procurement procedures?
-  • Does this authority, body or structure:
  - Produce monitoring reports mentioning, among other aspects, the most frequent sources of wrong application and legal uncertainty and the prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities?
  - Possess the necessary powers to indicate specific violations and systemic problems to national audit bodies, courts, ombudsman, national parliaments or appropriate committees?
  - Make the results of its monitoring activities available to the public?
-  • Is there a system in place which controls requisitions, records contract performance and payments made and which sets out:
  - Those responsible for the various procedures including assessment of needs and authorisation levels?
  - Data to be recorded?
  - Specific procedures to be adopted in ordering goods and services under agreed contract(s)?
  - Procedures for verifying that goods/services have been properly delivered/performed and are in accordance with the contract terms?
  - Procedures for approving payments, including reconciling claims made under the contract to delivery/performance records and checking the arithmetical accuracy of the payment requests?
  - Management monitoring of transactions and balances?
  - Enforcement of compliance in case contractors fail to meet contract terms?
  - Regular accounting reconciliations of contract payments, transactions and inventory?

- F/C** ● Is the progress of procurement procedures sufficiently documented, in such a way that:
  - Decisions taken at all stages are justified (preparation of the procurement documents, communications with economic operators, dialogues or negotiations if any, selection of bidders, award of the contract)?
  - Documentation is kept for a period of at least three years from the date of the award?
  - If requested, are procurement reports communicated to the competent authorities, bodies or structures?
- F/C** ● Is there appropriate segregation of duties between those procuring services, requisitioning goods / services, verifying the performance of the contract and approving payments?
- F/C** ● Have mechanisms to avoid conflicts of interests in the procurement processes been established (e.g. codes of conduct, training, declarations of absence of conflicts of interests by those taking part in the key stages of the procurement)?
- F/C** ● Are there no indications or evidences of conflicts of interest by officers authorizing transactions or by members of committees involved in the procurement processes?
- F/C** ● Are there no indications or evidences of repeated, unusual or unnecessary contacts by officers authorizing transactions or by members of committees involved in the procurement processes with contractors?
- F/C** ● Does an appropriate official review the procurement process on an ongoing basis to ensure that it is in compliance with applicable rules?
- F/C** ● Do controls exist for electronic procedures and records, covering in particular:
  - Access to data, including standing data, and the identification of restriction levels and authorised personnel?
  - Proper and complete records of transactions and events are maintained?
  - Transactions are properly verified after input or modification?
  - Is data securely stored?
- As for 1 January 2019 onwards, is electronic invoicing applied?
- F/C** ● Are there no materials provided to contractors who, according to the contracts, are supposed to provide them (such as office space, furniture, IT equipment) and no cases of employees from the contracting authority performing parts of contracted work?
- F/C** ● Are cases of double payment duly prevented and corrected?
- F/C** ● Where it was later identified that mandatory grounds for exclusion applied to any contractor at the time of the contract award or that a contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive, were contracts terminated?

## Guidance

- **Directive:**
  - For the establishment of monitoring and assistance authorities, bodies or structures, see article 83.
  - For reports of contracting authorities related to the procedures to award contracts, see article 84.
  - For rules applicable to communication, see article 22.

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

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

For termination of contracts, see article 73.

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

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

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

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

For risk management see n° 13 of PPM.

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

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

- **Audit reports and studies:**

**For the need of an effective internal control system:**

Report	SAI
Vienna International Airport Company – Vehicle Procurement and Fleet Management	Austria
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	»
Refurbishment of the Parliamentary Building – Planning Project	»
The Internal Control System in Cases of Direct Awards in the Selected Ministries of the Federal Ministry for Transport, Innovation and Technology and the Federal Ministry of Science, Research and Economy	»
Contract marketing and promotion expenditure	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»
Public procurement of the Fire and Medical Emergency Service of the Brussels-Capital Region, 2017	»
Public procurement and internal control within the Federal State Departments, 2017	»
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Organisation of public procurement in local governments, 2010	»
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Simplified procurement procedures	Lithuania
Performance of public procurement contracts for external services by public sector entities	Poland
File, storage, safekeeping or management of medical histories and past procurement or in force in 1999 and 2000 on this activity for a sample of public hospitals of the National Health System	Spain
Modernising procurement in the prison service	UK
Improving IT procurement: the impact of the Office of Government Commercies' initiatives on departments and suppliers in the delivery of major IT-enabled projects	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

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

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

**For the need of clear segregation of duties:**

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

**For preventing conflicts of interests:**

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

# 1. AUDITING THE MANAGEMENT OF THE PROCUREMENT FUNCTION

## 1.4. Is procurement execution duly monitored and documented?

### Background

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

### Questions

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

### Guidance

- **Procurement Performance Model (PPM):**
  - For regular evaluation of the procurement function see n. 8 of PPM.
  - For public procurement function controls see n° 11 of PPM.
  - For evaluation of suppliers' performance see n° 12 of PPM.
  - For malpractice and fraud in the procurement function see n° 14 of PPM.

- **Audit reports and studies:**

**For the need of specialised staff/expertise in procurement:**

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Annual Report concerning the financial year 2000, OJEC15-12-2001, page 318-328.	ECA
The Defence Administration's procurement activities – supply procurement	Finland
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Simplified procurement procedures	Lithuania
Improving public services through better construction	UK
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

**For the need of clear description of responsibilities:**

Report	SAI
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Public procurement of the autonomous ports of the Walloon region, 2015	»
Management of public procurement at the Ministry of Interior and its governing area	Estonia
Management of procurement at the Ministry of Environment	»
Performance of public procurement contracts for external services by public sector entities	Poland
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System- 1999 and 2000	Spain
Ministry of Defence: the rapid procurement of capability to support operations	UK

**For control on contract performance:**

Report	SAI
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	Austria
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Execution of economic compensations associated with the purchase of specific military equipment	»
Framework contracts: the Federal Central Buying Office's operation examined in terms of sound management and legality	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»
Public procurement of the Walloon Agricultural Research Centre, 2013	»
Federal State - Procurement of consultancy services (171st Report of the Court of Audit), 2014	»
Public procurement of the autonomous ports of the Walloon region, 2015	»
The procurement of public transport services	Finland
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Consultancy services in public owned companies, 2010	Portugal
Procurement awarded by the Provincial Delegations, financial year 2002, regarding the services of Home Assistance	Spain
Annual audit report of the autonomous (regional) and local public sectors, financial year 1996. Item concerning "Public procurement"	»
Acquisitions of medications and pharmaceutical products in a sample of public hospitals of the National Health System- 1999 and 2000	»



## 2. AUDITING THE PREPARATION OF THE PROCUREMENT

### 2.1. Are EU procurement regulations applicable?

#### Background

There are two main EU Directives setting up detailed rules for the award of public works, supplies and service contracts in the EU Member States: Directive 2014/24/EU and 2014/25/EU. The first one generally applies to most of the contracts and the second one coordinates specifically the procurement procedures of entities operating in the water, energy, transport and postal service sectors.

Basically, public authorities are obliged to observe the rules of the Directives provided the contract exceeds a certain threshold. In addition, the rules may also be applicable where public authorities subsidised contracts by more than 50%, or where an entity is granted special or exclusive rights to carry out a public service activity. Contracts below EU thresholds values and some other contracts explicitly excluded from the scope of application are not covered by those Directives. So, one must go through the complex rules and exemptions from the application of EU rules to determine when a contract is subject to the specific requirements.

Applying EU procurement regulations means that the public authority must follow certain procedures, recognise its obligations under the principle of fair competition, including advertising and transparency requirements, measures and decisions which allow all participants to operate on an equal basis, and avoid any kind of discrimination, including for reasons of nationality.

The Court of Justice of the European Union (CJEU) has confirmed that the internal market principles of the Treaty apply also to contracts outside the scope of the public procurement directives. According to CJEU's case law, for contracts that may attract cross-border interest there is an obligation of transparency, sufficient to enable the market to be opened up to competition through advertising contract details, and a duty to apply fair and impartial procedures.

#### Questions

- Is a contract being awarded for works, supply of products or provision of services?
- Does the contract involve the acquisition of works and supplies or the concession of works and services that are covered by the directives regimes?
- Is the contractor a “*contracting authority*”, as defined in the directive, is it a public works concessionaire or is the specific contract subsidised by more than 50% by a “*contracting authority*” (in the situations mentioned in article 13 of the directive)?
- Has the public authority estimated that the value of the contract will exceed the thresholds of the Directive?

- **F/C** Where contracts have several component parts (works, services or supplies):
  - Are those parts objectively not separable, and was the procurement procedure applied the one corresponding to the main subject matter of the contract and the respective threshold?
  - Could those parts be separated, and was the procurement procedure applied the one possible according to any of the separable components?
- **F/C** Where the public authority cites exemptions pursuant to articles 7-12 of the Directive, have the special requirements for those exemptions been met?
- **F/C** If exemption concerning public contracts between entities within the public sector was applied, have the requirements pursuant to article 12 of the Directive been proved?
- If a contract is being awarded for social or other services listed in Annex XIV, is the procedure in accordance with articles 74-77 of the Directive?

## Guidance

- **Directive:**

For definitions of “contracting authority” and “public contract”, see article 2.1(1) and (5) and Annex I. See also article 11 for contracts awarded on the basis of an exclusive right.  
 For mixed contracts, see article 3.  
 For exemptions, see articles 7 to 12.  
 For thresholds, see articles 4 and 13, and be aware that the European Commission shall verify and possibly modify thresholds every two years.  
 See Annex III for supplies awarded by contracting authorities operating in the field of defence.  
 See Annex XIV for public contracts for social and other specific services.  
 For contracts in the water, energy, transport and postal service sectors see Directive 2014/25/EU.  
 For contracts in the field of defence and security see Directive 2009/81/EC
- See also:
  - 2006/C 179/02- Interpretative Communication on the community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives, including references to the relevant ECJ case-law
  - C (2016) 7727- Guidance on the award of government-to-government contracts in the field of defence and security
  - COM/2006/0779-Interpretative Communication on the application of article 296 of the Treaty in the field of defence procurement
- **Guideline for Auditors:**

See n.ºs. 3 (Subject-matter and scope of Directive 2014/24/EU) and 4 (Public contracts between entities within the public sector) and Appendix II.
- **Procurement Performance Model (PPM):**

For compliance with EU law, see n.º 17.
- **CJEU Case-Law:**

For the «*scope of application of the directive*», see cases C-126/03 and C- 470/13.  
 For the concepts of «*contracting authority*», «*body governed by public law*» and «*public financing*», see cases C-31/87, C-44/96, C-323/96, C-353/96, C-360/96, C-275/98, C-380/98, C-237/99, C-223 and 260/99, C-470/99, C-373/00, C- 214/00, C-18/01, C-283/00, C-84/03 and C-526/11.  
 For the concept of «*service provider*» and «*economic operator*», see cases C-568/13 and C-203/14.  
 For «*in house-contracting*», see cases C-107/98, C-26/03, C-295/05, C-324/07, C-573/07, C-29/04, C-182 and 183/11, C-574/12, C-15/13 and C-553/15.

For «*contracts between entities within the public sector*», see cases C-480/06, C-159/11, C-386/11 and C-51/15.

For the concept of «*pecuniary interest*», see case C-159/11.

For the concept of «*public works*», see cases C-16/98, C-451/08, C- 306/08, C-197 and 203/11 and C-213/13.

For «*service contracts*», see cases C-411/00, C145 and 149/08, C-215/09, C-95/10, C-386/11, C-113/13 and C-50/14.

For «*public service concession*», see cases C-458/03 and C-274/09.

For «*mixed contracts*», see cases C-331/92, C-145 and 149/08, C- 306/08, C-213/13 and C-215/09.

For «*contracts in the field of defence*», see case C-615/10.

For the «*principles applicable to public contracts excluded from the scope of the directive*», see cases C-264/03, C-358/12, C-278/14 and C- 425/14.

For «*cross border interest*», see cases C-278/14 and C- 425/14.

- **Audit reports and studies:**

**For the need of complying with the basic standards of the EC Treaty:**

Report	SAI
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Funds allotted for mending and maintaining of roads	Czech Republic
Funds earmarked for the D3 motorway construction	»
Funds earmarked for the construction of the ring road around the capital city of Prague	»

**For the classification as a contracting authority:**

Report	SAI
Organisation of public procurement in local governments, 2010	Estonia

## 2. AUDITING THE PREPARATION OF THE PROCUREMENT

### 2.2. Did the public authority calculate the contract value accurately?

#### Background

A public authority must not split a contract in such a way that it remains below thresholds in order to avoid the scope of the Directive or of the national law. In this context, the calculation of values shall be comprehensive and take account of any form of option (i.e. possible additional supplies or services) and renewals.

However, on the other hand, the 2014 Directive recognised that public procurement should facilitate the participation of small and medium-sized enterprises (SMEs) and, to that end, contracting authorities are encouraged to divide large contracts into lots. Nevertheless, in most cases account shall be taken of the total estimated value of all such lots.

#### Questions

- **Did the public authority identify the full contract value and include options and provisions for renewals?**
- **Was the estimation of contract value (net of value added tax (VAT)) in accordance with the criteria fixed in the Directive?**
  - **Including any options or renewals?**
  - **Including prizes or payments to candidates or tenderers?**
  - **Considering the aggregate value of all lots?**
  - **In case of framework agreements and dynamic purchasing systems, the maximum value of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system?**
  - **In case of innovation partnerships, the maximum value of the research and development activities to take place during all stages of the partnership as well as of the supplies, services or works to be developed and procured at the end?**
  - **In case of concessions, the estimated total of the turnover of the concessionaire in consideration of the works and services being the object of the concession over the duration of the contract?**
- F/C** ● **Is there no evidence that the contracts and respective components were subdivided in order to remain below levels of authorisation or procedure?**
- F/C** ● **In case there was a subdivision, was it justified by objective reasons (i.e. separate operational unit of the contracting authority that independently runs the procurement procedures, makes the buying decisions and has a separate budget line)?**
- F/C** ● **In case the contract was divided into lots, and unless otherwise allowed, was the procurement procedure determined according to the aggregate value of the lots?**

- F/C** • Was the estimated contract value based on realistic and updated prices?
- F/C** • Was the estimated contract value in line with the final cost of the awarded contract?

## Guidance

- **Directive:**  
For methods for calculating the estimated value of the procurement, see article 5.  
For division of contracts into lots, see articles 46 and 5 (8, 9 and 10).
- **Guideline for Auditors:**  
See n.ºs 3 (Subject-matter and scope of Directive 2014/24/EU) and 11 (Preparing the procurement).
- **CJEU Case-Law:**  
For «*artificial splitting of a single work*», see case C-16/98.  
For «*projects carried out in several phases for budgetary reasons*», see case C-574/10.  
For «*estimation of contract value*», see case C-271/08.

- **Audit reports and studies:**

**For estimation of contract value:**

Report	SAI
Procurement of the Troop Radio System CONRAD, 2015	Austria
Reconstruction of the Salzburg Central Station	»
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	»
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
Construction of the “Deurganckdock” (Antwerp Container Terminal Complex)	»
Bus line services: cost price and contract award to operators	»
Performance audits of state owned companies’ public procurement 2011-2016	Croatia
Funds earmarked for transport infrastructure projects under the regional operational programmes	Czech Republic
Management of the state budget funds allotted for the Programme to support alterations of ex-military premises into municipal areas	»
Funds earmarked for the Programme for the care of the national cultural treasure in the State ownership	»
Audit over a Rail Transport Institute	Portugal

**For splitting of contracts to remain below levels of authorisation or procedure:**

Report	SAI
Consultancy contracts awarded by ministerial cabinets	Belgium
Walloon Region - Public procurement of the Walloon Agricultural Research Centre	»
Funds of the state budget allotted for organization of the 2009 FIS Nordic World Ski Championships in Liberec	Czech Republic
Funds allotted for construction of the Brno-Vienna (R52) road connection	»
Funds earmarked for housing support programmes	»
Funds provided to the Czech Republic from the European Economic Area and Norway Grants	»
Performance of public procurement contracts for external services by public sector entities	Poland
Public investment projects by public rail transport enterprise	Portugal
Integrated project of the Northern Railroad	»
Rehabilitation works in schools	»
Procurement awarded during the financial year 2002 by the state public sector	Spain
Autonomous (regional) and local public sectors. Financial year 2000. Item concerning “Public Procurement”	»
Procurement by the State public sector during the financial years 1999, 2000 and 2001	»

## 2. AUDITING THE PREPARATION OF THE PROCUREMENT

### 2.3. Was the performance description adequate to needs and legal requirements?

#### Background

The performance description is the heart of the procurement procedure. At this stage, the public authority defines its needs and the requirements the tenders must meet. Unjustified or inaccurate needs assessment may lead to the purchase of unnecessary goods or services. Poor planning at this starting point usually results in errors and unsuitable outcomes. On the other hand, when tender documents are unclear the tenderers tend to cover their risks by higher prices.

The new directive encourages contracting authorities to analyse and consult the market before launching the procurement. This allows them to gain prior knowledge and understanding of the potential solutions available to satisfy the needs, to further focus and define the subject matter and the budget of the contract and to apply the principle of sound financial management and achieve the best value for money. This analysis is fundamental in negotiated procedures without call for competition and in innovation partnerships, where the grounds for the use of the procedure depend on the inexistence of market solutions. Furthermore, situations where there are no answers to the call for competition because the market is not able to deliver what is requested could be avoided by analysing the market in advance. Prior information notices, desk market research, participation in fairs and market consultations are tools that can be used for this purpose.

Performance should be described unambiguously and comprehensively, so that all bidders have a clear understanding of what is required, so as to ensure that the detail in the tender documents received are comparable and in order to avoid that suppliers deliver less than expected.

In particular, the performance description must comply with the principles of equal treatment and transparency and may not discriminate in favour of any product or service. This means that the public authority is not entitled to require specified products unless justified by the subject matter of the contract. The issue of technical specifications is particularly sensitive because, by means of unjustified technical requirements, obstacles to competition and favouritism towards certain suppliers may take place within an apparent open competition. On the other hand, weak drafting of the specifications may cause subsequent contract modifications, due to not properly reflecting the needs of the contracting authority or the results expected from the works, supplies or services.

In principle, from the time notices are published, the described performance remains unchanged during the procedure and shall form the centre of the resulting contract.

In some procedures, like the negotiated ones, it is admissible that some items of the tenders may be adapted, provided that the character of the performance remains unaltered and requirements and specifications are respected.

In the case of particularly complex contracts, a dialogue with tenderers may be used to identify and define the means best suited to satisfy the requirements. For this case, a competitive dialogue procedure may be adopted, through which the contracting

authority identifies the solution(s) capable of meeting its needs, following procedures that shall ensure equality of treatment among all tenderers.

The 2014 directive created a new procedure (the innovation partnership) for those situations where there is a need for innovative products, services or works that are not available in the market.

## Questions

- F/C** ● Was there reasonable justification for the need of the purchase, namely when made towards the end of the financial year?
- Did the public authority consider and evaluate alternatives, like sharing resources, renting, bundling needs with other departments or grouping supplies in separate lots with different characteristics?
- Was a market analysis conducted? Was that analysis documented ?
- F/C** ● If preliminary market consultations were conducted, were transparency, equal treatment and non-discrimination ensured (e.g. announcing the consultation, no disclosure of privileged information, no biased influence over technical specifications, sharing the information with other candidates)?
- F/C** ● Was the decision to launch the procedure based on a proposal describing, inter alia, the need, the benefits to be obtained, the estimated costs, the available budget, the timescale, the potential risks, the options, a cost-benefit analysis, the rationale for choices and the subject matter of the procurement?
- In the case where the contract was not divided into lots, did the contracting authority provide indication of the main reasons for that decision?
- Were interested parties involved in describing the requirements for the performance?
- F/C** ● Was the performance described clearly, unambiguously and comprehensively, giving precise definition of the characteristics of what was to be supplied, so that all concerned had an equal understanding of requirements and that clarification or amendments are not necessary?
- Was the scale and complexity of the procurement project adequately addressed?
- In innovation partnerships, was the description of the performance designed suitably, according to a clear innovative strategy? Was the procedure prepared and conducted with sufficient expertise?
- F/C** ● Was the envisaged period for the execution of the contract feasible and reasonable, to allow a realistic execution, an adequate economic balance and a reopening to competition in a justified timeframe?
- F/C** ● In case of long-term contracts, such as concessions and public private partnerships, was the envisaged duration of contracts set according to:
  - The type of services concerned?
  - The time the contractors could reasonably need to recoup their investment, together with a return on invested capital?
  - The need to reopen the competition in order to avoid an excessive duration and dependence for the contracting authority?

- Have the performance conditions opened the possibility for economic operators to group and join forces regarding the respective economic, financial and technical capacities?
- Could the bidders assess the economic risks the successful bidder would be responsible for, thus limiting the inclusion of extra charges for risk?
- Were technical requirements set strict enough to guarantee the desired performance without being unnecessarily tight to exclude favourable bids that do not comply with all requirements?
- F/C • Did technical specifications (required characteristics of a material, product, supply or service) afford equal access for tenderers, containing no feature that directly or indirectly discriminate in favour, or against, any bidder, product, process or source?
  - Were they drafted in such a way that they do not mirror key characteristics of supplies, services or works usually offered by a specific economic operator?
- F/C • Were technical specifications formulated by reference to performance or functional requirements admitted by the Directive?
- F/C • Did technical specifications exclude any reference to a specific make or source, to a particular process, to trade marks, patents, types or to a specific origin or production, thus preventing favouring or eliminating certain undertakings or products?
- F/C • When such references were made, was a precise description of the performance not otherwise possible and were those references accompanied by the words “*or equivalent*”?
- F/C • When technical specifications provided explicit review clauses to allow for a certain degree of flexibility for possible modifications of the contract during implementation, did those review clauses specify the scope and nature of possible changes in a clear and precise way and did they indicate the conditions under which they may be used?
- F/C • Except for the flexibility strictly allowed in the competitive dialogue and innovation partnership, did the performance description remain unchanged once the notices have been published?
- F/C • If the public authority has modified the performance description unilaterally:
  - Was the scope of change relevant and admissible?
  - Have the participants been informed in an equal manner?
  - Was it conceivable that, under the assumption that the amended performance description had been the basis for the original competition, more bidders might have applied or submitted an offer?
- In that case, was the competition reopened or the application/submission deadline extended?
- If negotiations or fine-tunings of the tenders have taken place, were these such that they were in accordance with the type of procedure used and were there no substantial changes to the performance specifications described in procurement documents?
- When a competitive dialogue was used, did the contracting authority inform the participants when the dialogue was concluded and invite them to submit final tenders, describing the solution(s) and the elements required and necessary for the performance of the project?



## Guidance

- Directive:**  
 For preliminary market consultations, see article 40.  
 For division of contracts into lots, see articles 46 and 5 (8, 9 and 10).  
 For detailed information about admissibility of technical specifications, see article 42.
- For assessment of needs, market analysis, market consultations and justification of procurement, see *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.
- Guideline for Auditors:**  
 See n.º 11 (Preparing the procurement).
- Procurement Performance Model (PPM):**  
 For matching the goal of the procurement process with the users' needs see n. 15 of PPM.  
 For the planning of the public procurement process see nº 16 of PPM.
- CJEU Case-Law:**  
 For admissible and inadmissible «*technical specifications*», see cases C-45/87, C-359/93, C-368/10, C-552/13 and C-278/14.  
 For «*amendment of technical specifications during the procedure*», see case C-278/14.  
 For «*discriminatory requirements*», see cases C-3/88 and C-243/89.  
 For «*social protection of workers*», see case C-115/14.
- Audit reports and studies:**

Report	SAI
Performance Description	Germany

### For a good preparation of procurement:

Report	SAI
IT Structures and Procurement in the Central Unit of the Federal Ministry of Agriculture, Forestry, Environment and Water Management	Austria
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	»
Reconstruction of the Salzburg Central Station	»
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	»
Refurbishment of the Parliamentary Building – Planning Project	»
Innsbruck Cable Railways Company – Reconstruction of the Hungerburgbahn and the Nordkettenbahnen Cable Railways	»
Planning and monitoring costs and benefits of information system procurement, 2017	Finland
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
	»
Construction of the Modlin Airport	Poland
Infrastructure investments of the Polish State Railways Polish Railway Lines (PKP PLK SA)	»
Implementation of selected tasks related to road construction and modernisation by local governments of the biggest cities in Poland	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

### For the lack of a clear definition of the main components of the contract:

Report	SAI
Control of public contracts covering the road transport infrastructure in Brussels	Belgium
Funds allotted for mending and maintaining of roads	Czech Republic
Funds earmarked for financing selected programmes in the competence of the Ministry of Labour and Social Affairs	»

**For contracts based on poor projects and leaving many and important issues uncovered:**

Report	SAI
Outsourcing of the data processing function at the Ministry of the Flemish Community	Belgium
Damage compensations in public works	»
Contract Variation Costs met by the Flemish Inland Waterway Agency “De Scheepvaart”, 2016	»
Construction of the Brno Justice Palace and Facility	Czech Republic
Funds allotted for programmes of support for development of industrial zones and regeneration of brownfields	»
Funds earmarked for rehabilitation of old environmental burdens	»
Planning and implementation of selected ICT projects, aimed to improve the functioning of the police organisational units	Poland
Audit of a housing rehabilitation institute, 2014	Portugal

**For justification of purchases/needs:**

Report	SAI
Public Relations of the Federal Ministry of Agriculture, Forestry, Environment and Water Management	Austria
Investments in sport facilities in Flanders, 2014	Belgium
Decision-making process and justification of tram infrastructure projects by the Flemish Agency “De Lijn”, 2014	»
Funds spent on acquiring- Czech Statistical Office headquarters	Czech Republic
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Implementation of public procurement related to external services by public sector entities	Poland
Consultancy services in public companies, 2010	Portugal
Audit Report on Public Procurement of the Municipalities of the Autonomous Community of La Rioja, 2014	Spain

**For the use of social clauses:**

Report	SAI
Social clauses in public procurement procedures conducted by the public administration	Poland

## 2. AUDITING THE PREPARATION OF THE PROCUREMENT

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

#### Background

In addition to the performance description, the procurement documents provide all the relevant conditions for the competition. Through the procurement documents, the contracting authority will explain its needs and its related objectives and requirements to the market, namely to those interested in tendering.

They inform the bidders about content and form of the documents they have to submit in order to verify their professional and financial ability and all the necessary declarations that the public authority requires. The public authority has some discretion concerning the requirements and verification it seeks, provided they are justified by the subject matter of the contract. Furthermore, the public authority should be aware that unnecessary strict requirements limit competition and reduce the scope for value for money.

In order to reduce procedural burdens, and as regards documents and certificates, the 2014 directive introduced the European Single Procurement Document (ESPD). The ESPD consists of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils conditions of non-exclusion, selection criteria and minimum levels of ability. The up-to-date supporting documents will ordinarily be required only to the tenderer to which the contract is awarded. Tenderers and candidates may, however, at any moment during the procedure, be requested to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

The tender documents also indicate the award criteria and the sub-criteria for the evaluation of the most advantageous offer and their weighting. Clear, objective and admissible criteria are crucial for impartial and transparent awards, reducing scope for arbitrary and corrupt decisions. The 2014 directives have put more emphasis on assessing quality of tenders, by encouraging the use of the best price-quality ration.

#### Questions

- F/C** • Did the bidders have a clear understanding of which documents and declarations had to be presented with the tender?
- F/C** • Could bidders learn all relevant information straight from the procurement documents? Did the public authority make sources of information beyond the procurement documents equally available for all the candidates?
- Did the procurement documents clearly differentiate between exclusion grounds, selection criteria and award criteria?

- F/C** ● Did the procurement documents describe the requirements for the suitability of bidders, concerning:
  - Minimum capacity levels of economical and financial standing?
  - Minimum capacity levels of technical and/or professional ability?
  - Required standards of quality assurance or environmental management?
- F/C** ● Were these requirements justified by objective reasons, related and proportionate to the subject matter of the contract and, thus, not overly demanding?
- F/C** ● Were means of proof required (registers, authorisations, memberships, turnovers, insurances, resources, proves of experience, certificates, standards, certifications or other) admissible under the directive?
- F/C** ● Was the extent of information required related and proportionate to the admissible requirements, avoiding unnecessary formalities?
  - Unless otherwise decided and justified, did the contracting authority clarify that, at the time of submission of requests to participate or of tenders, a self-declaration (ESPD) would be accepted as preliminary evidence in replacement of certificates confirming that the economic operator is not in a situation that would determine its exclusion and meets the relevant selection criteria or minimum levels of ability?
  - Did the public authority abstain from unnecessary verification in terms of the scope and deadline to prove the bidders capability?
- F/C** ● Where the contracting authority used methodologies to assess or weight selection criteria, did it publish those methods or weightings in the procurement documents? Were these methods objective and non-discriminatory?
- F/C** ● Has the public authority clearly defined the award criteria, in such a way that no unrestricted freedom of choice is conferred to the contracting authority?
  - Was the award criteria based on the most economically advantageous tender?
  - If the price-only criterion was chosen, were the technical specifications and quality minimum requirements clearly and sufficiently defined upfront?
  - In the case the assessment was not to be made on the basis of price alone, was the assessment of the most economically advantageous tender based on sub-criteria which:
    - Were clearly indicated?
    - Were suitable to determine cost-effectiveness?
    - Did not reduce or distort competition?
    - Were assessed according to a specified relative weighting of each one of the sub-criteria or to a range with an appropriate maximum spread specified?
    - When weighting was not possible for objective reasons, were indicated in descending order of importance?
    - Were different from those defined in the qualification of bidders?
- F/C** ● Were those sub-criteria linked to the subject matter of the contract, reflecting the main focus and the importance of the elements of the performance?
- F/C** ● Was the weighting set coherent, convincing and leaving little scope for arbitrary and random evaluation and ranking?
- F/C** ● When the assessment is based in life-cycle costing, did the procurement documents indicate the method to determine the life-cycle costs and the data to be provided by the tenderers for that purpose?

- F/C** • When the award criteria included environmental, social and innovation related sub-criteria were these admissible under the directive?
- F/C** • Were set criteria and sub-criteria suitable to identify the tender that offers best value for money?
  - If a contract was divided into lots, was it specified how many lots may be awarded to each tenderer and the objective and non-discriminatory criteria for awarding more lots to each one?
- F/C** • Were there no inconsistencies between the several tender documents?
- F/C** • Were no changes introduced to selection and award criteria? In case changes were needed during the deadline for submission of tenders, was the deadline extended?
- F/C** • When the contracting authority set social or environmental conditions for the performance of the contract, were these compatible with EU law and was adequate information given to the candidates?

## Guidance

- **Directive:**

For requirements and criteria concerning the suitability and selection of economic operators and correspondent means of proof, see articles 56 to 64.  
 For ESPD, see article 59.  
 For award criteria, see article 67. For the award of lots, see also article 46.  
 For performance conditions, see article 70.
- See also European Commission's *Buying Social - A Guide to taking account of social considerations in public procurement* and *Buying Green - A Handbook on green public procurement*.  
 For guidance and examples of good and bad practice in defining selection and award criteria and methods, see *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.
- **Guideline for Auditors:**

See n°s. 14 (Selection of suppliers) and 16 (Evaluation of tenders and award of contract).
- **Procurement Performance Model (PPM):**

See n° 16 of the PPM, about the implementation of the public procurement process and n° 17 about the compliance with EU law.
- **CJEU Case-Law:**

For «*grounds of exclusion*», see cases C-74/09, C-465/11, C-358/12, C-42/13, C-440/13, C-470/13, C-27/15, C-199/15, C-171/15 and C-387/14.  
 For «*criteria for qualitative selection*» and its weighting, see cases C-76/81, C-27-29/86, C-31/87, C-360/89, C-225/98, C-470/99, C-74/09, C-368/10, C-94/12, C-358/12, C-538/13, C-234/14, C-324/14, C-225/15 and C-387/14.  
 For «*reliance on the capacities of other economic operators*» or «*subcontractors*», see cases C-324/14, C-27/15, C-549/2013, C-298/15 and C-387/14.  
 For «*conditions or restrictions to the participation in the procurement procedures*» (protection of unemployed persons, specific or local undertakings, public sector participations, obligations imposed on economic operators), see cases C-31/87, C-21/88, C-272/91 and C-357 to C-359/10.  
 For «*discriminatory or disproportionate requirements or criteria*», see cases C-3/88, C-16/98, C-203/14, C-425/14, C-552/13 and C-234/14.  
 For «*requirements concerning labour law*», see case C-549/2013.

For requirements on the «*qualifications of the staff assigned to the performance of the contract*», see case C-601/13.

For admissible and non-admissible «*award criteria*», see cases C-19/00, C-513/99, C-315/01, C-448/01, C-247/02, C-368/10 and C-538/13.

For the «*applicability, definition and weighting of the most advantageous tender award criteria*», see cases C-274/83, C-31/87, C-225/98, C-226/09 and C-6/14.

For the respect of the principles of «*equal treatment*» and «*transparency*», see cases C-94/99 (subsidised tenderers), C-340/02 (clear definition of subject matter and award criteria), C-226/09 and C-298/15 (changes on requirements or criteria during procedure), C-387/14 and C-131/16 (possibilities to clarify, correct or supplement the tender).

- **Audit reports and studies:**

**For absence of information in the procurement process:**

Report	SAI
Roads, Motorways and waterways maintenance leases	Belgium
Audit over a Rail Transport Institute	Portugal
Autonomous (regional) and local public sectors, financial year 1999. Item concerning “Public Procurement “	Spain

**For clear and proportionate requisites of technical competence of tenderers:**

Report	SAI
Funds earmarked for the construction of the ring road around the capital city of Prague	Czech Republic
Procurement management in the field of IT systems, software products and software services, 2004	Estonia
Audit of the Territorial Enhancement Operational Program, 2012	Portugal
Building works of the high speed line Madrid-Barcelona-1999 and 2000	Spain

**For facilitating the access of SMEs to public procurement by simplifying requirements:**

Report	SAI
The EU institutions can do more to facilitate access to their public procurement, 2016	ECA
Government’s spending with small and medium-sized enterprises, 2016	UK

**For the need of clear definition and detailing of the awarding criteria and its weighting:**

Report	SAI
Bus line services: cost price and contract award to operators	Belgium
2000 Annual Report (§ 4.127.6), 2001 Annual Report (§ 4.129.65), 2002 Annual Report (§ 4.136.7(a))	Cyprus
Funds earmarked for housing support programmes	Czech Republic
Acquisition of cars in local governments, 2011	Estonia
Finnish state’s payment traffic procurement	Finland
Audit over a Rail Transport Institute	Portugal
Public Private Partnerships in Health Sector	»
Integrated Project of the Northern Railroad	»

**For relevancy of the award criteria towards the subject matter of the contract:**

Report	SAI
Funds earmarked for railway infrastructure development	Czech Republic
Funds earmarked for the D3 motorway construction	»
Funds allotted for wastewater treatment	»
Simplified procurement procedures	Lithuania
Public Private Partnerships in Health Sector	Portugal
Integrated Project of the Northern Railroad	»

Report	SAI
Audit of public hospitals, 2011	»
Audit of a housing rehabilitation institute, 2014	»

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

Report	SAI
Funds of the state budget allotted for organization of the 2009 FIS Nordic World Ski Championships in Liberec	Czech Republic
Funds allotted for programmes of support for development of industrial zones and regeneration of brownfields	»
Integrated Project of the Northern Railroad	Portugal

**For changes of requirements and criteria during the procedure:**

Report	SAI
Rehabilitation works in schools, 2012	Portugal

## 2. AUDITING THE PREPARATION OF THE PROCUREMENT

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

#### Background

As a rule, economic operators should prepare tenders on the basis of what is requested by the procurement documents. However, contracting authorities can decide to leave room for different approaches or alternative solutions. For this purpose, they may allow the submission of variants. In this case, the tender may vary from the performance description without being excluded only for this reason. However, the public authority may evaluate any submitted variant only in cases where certain requirements are met.

#### Questions

- **Did the public authority permit tenderers to submit variants, thus offering space for creative solutions?**
- **Did the contract notice or, where a prior information notice was used as a means of calling for competition, the invitation to confirm interest explicitly indicate the admissibility of variants?**
- **Did the public authority describe the minimum requirements to be met by the variants in the procurement documents?**
- **Did it also specify the requirements for the presentation of variant tenders?**
- **Was the award criteria described in such a way that it can be applied both to conforming tenders which are not variants and to variant tenders meeting requirements?**

#### Guidance

- **Directive:**  
For detailed information about variants, see article 45.
- **Procurement Performance Model (PPM)**  
See n° 16 of PPM, about procedures open to innovation .
- **CJEU Case-Law:**  
For the *«need of informing tenderers about the minimum specifications of variants»*, see case C-421/01.
- **Audit reports and studies:**

Report	SAI
Funds allotted for the waterways and ports development and modernization	Czech Republic



## 2. AUDITING THE PREPARATION OF THE PROCUREMENT

### 2.6. Where applicable, did the public authority adequately manage experts employed to assist in the procurement process?

#### Background

The 2014 directive envisages that contracting authorities may conduct market consultations before launching a procurement procedure with a view to prepare the procurement and informing economic operators of their procurement plans and requirements. For this purpose, they may seek or accept advice from independent experts or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

On the other hand, in many cases where a specific knowledge or expertise is required, a public authority will need to engage experts to prepare technical specifications and/or tender documents. Experts may also need to be employed to meet particular requirements of the directive.

Monitoring by the public authority is of particular importance in these cases. Care must be taken to ensure user requirements are defined and incorporated into contract performance. Care must also be exercised to ensure that the specifications defined do not give any advantage to economic operators who are in a position to influence the expert. Furthermore, all the key documentation must be given to the contracting authority, so that it effectively owns the process and is able to treat all candidates in an equal manner, including in what regards the distribution of all requested information.

The involvement of experts in procurement procedures raises risks to the principles of equal treatment/non-discrimination and transparency. For example, experts may use the opportunity to design requirements in their own favour or, at least, may have access to privileged knowledge or other advantages capable of distorting the normal conditions of competition. Risks of corruption are also increased. Many national rules exclude experts employed on any part of the process from subsequently participating in the competition.

The Court of Justice of the European Union has ruled that a provision to automatically exclude experts from submitting a tender in a competition where they were involved is precluded by the directives. The Court stated that those experts must be given the opportunity to prove that, in the circumstances of the case, the experience acquired was not capable of distorting competition. In any case, if the public authority accepts the participation of an expert it had engaged, it must be able to demonstrate that the expert gained no advantage from the engagement.

## Questions

- F/C** • Where preliminary market consultations were conducted by seeking or accepting advice from independent experts or authorities or from market participants, is it evident that such advice had no effect in distorting competition and did not result in a violation of the principles of non-discrimination and transparency?
- F/C** • Where the public authority contracted an expert, was the contract awarded in compliance with procurement regulations?
- F/C** • Were the specifications of the contract determined free from influence of particular interests of consultants, experts or other economic operators?
- F/C** • Was all the key documentation given to the contracting authority?
- F/C** • Has the public authority examined in detail the definition of performance?
- F/C** • Is there no evidence that the expert has influenced the decisions taken by the public authority in his/her interest or in the interest of a specific contractor?
- F/C** • Is there no evidence that any personal interest (financial, economic or other) of a procurement service provider acting on behalf of the contracting authority compromised or may have been perceived as compromising its impartiality and independence in the context of the procurement procedure?
- F/C** • Was the expert likely to gain privileged knowledge from his activity that could be advantageous for him in a subsequent competition? If so, was his participation in the contract specifically excluded?
  - In case of exclusion, has the candidate or tenderer been given the opportunity to prove that his involvement in preparing the procurement procedure was not able to distort competition?
- F/C** • If the expert submitted a tender, was all the relevant information exchanged in the context of or resulting from the involvement of that expert in the preparation of the procurement procedure made available to the other bidders? If necessary, were time limits for the receipt of tenders extended?
- F/C** • Is there no evidence that the consultants participating in the project design released information to contractors competing for the prime contract?
  - Were the measures taken documented?

## Guidance

- **Directive:**  
For detailed information on conflicts of interests, see article 24.  
For preliminary market consultations, see article 40.  
For prior involvement of candidates or tenderers, see article 41.
- **Guideline for Auditors:**  
See n.º 11 (Preparing the procurement).
- **CJEU Case-Law:**  
For the *«principle of non-discrimination between tenderers and no privileged knowledge»*, see cases C-21/03 and C-34/03.
- **Audit reports and studies:**

Report	SAI
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	Austria

### **3. AUDITING THE PROCEDURE CHOSEN TO PROCURE**

#### **3.1. Did the public authority decide for an appropriate and admissible procurement procedure?**

##### **Background**

The selection of the procedure has consequences for the scope of competition. The basic procurement procedures that contracting authorities may use are the open or restricted ones. An open procedure is the one where any interested economic operator may submit a tender in response to a call for competition. A restricted procedure is a two-stage process where only those parties who meet minimum requirements concerning professional or technical capability, experience and expertise and financial capacity to carry out a project are invited to tender.

Traditionally, the European regulations and case law consider negotiated procedures as narrowing competition, equal treatment and transparency. Therefore, negotiations have only been admitted when exceptional conditions expressly described prevail. However, the 2014 directive allows more freedom to negotiate, by creating the competitive procedure with negotiation and by regulating the conditions for negotiations in several procedures such as the competitive dialogue and the innovation partnership. Anyhow, pre-conditions for the use of this possibility must be met.

The possibility of using negotiations and specific types of procedures (such as competitive dialogue and innovation partnership) aim at allowing adaptations to the description of performance during the procedures. They are intended for cases of complex purchases or services, where the products are not currently available in the market, where the buyer is unable to define the means of satisfying its needs or where an inexistent product, work or service must be developed. These procedures can be developed in successive stages.

Negotiated procedures without call for competition are only to be accepted in very exceptional circumstances, which are explicitly described in the directive and must be strictly interpreted by contracting authorities. It is a major violation of EU procurement regulations and international standards for public authorities to award contracts without following the applicable procedures.

Some procurement instruments, such as central purchasing, framework agreements, dynamic purchasing systems, joint procurement and electronic auctions, are envisaged to bring some procedural flexibility and savings' possibilities without comprising fair competition and transparency.

## Questions

- F/C** ● Has the public authority taken a well-grounded decision about the procurement procedure chosen and was the decision process documented?
- Is it clear which procurement procedure the public authority has opted for?
- F/C** ● Where the directive is not applicable, are there regulations or policies stating the procedures to be adopted for the procurement and were they complied with?
- F/C** ● Did the public authority opt for the procedure that offers fair and open competition under the given circumstances?
- F/C** ● If exceptional negotiated procedures without call for competition were used, did the contracting authority give sufficient and reasonable reasons for its option, providing a detailed explanation as to why an open or restricted procedure was not possible?
- F/C** ● In this case, did it use one of the possible exemptions set in the directive to justify the procedure without call for competition and did it clearly and adequately set forth that the conditions of that exemption are met?
- F/C** ● Did those conditions actually occur?
- When a competitive procedure with negotiation or a competitive dialogue was used, did the contracting authority provide sufficient justification for the use of the procedure and did at least one of the following situations actually occur?
  - The needs could not be met without adaptation of readily available solutions
  - The meeting of needs required design or innovative solutions
  - The nature or complexity of the contract, its legal and financial make-up or the risks attached required prior negotiations
  - The technical specifications could not be established with sufficient precision against a reference or standard
  - In a previous open or restricted procedure only irregular or unacceptable tenders were submitted
- When an innovation partnership procedure was used, did the contracting authority provide sufficient justification by identifying the need for an innovative product, service or work that could not be met by purchasing products, service or works already available on the market? Did that circumstance actually occur?
- Was the chosen procedure the most efficient and effective for the performance of the contract?

## Guidance

- **Directive:**
  - For more details concerning procurement procedures see articles 25 to 32.
  - See description of circumstances that allow the use of exceptional negotiated procedures without a call for competition in article 32.
  - For procurement rules in the field of defence and security, see articles 4(b,c), 9(3), 10(h),15, 16 and 17, Annex III, and Directive 2009/81/EC.
- **Guideline for Auditors:**
  - See n.º 8 (Tendering Procedures).

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

See n° 16 of PPM, about planning the public procurement process, and n° 17, about compliance with EU law.

- **CJEU Case-Law:**

According to the CJEU's extensive case law concerning exemptions to the application of the public procurement directives, the codified exemptions must be interpreted in a strict way and applied only under exceptional circumstances. This concerns especially those premises related to the use of direct award or negotiated procedures with no call for tenders.

For «*strict interpretation*» and the «*need of admissible and adequate justification and proof*» for the use of non-competitive procedures, see cases C-199/85, C-3/88, C-340/02, C-385/02, C-84/03, C-157/06, C-24/91, C-107/92, C-328/92, C-318/94, C-299/08, C-271/08, C-113/13, C-50/14 and C-221/12.

For «*reasons of extreme urgency*» and «*unforeseeable events*», see cases C-24/91, C-107/92, C-328/92 and C-318/94.

For «*non-admissible direct award of concessions*», see cases C-231/03 and C-458/03.

For «*in-house contracting*», see cases C-107/98, C-26/03, C-458/03, C-295/05, C-324/07, C-573/07, C-182 and 183/11, C-15/13, C-574/12 and C-553/15.

For «*direct awards to semi-public companies formed following competitive procedures*», see case C-196/08.

For «*contracts between public authorities*», see cases C-480/06 and C-159/11.

For «*non-admissible direct award of additional works*», see case C-423/07.

- **Audit reports and studies:**

**For advantages of framework agreements:**

Report	SAI
Framework contracts: the Federal Central Buying Office's operation examined in terms of sound management and legality	Belgium
Follow-up framework agreements	»
Framework agreements by the Flemish Agency for Facility Management, 2014	»
Audit of the main central purchasing body of the State, 2011	Portugal

**For "stock contract technique":**

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

**For the use of undue and less competitive procedures:**

Report	SAI
Public Relations of the Federal Ministry of Agriculture, Forestry, Environment and Water Management	Austria
Procurement Practice in the Federal Ministry of the Interior with Focus on Digital Radio	»
Procurement Processes of Construction Works in Bruck an der Mur (Styria), Gmunden (Upper Austria) and Hollabrunn (Lower Austria)	»
Introduction of double entry accounting at the Ministry of the Flemish Community	Belgium
Contract marketing and promotion expenditure	»
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	»
Consultancy contracts awarded by ministerial cabinets	»
Dredging works	»
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Report on the Danish government's tendering of IT operations and maintenance, 2016	Denmark
Organisation of public procurement in Viimsi Municipality, 2013	Estonia
Organisation of public procurement in local governments, 2010	»
Statistics Finland's service procurements	Finland
Universities' procurement activities	»
Use of expert services by the Defence Administration	»
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece

Report	SAI
Compliance of the operation of a municipal joint-stock company “ <i>Daugavpils siltumtīklī</i> ” with the planned goals and requirements of regulatory enactments	Latvia
Construction of the Modlin Airport	Poland
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Poland
Audit over a Rail Transport Institute	Portugal
Public investment projects by public rail transport enterprise	»
High speed railway project	»
Integrated project of the Northern Railroad	»
Mafra Municipality and its enterprises	»
Sintra Municipal enterprise for parking management (including selection of private partner to a PPP arrangement)	»
Audit of public hospitals, 2011	»
Audit of the existing mechanisms for the control and reduction of CO 2 emissions, 2011	»
Audit of compliance with the Convention on Wetlands of International Importance (Ramsar Convention), 2012	»
Audits of municipalities, 2013	»
Direct award contracts in water public companies, 2017	»
Procurement awarded during the financial year 2002 by the state public sector	Spain
Autonomous (regional) and local public sectors, financial years 1999 and 2000. Items concerning “Public Procurement”	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

**For non-justification of used procedure:**

Report	SAI
Performance audits of state owned companies’ public procurement 2011-2016	Croatia
Direct award contracts in water public companies, 2017	Portugal
Procurement awarded by the state public sector during the financial years of 1999, 2000 and 2001	Spain

**For the use of restricted procedures:**

Report	SAI
Restricted procedures (above and below thresholds)	Germany

**For awards to companies controlled by the contracting authority:**

Report	SAI
Audit conducted in municipalities, 2015	Lithuania

**For the use of Public Private Partnerships:**

Report	SAI
Public Private Partnerships in the EU: widespread shortcomings and limited benefits, 2018	ECA
Implementation of public-private partnership undertakings	Poland

## 3. AUDITING THE PROCEDURE CHOSEN TO PROCURE

### 3.2. Did the chosen procedure ensure competition, transparency and equal treatment?

#### Background

Besides the attainment of value, the principles of fair competition, transparency and equal treatment must also be respected. European regulations establish different levels for safeguarding these principles according to the relevant size of the contracts and the need to balance the function and weight of formalities with the associated costs. In an open procedure, all interested economic operators are given the opportunity to submit a tender, which is not necessarily the case with other procedures. According to the procedures chosen, certain minimums have yet to be considered. For reasons of equal treatment, economic operators who did not apply must not be separately invited by the public authority.

#### Questions

##### ➤ When an open procedure was used:

- F/C • Did the public authority publish a contract notice calling for competition all interested economic operators?
- F/C • Were all the submitted tenders considered for analysis?

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

- F/C • Did the public authority publish a prior notification calling any interested candidate to request participation?
- F/C • Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - The minimum and, where appropriate, maximum number of candidates it intends to invite?
  - The objective and non-discriminatory selection criteria to choose the candidates to invite?
- F/C • Did the number of candidates invited respect the minimum set (usually 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 competitive procedure with negotiation was used:

- F/C** • Were all interested operators allowed the opportunity to participate in the tender stage?
- F/C** • Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - The minimum and, where appropriate, maximum number of candidates it intends to invite?
  - The objective and non-discriminatory selection criteria to choose the candidates to invite?
- F/C** • Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?
- F/C** • Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?
- F/C** • Did the description of the procurement define the minimum requirements to be met by all tenders and were those requirements kept unchanged?
- F/C** • When successive stages were used, was that envisaged in the notice or procurement documents and were the number of solutions to be discussed reduced by application of the described award criteria?
- F/C** • Did contracting authorities ensure equality of treatment among all participants during the whole procedure, notably by providing information in a non-discriminatory manner and by informing all in writing of any changes to the technical specifications or other procurement documents?
- F/C** • Is it clear that negotiations did not involve change to the essential aspects of the tender or the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document?

➤ When a competitive dialogue was used:

- F/C** • Were all interested operators allowed the opportunity to participate?
- F/C** • Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - The minimum and, where appropriate, maximum number of candidates it intends to invite?
  - The objective and non-discriminatory selection criteria to choose the candidates to invite?
- F/C** • Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?
- F/C** • Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?
- F/C** • Did the description of the procurement define the minimum requirements to be met by all tenders?
  - Was the best price-quality ratio the sole basis of the award criterion?
- F/C** • When successive stages were used, was that envisaged in the notice or procurement documents and were the number of solutions to be discussed reduced by application of the described award criteria?



- F/C** • Did contracting authorities ensure equality of treatment among all participants during the whole procedure, notably by providing information in a non-discriminatory manner?
- F/C** • Is it clear that negotiation, clarification, specification or optimisation of tenders or any additional information did not involve change to the essential aspects of the tender or the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document?








➤ **When an innovation partnership was used:**

- F/C** • Did the public authority publish a prior notification calling any interested candidate to request participation and providing the information for qualitative selection?
  - Did the criteria for qualitative selection include candidates' capacity in the field of research and development and of developing and implementing innovative solutions?
- F/C** • Where the contracting authority decided to limit the number of candidates to invite to tender, did the contract notice indicate:
  - The minimum and, where appropriate, maximum number of candidates it intends to invite?
  - The objective and non-discriminatory selection criteria to choose the candidates to invite?
- F/C** • Did the number of candidates invited respect the minimum set (usually 3), ensuring a genuine competition?
- F/C** • Is it certain that the public authority did not permit the inclusion of economic operators who had not previously applied to participate?
  - Was the best price-quality ratio the sole basis of the award criterion?
- F/C** • Did the procurement documents describe how the partnership will work: one or several partners; how to agree on performance levels and maximum costs and on intermediate targets and remuneration; sequence of phases; conditions of termination and/or reduction of partners?
- F/C** • When successive stages were used, was that envisaged in the notice or procurement documents and were the number of solutions to be discussed reduced by application of the described award criteria?
- F/C** • Did contracting authorities ensure equality of treatment among all participants during the whole procedure, notably by providing information in a non-discriminatory manner and by informing all in writing of any changes to the technical specifications or other procurement documents?
- F/C** • Is it clear that negotiations did not involve changes to the minimum requirements set out in the procurement documents?




**F/C** ➤ **When a negotiated procedure without prior publication of a contract notice was used:**

- If possible, was a sufficient competitive environment created?



➤ When a framework agreement was used:

-  • Has the agreement been awarded in compliance with the general procurement regulations?
-  • To prepare the framework agreement, was there effective competition?
- Have the special requirements pursuant to article 33 of directive been met?
- Is the duration of the agreement less than the maximum term of four years? If not, is there a justification for the exceptional case?
-  • Did the procurement documents indicate the conditions and terms to reopen competition in framework agreements concluded with more than one economic operator?
-  • Did the procurement documents of the framework agreement concluded with more than one economic operator specify clear and objective award criteria for subsequent contracts?
-  • When awarding a single contract, were the public authority and the supplier original parties to the framework agreement?
-  • Did contracts based on a framework agreement respect the terms laid down in that agreement?
-  • When the competition was reopened, were contracts awarded on the basis of the criteria set out in the procurement documents for the framework agreement?

➤ When a dynamic purchasing system was used:

- Was the dynamic purchasing system set up following the rules of restricted procedure?
- In the set up of the system and in the award of contracts were only electronic means used?
-  • Were the selection criteria clearly defined (for each category of products, works or services, if applicable)?
-  • Were all economic operators satisfying the selection criteria allowed admission throughout the entire period of the dynamic purchasing system?
- Have the special requirements pursuant to article 34 of directive been met?
- Was invitation to tender to each specific contract issued after the evaluation of the indicative tenders was completed?
-  • Were all admitted tenderers invited to submit a tender for each specific contract?
- Were no charges billed to interested economic operators or the parties to the system?

➤ When an electronic auction was used:

-  • Was the auction announced in the contract notice or in the invitation to confirm interest and were the necessary details included in the procurement documents? Were all required specifications given equally to tenderers?
-  • Were all tenderers simultaneously invited to participate in the auction, informed on the instructions and connections and sent the outcome of the initial evaluation of the tender?

- Was the auction solely based on prices and/or on new values of the features of the tenders indicated in the procurement documents?
- Did the invitation included the formula to determine the automatic re-rankings on the basis of the new prices and/or new values submitted?
- F/C** • Throughout each phase of the auction, did the contracting authority instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment?
- F/C** • Is it clear that, during any phase of the auction, the identities of the tenderers were never disclosed?
- F/C** • Did the auction comply with the applicable and announced rules?

➤ **When electronic catalogues were used:**

- Was the presentation of tenders in the form of electronic catalogues announced in the contract notice or in the invitation to confirm interest and were the necessary details included in the procurement documents?
- Have the special requirements pursuant to article 36 of directive been met?
- Were catalogues compliant with requirements concerning electronic communication tools, as well as all additional requirements specified by the contracting authority?

➤ **When the contracting authorities acquired works, supplies and/or services from central purchasing bodies:**

- Did they respect provisions set out in article 37 of the directive?

➤ **When two or more contracting authorities agreed to jointly perform certain specific procurements:**

- If and in the extent where the conduct of the procurement procedure was carried out jointly or where the procedure was managed by one of them acting on behalf of all, did all of them fulfil their obligations pursuant the directive?
- In the extent where the procedure was conducted on the name and behalf of a sole contracting authority, did this contracting authority fulfil its correspondent obligations pursuant the directive?

➤ **When contracting authorities from different Member States acted jointly in the award of public contracts (notably by using central purchasing activities offered by central purchasing bodies located in another Member State) :**

- Did the contracting authorities comply with the respective and applicable national mandatory public law provisions?
- Did the participating contracting authorities conclude an agreement defining:
  - The responsibilities of the parties?
  - The relevant applicable national provisions?
  - The internal organisation of the procurement procedure (including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts)?

➤ **When contracting authorities from different Member States have set up a joint entity:**

- **Did the participating contracting authorities agree on the applicable national procurement rules (for an undetermined period, for a certain period of time, for certain types of contracts or for one or more individual contract awards)?**

## Guidance

- **Directive:**

For open procedure, see article 27.

For restricted procedure, see articles 28, 65 and Annex V.

For competitive procedure with negotiation, see articles 29, 65 and Annex V.

For competitive dialogue, see articles 30 and 65.

For innovation partnership, see articles 31 and 65.

For negotiated procedure without prior publication, see article 32.

For framework agreements, see article 33.

For dynamic purchasing systems, see article 34.

For electronic auctions, see article 35 and Annex VI.

For electronic catalogues, see articles 36 and 22.

For central purchasing, see article 37.

For occasional joint procurement, see article 38.

For joint cross-border procurement, see article 39.

- **Guideline for Auditors:**

See n.ºs 8 (Tendering procedures), 9 (Procurement instruments) and Appendix VI

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

See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **CJEU Case-Law:**

For «*limitation to a maximum number of tenderers*», see case C-225/98 and C-138/08.

For «*obligation to ensure genuine competition*», see case C-138/08.

For «*negotiation with a tenderer not complying with mandatory requirements*», see case C-561/12.

For «*publication of notices*», see cases C-20 and 28/01.

For «*equal treatment of economic operators*», see case C-396/14.

- **Audit reports and studies:**

**For lack of transparency and competition:**

Report	SAI
ASFINAG Bau Management GmbH (Highway and Road Construction Financing Company Construction Management Corporation) regarding the construction of the 2nd tube of the Tauern Road Tunnel	Austria
Flemish Broadcasting Corporation (VTR)'s cooperation with external services for television programmes	Belgium
Report on procurement at Danish institutions of higher education, 2015	Denmark
Organisation of public procurement in local governments, 2010	Estonia
Contracts and payments in health care provision, 2016	Slovak Republic

**For centralised purchasing:**

Report	SAI
Federal State - Procurement through the central purchasing body FOR CMS (171st Report of the Court of Audit), 2014	Belgium
Compliance with the joint procurement obligation, 2011	Finland
Centralised public procurement 2013	Lithuania
Public procurement of goods and services typical for public administration	Poland
Audit of centralised purchasing in the National Health System, 2012	Portugal
Centralised purchasing at a school of tourism, 2016	»

## **4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED**

### **4.1. Did the public authority notify procurement processes and results in compliance with the Directive and EC Treaty?**

#### **Background**

Notifying the intention to award a contract and publishing the rules that govern the procedure is crucial for a fair and open competition.

Directives comprise a series of rules which cover the form of notification and time frame for the procedure. Although these rules may seem merely formal, they are generally binding and ensure conditions for fair competition, adequate time for preparation of tenders, equal treatment and transparency. Also, the Court of Justice of the European Union has considered that their violation has serious consequences for the legitimacy of the procedure.

The directive specifies three different commitments to place notifications – prior information notice (PIN), contract notice and contract award notice. The means used to call for competition is the most crucial aspect. When the directive is applicable, all relevant publications must be made or announced in the Official Journal of the European Union (OJEU).

#### **Questions**

- F/C** • When the directive is applicable, was the call for competition for contracts or framework agreements published in the OJEU?
- F/C** • Did this notice follow the necessary form, including disclosure of all the required information?
  - Were notices published at national level no sooner than the publication in the OJEU?
  - Did national advertisements confine details to those contained in the notification sent to OJEU?
  - Did prior information notices follow the requirements mentioned in article 48 and Annexes V and VIII of the directive, particularly when they were used as a call for competition?
  - When the contracting authority made publications in its buyer profile, was a notice on that sent to the OJEU?
- F/C** • Did time limits set to receive tenders and requests to participate comply with the minimum requirements established for the chosen procedure?
  - When minimum time limits were shortened on the ground that a prior information notice had been published, did this PIN include all the information required and was it sent for publication between 35 days and 12 months before the date on which the contract notice was sent?

- F/C** ● When minimum time limits were shortened on the ground of a state of urgency:
  - Was the state of urgency duly substantiated?
  - Is it clear that the concrete urgency circumstances would, in fact, render impracticable the normal minimum time limits?
- When minimum time limits were shortened on the ground that tenders may be submitted by electronic means:
  - Were tools, devices, file formats and technical characteristics required non-discriminatory, general available and interoperable with ICT products in general use (no proprietary licensing scheme)? Otherwise, were alternative means of access offered?
  - Did they not involve any restriction of the economic operators' access to the procurement procedure?
  - Were requirements mentioned in article 22 (6) and Annex IV of the directive respected, including in what respects security and the format of electronic signature?
- In restricted procedures, competitive procedures with negotiation, competitive dialogue and innovation partnerships, were selected candidates invited to submit their tenders or take part in the dialogue, simultaneously and in writing?
- Did the invitations include all the required information, as described in annex IX of the directive?
- F/C** ● For contracts below the thresholds, was an advertisement to open the award to competition published?
- F/C** ● In this case, were the means and content of advertising adequate having regard to the relevance of the contract to the internal market?
- F/C** ● Were the time limits set for submission of bids sufficient for the potential bidders to prepare and submit their bids?
- F/C** ● In particular, were time limits duly and proportionately fixed or extended in cases where:
  - There was a need for visits to the site or on-the-spot inspection of documents?
  - Additional information was required and not supplied in due time?
  - Significant changes were made to procurement documents?
  - Unrestricted and full direct access free of charge by electronic means to certain procurement documents could not be offered?
- F/C** ● When time limits were extended, were economic operators duly informed and was that published according to the requirements applying to the initial notice?
  - Were results of the procurement procedures published through contract award notices, in line with deadlines and content described in article 50 and annex V of the directive?
- F/C** ● Were all candidates and tenderers informed of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system?
- F/C** ● When candidates or tenderers requested information on reasons for rejection, on decisions and their grounds and/or on the conduct and progress of negotiations and dialogues, did the contracting authority timely provide that information?

## Guidance

- Directive:**
  - For prior information notices, see article 48 and Annex V.
  - For forms and content of contract notices, see article 49 and Annex V.
  - For minimum time limits to receive tenders or requests to participate and shortening possibilities, see articles 27 to 3. For the extent of time limits, see articles 47 and 53.
  - For contract award notices, see article 50 and Annex V.
  - For form and manner of publication of notices, see article 51, Annex V and Annex VIII.
  - For content of the invitations to submit tenders, to participate in a dialogue or to confirm interest, see article 54 and Annex IX.
  - For publications at national level, see article 52.
  - For rules applicable to communication, notably electronic transmission and receipt of tenders and requests to participate, see article 22 and Annex IV.
  - For information to candidates and tenderers, see article 55.
- For notification of procurement in contracts not covered by the Directive, namely contracts below the thresholds, see Commission Interpretative Communication 2006/C 179/02.
- Guideline for Auditors**
  - See n.ºs 5 (Contracts excluded from the scope of EU public procurement directives), 6 (Publications in the OJEU), 10 (Time limits), 16 (Disclosure of information) and Appendices IV and V.
- Procurement Performance Model (PPM):**
  - For the need for proper communication between procurement staff and suppliers see nº 16 of PPM.
  - For compliance with EU law see nº 17 of PPM.
- CJEU Case-Law:**
  - For the «*need and purpose of rules regarding participation and advertising*», see cases C-76/81, C-324/98, C-399/98 and C-423/07.
  - For the need of «*prior information notices*», see case C-225/98.
  - For «*publication of notices*», see cases C-20 and 28/01.
- Audit reports and studies:**

### For publicity, notices or information to the bidders:

Report	SAI
Contract marketing and promoting expenditure	Belgium
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Organisation of public procurement in local governments, 2010	Estonia
Statistics Finland's service procurements	Finland
Contracts of assistance, consultancy and services awarded by the Foundation for Further Education- financial years 1996 to 1998	Spain
Contracting awarded under the establishment of new ways of management of the National Health Service- financial years 1999, 2000 and 2001	»

## **4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED**

### **4.2. Was timely and equal access to contract documents and information provided to all candidates?**

#### **Background**

The equal access to information by candidates is clearly and extensively protected by the European public procurement regulations and is a primary mechanism for guaranteeing fair competition and transparency and for reducing the scope of favouritism given to specific interests.

The use of information and communication technologies has brought wider possibilities of accessing and spreading information, for taking advantage of organised knowledge and for accelerating procedures. The 2014 directive introduces the principle of electronic communication throughout the procurement process. Accessibility and security have new significance in this context.

#### **Questions**

- **Did the contracting authority offer by electronic means timely, unrestricted and full direct access free of charge to the procurement documents and any supplementary documents (specifying the internet address in the notice or invitation)?**
- F/C** • **When that type of access was not offered, were all specifications, documents and additional information made available by alternative means and on a timely basis to economic operators?**
- F/C** • **Were the documents describing the requirements and performance accessible to all bidders in the same way and was it not easier for domestic bidders to obtain specific documents?**
- F/C** • **Was additional significant information supplied to all interested parties in an equal basis?**
- F/C** • **When economic operators asked for clarifications during the period of submission, was that foreseen in the applicable rules or in the procurement documents, was the communication held in writing and has it been documented and was the additional information made available to all potential tenderers?**
- F/C** • **Were the means of communication and information exchange used free from barriers and did they allow economic operators' equal access to the procurement procedure?**



- **When communication and information exchange were conducted by electronic means:**
  - Were tools, devices, file formats and technical characteristics required non-discriminatory, general available and interoperable with ICT products generally used (no proprietary licensing scheme)? Otherwise, were alternative means of access offered?
  - Did they not involve any restriction of the economic operators' access to the procurement procedure?
- Were requirements mentioned in article 22 (6) and Annex IV of the directive respected, including in what respects security and the format of electronic signature?
- If an electronic auction or a dynamic purchasing system was used, did the tender documents specify details on access to information, electronic equipment used and connection specifications?
- Did the contracting authority respect the proportionality principle between the security level of electronic communications means used and the risk related to identification of senders and integrity of message (for instance risk that the information was sent by another sender), in line with article 22 (6) of the directive?

## Guidance

- **Directive:**  
For electronic and non-electronic communication and access to documents, including levels of security, see articles 22 and 53 and Annex IV.  
For dynamic purchasing systems, see article 34.  
For electronic auctions, see article 35 and Annex VI.
- **Guideline for Auditors:**  
See n. °s 1 (Main changes introduced by the directive) and 13 (Documents and communication).
- **Procurement Performance Model (PPM):**  
See n° 16 (implementing the public procurement process) and n° 17 (compliance with EU law).
- **CJEU Case-Law:**  
For the «*information to be included in tender notices*», see case C-359/93.
- **Audit reports and studies:**  
For the need of providing all the bidders with complete information about the contract performance:

Report	SAI
The procurement and commercial use of multipurpose icebreakers	Finland





## 4. AUDITING THE PUBLICITY AND NOTIFICATIONS USED

### 4.3. Was confidentiality ensured when necessary?

#### Background

Transparency should not undermine the importance of not giving any advantage to bidders when submitting their offers. Confidentiality in critical moments is essential to ensure that the public interest is protected and to preserve business confidence. Preventing access to privileged information is also a cornerstone to deter corrupt opportunities.

#### Questions

-  • Did communication, exchange and storage of information ensure confidentiality of tenders and requests to participate?
-  • Was the content of tenders and requests to participate examined only after expiration of the time limit set for submitting them?
  - Did the contracting authority abstain from disclosing information forwarded by economic operators that they have designated as confidential?
-  • During an electronic auction, did the identity of tenderers remain undisclosed at all times?
  - In competitive procedures with negotiation, competitive dialogues and innovation partnerships, did the contracting authority ensure that solutions proposed or confidential information provided by candidates during negotiations, dialogue and partnership, were not revealed to others without their explicit agreement?
- When the procurement documents included information of confidential nature, has the contracting authority:
  - Identified the confidential information?
  - Indicated in the notice or in the invitation to confirm interest the requirements imposed on economic operators to protect that information?
  - Mentioned in those documents how the economic operators could obtain access to that information?
  - Extended the time limit for the submission of tenders?
- Were national laws on confidentiality respected?
-  • When an economic operator has undertaken to obtain confidential information that may confer upon it undue advantages in the procurement procedure, did the contracting authority exclude it from participating in the procurement procedure? Did the decision of exclusion follow an opportunity to, despite the fact, provide evidence of measures taken to demonstrate its reliability?

#### Guidance

- **Directive:**  
For confidentiality requirements see articles 21, 22(3), 29(5), 30(3), 31(4) and (6), 53(1) and 57(4).

- **CJEU Case-Law:**  
For «*relationship between tenderers*», see case C-538/07

## 5. AUDITING THE AWARD PROCEDURES

### Background

During the awarding phase, tenders are analysed and selected against the rules and criteria established in the procurement documents.

The awarding procedures are typically conducted in five separate steps:

- Formal review of bids
- Assessment of:
  - Inexistence of exclusion causes for bidders
  - Suitability of bidders
- Confirmation of exclusion causes for tenders
- Evaluation of tenders and award decision
- Conclusion of the contract

In some procedures, like restricted procedure, competitive procedure with negotiation, competitive dialogue, innovation partnership and dynamic purchasing system, completely autonomous stages are devoted to the selection of the economic operators allowed to submit a tender. Those who, having requested that possibility, are not selected as suitable bidders are, from that moment, outside of the competition and are not required to prepare a tender.

For other procedures, such as the open one, the suitability of candidates is assessed after they have submitted their tenders. However, the qualitative assessment of candidates must be undertaken separately and performed prior or independently to the evaluation of tenders, a practice that is sometimes overlooked by contracting authorities.

Evaluation steps must be done in accordance with the framework of each specific procedure.

Exclusion grounds and selection and award criteria must never be modified during the assessment.

Even if exclusion grounds and selection and award criteria are transparent and objective, it is good practice that the assessment is conducted by more than one person. It is common to use an evaluation committee or panel that will issue a recommendation to the contracting authority on the results of the assessment and on the selected tender to be awarded. Contracting authorities must verify potential conflicts of interest affecting the people involved in the assessment and recommendation.

## 5.1. Was a formal review of tenders received undertaken?

### Background

Before the assessment of bidders takes place there should be a formal verification about the compliance of tenders with basic requirements, such as adherence to deadlines and enclosure of the information requested.

### Questions

- F/C** • 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 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?
  - 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 the content of the report on the tendering and evaluation process, see article 84.  
For formal review of tenders, see article 56.
- **Guideline for Auditors:**  
See n.º 12 (Receipt, opening and clarification of tenders).
- **Procurement Performance Model (PPM):**  
See n.º 16 of PPM (implementing the public procurement process).
- **CJEU Case-Law:**  
For «*lack of required documents*», see case C-336/12.  
For «*possibilities to clarify, correct or supplement the tender*», see cases C-336/12, C-387/14 and C-131/16.  
For «*non-compliance with technical specifications or requirements*», see cases C-561/12, C-538/13, C-278/14 and C-27/15.

## 5. AUDITING THE AWARD PROCEDURES

### 5.2. Was the suitability of candidates accurately assessed?

#### Background

At this stage, the contracting authority should establish whether there are grounds to exclude bidders from participating in the procurement and, if not, whether they meet the established requirements to be selected as tenderers.

The contracting authority should admit only those bidders who have not committed certain offences or participated in criminal organisations (the new directive enlarged the grounds for exclusion) and who demonstrate eligibility, including minimum capacity levels set in the procurement documents.

As we have seen in 2.4, the public authority has some discretion concerning the requirements and verification it seeks, provided they are justified by the subject matter of the contract and don't unnecessarily limit competition.

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

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

In some procedures it is possible to shortlist a limited number of qualified tenderers. In these cases, shortlisting must be carried out by non-discriminatory and transparent rules and criteria made known to candidates.

The selected bidders will then be invited to submit tenders, to negotiate or to participate in a dialogue. In open procedures, the tenders that bidders have already submitted will be evaluated.

When a bidder is not selected, the tender submitted by this bidder should not be evaluated.

#### Questions

- F/C** • Was the qualitative assessment of submissions received undertaken independent of and previously to the evaluation of tenders?
- F/C** • When, in open procedures, a contracting authority decided to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria, was the verification of these aspects ensured and carried out in an impartial and transparent manner?
- F/C** • Was the selection process documented, including the reasons for selection and rejection?
- F/C** • Did the contracting authority assess suitability of bidders exclusively on the basis of the requirements previously announced and in a transparent, objective and non-discriminatory manner?
- F/C** • Unless otherwise provided by national law, when contracting authorities requested economic operators to submit, supplement, clarify or complete information or documentation, did they fix an appropriate time limit for that purpose and did they comply with the principles of equal treatment and transparency?

- At the time of submission of requests to participate or of tenders, and unless otherwise decided and justified, did the contracting authority accept the ESPD as a preliminary evidence of the inexistence of exclusion causes and the fulfilment of selection criteria or minimum ability levels?
- Did the ESPDs accepted include a formal statement by the bidder:
  - Committing that the relevant grounds for exclusion do not apply and that the relevant selection criteria or minimum ability levels are fulfilled?
  - Providing the relevant information required by the contracting authority?
  - Identifying the public authority or third party responsible for establishing the supporting documents?
  - Stating the ability to provide those supporting documents, upon request and without delay?
  - Confirming that other entities in whose capacities the bidder relies fulfil the same conditions?
- F/C** • In case the contracting authority considered it necessary for the proper conduct of the procedure to ask candidates or tenderers to submit all or part of the supporting documents, were these documents submitted and did they provide the necessary evidence?
- F/C** • In case the candidate or tenderer seriously misrepresented in supplying the information required, withheld such information or was not able to submit the supporting documents required, did the contracting authority exclude it from the procedure, after giving it the opportunity to provide evidence that, despite the fact, it has taken sufficient measures to demonstrate its reliability?
- Did the contracting authority abstain from demanding documentary evidence where it already possessed the documents or where it could directly and free of charge access a database containing the relevant information or certificates (see list of databases and repository of certificates in e-Certis)?
- F/C** • Did the contracting authority verify that candidates or tenderers:
  - (and/or their representatives) Were not convicted of participation in a criminal organisation, corruption, fraud, terrorist offences or offences linked to terrorist activities, money laundering, terrorist financing, child labour or other forms of trafficking in human beings?
  - Have not infringed obligations related to the payment of taxes and social security contributions?
  - Have not violated applicable obligations in the fields of environmental, social and labour law?
  - Were not bankrupt, insolvent or in an analogous situation?
  - Were not guilty of grave professional misconduct?
  - Have not entered into agreements with other economic operators aimed at distorting competition?
  - Were not in a situation of conflict of interests?
  - Have not been previously involved in the preparation of the procurement procedure?
  - Have not shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract?
  - Have not undertaken to unduly influence the decision-making process, to obtain confidential information conferring undue advantages in the procurement procedure or to negligently provide misleading information that might have a material influence on decisions concerning exclusion, selection or award?

- F/C** ● In case one or more of those situations occurred, did the contracting authority give a serious consideration to that? Is it documented that the contracting authority has taken a grounded decision on excluding or not the economic operator from participating in the procurement procedure, after verifying if, despite the fact, the economic operator has taken sufficient measures to demonstrate its reliability?
- F/C** ● Did the contracting authority verify that candidates:
  - Were suitable to pursue the professional activity as admissibly required?
  - Had technical and/or professional ability in accordance with the references specified in either the notice or invitation to tender?
  - Had economic and financial standing in accordance with the references specified in either the notice or invitation to tender or other appropriate documents?
- F/C** ● Where required, did the contracting authority verify that candidates complied with quality assurance standards and environmental management standards, in line with the criteria of the directive?
- F/C** ● Where required, were candidates registered as approved contractors, suppliers or service providers or certified by relevant bodies? Did the contracting authority recognise equivalent certificates from bodies established in other Member States or accept other equivalent means of proof?
- F/C** ● Where the economic operator intended to rely on the capacities of other entities, did it prove to the contracting authority that it would have at its disposal the necessary resources, by, for instance, producing a commitment by those entities to that effect?
- F/C** ● In that case, did the contracting authority verify whether the entities on whose capacity the economic operator intended to rely fulfilled the relevant selection criteria and whether there were grounds for their exclusion? For this purpose, did the subcontractors provide their self-declarations?
- F/C** ● When the contracting authority shortlisted a limited number of qualified tenderers:
  - Was that possible within the followed procurement procedure?
  - Was that indicated in the contract notice with the necessary details?
  - Were the criteria and method priory established?
  - Were the established criteria and method respected?
- F/C** ● Did the contracting authority require that the economic operator replaced an entity that did not meet a relevant selection criterion, or in respect of which there were grounds for exclusion?
  - Where required, did the economic operator and subcontractors provide documents of joint liability for the execution of the contract?
- F/C** ● Is it evident that the contract was not awarded to a tenderer that should have been excluded or that did not meet the selection criteria or minimum ability levels?



- F/C** • **Has the tenderer to which the contract was awarded been requested to submit and has it submitted up-to-date supporting documents proving the absence of grounds for exclusion and the fulfilment of the selection criteria and, if applicable, certificates of quality assurance and environmental management standards?**
- **When the participation in the procurement was reserved to support social inclusion, did at least 30% of the workforce of the organisation consist of people with disabilities or disadvantaged people?**
- F/C** • **Is there no evidence of false certifications?**
- **Were candidates from States covered by AGP Agreement included and evaluated in like manner to all other submissions received?**

## Guidance

- **Directive:**  
 For suitability of economic operators (exclusion grounds and selection criteria), see articles 56 to 58.  
 For conflict of interests, see article 24.  
 For ESPD, see article 59.  
 For admissible means of proof, see article 60.  
 For online repository of certificates and databases (e-Certis), see article 61.  
 For reliance on capacities of other entities, see articles 63 and 71.  
 For admissible quality assurance and environmental management assessment, see article 62.  
 For non-discriminatory provisions about lists or certifications, see article 64.  
 For reserved contracts, see article 20.  
 For AGP Agreement, see article 25.
- **Directive 2009/81/EC:**  
 In defence and security procurement, candidates may be required to submit specific guarantees ensuring security of information and security of supply.
- **Guideline for Auditors:**  
 See n.º 14 (Selection of suppliers).
- **Procurement Performance Model (PPM):**  
 See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).
- **CJEU Case-Law:**  
 For «*exclusion causes*», see cases C-376/08, C-74/09, C-465/11, C-358/12, C-42/13, C-440/13, C-470/13, C-387/14, C-396/14, C-425/14, C-27/15, C-199/15 and C-171/15.  
 For «*qualitative selection*», see cases C-199/07, C-368/10, C-94/12, C-358/12, C-234/14, C-324/14, C-387/14 and C-298/15.  
 For the «*assessment of economic and financial standing*», see cases C-94/12 and C-225/15.  
 For «*registration in official lists and certifications*», see cases C-94/12 and C-203/14.  
 For «*reliance on the capacity of other economic operators and subcontractors*», see cases C-389/92, C-176/98, C-5/97, C-425/14, C-234/14, C-324/14, C-387/14 and C-27/15.  
 For «*non-profit organisations*», see case C-305/08.
- **Audit reports and studies:**  
**For illegal admission of bidders:**

Report	SAI
Compliance of the operation of municipal joint-stock company “ <i>Daugavpils siltumtīkli</i> ” with the planned goals and requirements of regulatory enactments	Latvia
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	Poland
Audit over a Rail Transport Institute	Portugal

## 5. AUDITING THE AWARD PROCEDURES

### 5.3. Were the documents received scrutinised for completion and adherence to stated conditions before the tenders were evaluated?





#### Background

Once suitability has been established, the next step is to evaluate the tenders received. The public authority may first exclude tenders that cannot be accepted for reasons such as not meeting performance conditions or quoting too low a tender sum to enable the contract to be properly performed.

Abnormally low tenders refer to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be carried out properly. A very low priced tender cannot be rejected unless the bidder is first given the opportunity to explain the basis of his cost estimates.

#### Questions

- F/C** • Did the contracting authority verify whether the tenders were admissible and suitable:
  - Relevant to the contract?
  - With a price that does not exceed the contracting authority's budget as determined and documented prior to the launching of the procurement?
  - Capable of meeting the contracting authority's needs and requirements as specified in the procurement documents?
  - In conformity with the technical specifications?
  - With no evidence of collusion or corruption?
- F/C** • When special conditions relating to the performance of a contract were detailed in the procurement documents, did the contracting authority verify if the tenders received met those requirements?
- F/C** • If required, did tenders indicate the share of the contract that is intended to be subcontracted to third parties and subcontractors?
- F/C** • In case variant tenders were submitted, were they authorised by procurement documents?
- F/C** • Were submitted variant tenders linked to the subject matter of the contract?
- F/C** • Did variants taken into consideration meet the requirements for their presentation?
- F/C** • Is there no evidence of a quotation priced too low?
- F/C** • In the case of a quotation priced too low, did the contracting authority require the bidder to explain the price or costs proposed?
- Did the bidder comply with this request within the deadline set?

-  • Were the reasons for the estimation verified and was it possible to clear doubts?
-  • 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?
-  • When the contracting authority established that the tender was abnormally low because it didn't comply with legal environmental, social and labour obligations, did it reject the tender?
  - When the contracting authority established that the tender was abnormally low because of state aid, was the tenderer able to prove that the aid was compatible with the internal market within the meaning of article 107 of the TFEU?
  - In the case the tenderer was not able to prove it, was the tender rejected and did the contracting authority inform the European Commission?
-  • When tenders were actually rejected because they were abnormally low, were reasons for this decision given and were they sufficiently grounded?

## Guidance

- **Directive:**
  - For conditions for the performance of contracts, see article 70.
  - For subcontracting, see article 71.
  - For abnormally low tenders, see article 69.
  - For variants, see article 45.
- **Guideline for Auditors:**
  - See n.º 15 (Evaluation of tenders and award of contract).
- **Procurement Performance Model (PPM):**
  - See n.º 16 of PPM (implementing the public procurement process) and n.º 17 (compliance with EU law).
- **CJEU Case-Law:**
  - For «*social, labour and sustainability requirements*», see cases C-368/10, C-549/2013 and C-115/14.
  - For «*qualifications of staff assigned to the performance of the contract*», see case C-601/13.
  - For «*abnormally low tenders*», see cases C-76/81, C-103/88, C-285 and 286/99, C-568/13 and C-318/15.
  - For «*non-admissibility of tenders not complying with defined conditions*», see cases C-243/89 and C-561/12.

## 5. AUDITING THE AWARD PROCEDURES

### 5.4. Were bids properly evaluated?

#### Background

The final evaluation and award process must be demonstrably objective and transparent and based solely on the published criteria. The public authority has to consider all the published criteria, pursuant to the indicated weighting. Admissible variants which meet the requirements must be evaluated in the same way as the other bids.

The award decision will be based on the result of the evaluation of tenders.

In open and restricted procedures, any dialogue with candidates that could be considered as “post tender negotiation” on price or other tender elements is not permissible.

However, for other procedures, such as competitive procedure with negotiation, competitive dialogue and innovation partnership, negotiations are admissible within certain rules and may result in changes in the tenders. Electronic auctions may be considered as a special negotiation means, since they allow, in strict conditions, a change in tenders.

Contracting authorities must, under no circumstances, modify a tender.

#### Questions

- F/C** • Is the evaluation process documented in a transparent, plausible and convincing manner?
- Did the contracting authority draw up a written report on the procurement procedure, including information on the outcome of the selection and evaluation, in accordance with article 84 of the directive?
- F/C** • Is there no evidence of collusion between bidders?<sup>6</sup>
- F/C** • Is there no evidence of unauthorized release of information or seemingly unnecessary contacts with bidders' personnel during the negotiation/dialogue and evaluation processes?
- F/C** • Is there no evidence of favouritism towards a particular contractor during the negotiation and evaluation processes?
- F/C** • Is there no evidence of any individual on the evaluation panel being biased?
- F/C** • Is there no evidence of any external or superior pressure to reach a specific result?
- F/C** • Was the award based on published and admissible criteria (see item 2.4. above)?

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<sup>6</sup> 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

- F/C** • When open and restricted procedures were used, were no negotiations or alterations to tenders allowed, namely on price?
- F/C** • When negotiation/dialogue of the tenders did take place, were these permitted within the adopted procedure and did they follow the correspondent rules?
- F/C** • When negotiation/ dialogue took place in successive stages, was this practice stated in the procurement documents and was the reduction of tenders made according with the described award criteria?
- F/C** • Is it clear that, when admissible, negotiations did not involve change to the essential aspects of the tender or the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document?
- F/C** • When an electronic auction was conducted:
  - Before proceeding with the auction, did the contracting authority make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them?
  - Were the tenderers informed on the outcome of that evaluation when invited to the auction?
  - Was the auction solely based on prices and/or on new values of the features of the tenders indicated in the procurement documents?
  - Were the automatic re-rankings based on the announced formula?
- F/C** • Were tenders evaluated and ranked against all and only those criteria, and relative weighting, which have been published in the procurement documents? Is it clear that no modification whatsoever to the defined criteria was introduced during the evaluation process?
- F/C** • Was the scoring method and rationale decided before the evaluation started, was there a sound basis for the scorings applied to the criteria and was the scoring well balanced?
  - Were calculations used in evaluation adequate and correct?
- F/C** • Did the evaluated and awarded tenders qualify in the former 3 evaluation steps (formal review of bids, suitability of bidders and verification of exclusion causes)?
- F/C** • In competitive dialogue, if negotiations to finalise the terms of the contract did take place with the tenderer submitting the best ranked tender, is it clear that they did not have the effect of materially modifying essential aspects of the tender or of the public procurement and did not risk distorting competition or causing discrimination?
  - When awarding contracts under a framework agreement, did the contracting authority comply with the terms laid down in that agreement?

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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.

## Guidance

- **Directive:**

Articles 67 and 67 are the central provisions for the evaluation of tenders.

For admissible negotiations, see articles 29, 30, 31 and 32.

For electronic auctions, see article 35.

For individual reports on the procedures for the award of contracts, see article 84.

For guidance on evaluation of tenders, see *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*.

- **Guideline for Auditors:**

See n.ºs. 8 (Tendering procedures), 9 (Procurement instruments), 15 (Evaluation of tenders and award of contract) and 16 (Disclosure of information).

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

See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).

- **CJEU Case-Law:**

For «award criteria», see cases C-226/09, C-368/10, C-538/13, C-601/13 and C-6/14.

For «equal treatment during the award procedure», see cases C-19/00 and C-396/14.

For the «powers of juries to detail award criteria», see case C-331/04.

For «amendments to tenders», see cases C-87/94 and C-324/14.

- **Audit reports and studies:**

**For formalisation of consolidated tenders in negotiated procedures:**

Report	SAI
The North Wastewater Treatment Plant in Brussels. Award and funding of the concession contract	Belgium

**For the need of a document comparing the bids and stating the grounds of the award:**

Report	SAI
Public procurement and internal control within the Federal State Departments, 2017	Belgium
Statistics Finland's service procurements	Finland
Audit over a Rail Transport Institute	Portugal

**For a fair and transparent evaluation of bids, according to the award criteria:**

Report	SAI
Bus line services: cost price and contract award to operators	Belgium
2000 Annual Report (§ 4.127.6), 2001 Annual Report (§4.129.65) and 2002 Annual Report (§ 4.136.7(a))	Cyprus
Ex-ante audit and also on the request of the Public Accounts Committee of the House of Representatives	»
State Budget funds provided for investment to the industrial zones	Czech Republic
Annual Report 2004 on federal financial management, Part II, items 3, 17, 18 and 42	Germany
Autonomous (regional) and local public sectors, financial year 1997. Item concerning "Public procurement".	Spain

**For awarding a contract not complying with the contract documents:**

Report	SAI
Acquisition of cars in local governments, 2011	Estonia
Public investment projects by a public rail transport enterprise	Portugal
Public investment projects by the National Laboratory for Civil Engineering	»

**For collusion among bidders:**

Report	SAI
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<b>Report</b>	<b>SAI</b>
Rental of aircrafts to fight forest fires	Portugal

## 5. AUDITING THE AWARD PROCEDURES








### 5.5. Was the outcome of the award process properly reached and communicated?

#### Background


Having concluded the procurement process and award decision, the contracting authority has obligations of reporting and notification. These obligations reflect public accountability, transparency, control and the rights of candidates.

The contract may be awarded after the expiry of a standstill period if no complaint has been filed.

#### Questions

-  • Was the award decision based on the result of the evaluation of tenders?
-  • Has the award included no items different from those contained in bid specifications?
-  • Did the chosen bid meet user needs?
-  • Did the contracting authority draw up a comprehensive written report about progress and outcome of the procurement process?
  - Was that report communicated to national authorities and to the European Commission, when requested?
-  • Were tenderers notified in writing and on a timely basis of decisions concerning the rejection of tenders or applications, the conclusion of the procurement procedure, the name of tenderer(s) selected, the characteristics and relative advantages of the chosen tender(s) and the standstill period for contestation of the award decision?
  - In case of decisions not to conclude a procurement or award a contract, were tenderers informed in writing and on a timely basis of those decisions and their grounds?
  - If information was withheld, was there reasonable justification for this decision?
  - Was there a reasonable interval (at least 10 days) between dates of award and contract to allow unsuccessful tenderers to seek a review of award decision (e.g. price, nature of performance, completion period, terms of payment, materials to be used)?
-  • Did the conditions of contract comply with the detail provided in the procurement documents and with the outcome of the procurement procedure followed? Were no essential components negotiated or modified after the award?
-  • Did the conditions included in the contract protect the risk of non-performance by the supplier and were there no conflicting provisions?



- **Did the contract include provisions on applicable regulation, subject matter, price, delays, misconduct, liability, dispute resolution, revision clauses, intellectual property rights, confidentiality obligations and any other relevant aspects?**
-  • **Were there no material changes in the contract shortly after award?**
- **Were results of the procurement procedures published through contract award notices, in line with deadlines and content described in article 50 and annex V of the directive?**

## Guidance

- **Directive:**  
Article 84 outlines the content of the report on the tendering and evaluation process.  
For information to tenderers and reasons to withhold it, see article 55.  
For contract award notices, see article 50 and Annex V.
- For standstill period, see Directives 89/665/EEC, 92/13/EEC and 2007/66/EC (Remedies Directives)
- **Guideline for Auditors:**  
See n.ºs 15 (Evaluation of tenders and award of contract) and 16 (Disclosure of information).
- **Procurement Performance Model (PPM):**  
See nº 16 of PPM (implementing the public procurement process) and nº 17 (compliance with EU law).
- **CJEU Case-Law:**  
For «*decision not to award contract*», see case C-27/98.  
For «*standstill period*», see case C-455/08.
- **Audit reports and studies:**

### For the need of formal consolidated tenders after negotiations:

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

### For the need of written contracts:

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

### For contract clauses inconsistent with awarded tenders:

Report	SAI
Performance audits of state owned companies' public procurement 2011-2016	Croatia

### For lacking or insufficient notifications:

Report	SAI
Public procurement and internal control within the Federal State Departments, 2017	Belgium
Performance audits of state owned companies' public procurement 2011-2016	Croatia

### For performance conditions:

Report	SAI
Social clauses in public procurement contracts awarded by the public administration	Poland

**For too long periods of contracts:**

<b>Report</b>	<b>SAI</b>
Federal State - Long term procurement contract (171st Report of the Court of Audit), 2014	Belgium
Federal State - Awarding and execution of public service contracts (172nd Report of the Court of Audit), 2015	»
Public procurement and internal control within the Federal State Departments, 2017	»
Audits of municipalities, 2013	Portugal
Audit of expenses in a Dentist University, 2014	»

**For post awarding changes in the contract:**

<b>Report</b>	<b>SAI</b>
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 6.2	

## 6. AUDITING THE CONTRACT IMPLEMENTATION

### 6.1. Is the execution of the contract adequately managed and monitored?

#### Background

The goal of the contract implementation stage is to ensure that the contract is satisfactorily implemented and that both the contractor and contracting authority meet their obligations.

At this stage:

- The execution of the contract should be managed and monitored
- The payments should be made and controlled
- Modifications must be dealt with
- Termination of contract must be considered and compliant with applicable rules
- Closing of the contract must be prepared.

It is beneficial to create and maintain an open and constructive relationship and communication between the contracting authority and the contractor during the whole process.

#### Questions

- F/C** • Is the implementation process documented?
  - Is the documentation kept for the established period or, when there is no rule in this respect, for a reasonable period?
- F/C** • Are key decisions justified?
  - Are there regular meetings between the contracting authority and the contractor during the implementation of the contract?
- F/C** • Is there timely reporting on the progress of the actual implementation and on compliance against the implementation plans?
  - Were risks to the execution of the contract identified, analysed, monitored and dealt with? Is a follow-up of those risks conducted at key stages of the contract implementation?
  - For complex contracts, is there a contingency plan?
  - In complex contracts, is the completion of key steps of the implementation reviewed by the contracting authority before moving on to next stages?
- F/C** • Are performance requirements and service level agreements monitored by the contracting authority?
- F/C** • Is there evidence that the works, goods or services have been properly delivered or performed?
- F/C** • Was it confirmed that deliveries were in accordance with the contract terms, as regards both cost and technical specifications?
- F/C** • Were payments verified and approved?
- F/C** • Were payments in line with contract terms and actual deliveries?
- F/C** • Were any measures put in place to avoid risks of poor, biased or false control?

- F/C** • Is there appropriate segregation of duties between those verifying the performance of the contract and approving payments?
- F/C** • Is there no evidence of materials provided to contractors who, according to the contracts, are supposed to provide them (such as office space, furniture, IT equipment) and of employees from the contracting authority performing parts of the contracted work?
- F/C** • In case the contractor failed to meet the contract terms, were there measures taken to enforce compliance?
- F/C** • Where justified, were compensations for no compliance sought by the contracting authority?
  - Where it was later identified that mandatory grounds for exclusion applied to any contractor at the time of the contract award or that a contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive, were contracts terminated?
  - Was the contract closed only when the contracting authority formally accepted the final deliveries and paid the related invoices?

## Guidance

- **Directive:**  
For conditions for performance of contracts, see article 70.  
For termination of contracts, see article 73.

- **Audit reports and studies:**

**For contract management and performance:**

Report	SAI
Reconstruction of the Kaunitz Palace for the International Anti-Corruption Academy (IACA) in Laxenburg (Lower Austria)	Austria
Contract Variation Costs met by the Flemish Inland Waterway Agency “De Scheepvaart”, 2014	Belgium
Performance audits of state owned companies’ public procurement 2013-2016	Croatia
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Poland
Investments of local government units, including projects co-financed by the EU budget»	»
Transforming government’s contract management, 2014	UK
Paying government suppliers on time, 2013	»

**For poor monitoring over execution and deliveries:**

Report	SAI
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Audit of the Technological Education Plan, 2012	Portugal
Audit of a housing rehabilitation institute, 2014	»
Audit of Underground construction works in Lisbon, 2014	»

**For overpayment and non-delivery of agreed work and supplies:**

Report	SAI
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Audits over additional public works in polytechnic and university institutions and rehabilitation works in schools	Portugal

## 6. AUDITING THE CONTRACT IMPLEMENTATION

### 6.2. Were any identified modifications to contracts or additional works or deliveries admissible without the need for a new procurement procedure?

#### Background

Usually, the need for a modification to a contract during its implementation or the need for additional works, supplies or services may be avoided by good planning, by comprehensive specifications and by a well-designed contract.

Even though flexibility to modify performance during its execution or additional deliveries, without the need to disrupt and going through a new procurement procedure, might be necessary to fulfil needs and achieve savings.

However, it might also be a means of disrespecting the rules, favouring or rewarding a supplier, avoiding an open procurement or overcoming budgetary constraints. Therefore, modifications or additions to contracts should only be admissible in exceptional cases. Modifications of contracts or direct award of additional tasks to the same contractor is a recurrent error in public procurement procedures.

The new directives extend the scope of procurement rules beyond the award and conclusion of the public contract, by including provisions to regulate the modification of contracts during their term, accepting those modifications in certain circumstances.

In principle, a new procurement procedure is required in cases of material or substantial changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties. This is particularly the case if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure. Thus, modification to a contract, without the need to carry out a new procurement procedure, is not acceptable where it results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement.

Similar conditions apply to concession contracts, according to the respective directive.

#### Questions

- F/C** • Did the modification provide no alteration to the overall nature of the contract or framework agreement? <sup>7</sup>
- F/C** • Is the value of the modification to a service or supply contract:
  - Below the EU thresholds? and
  - Cumulated with the value of former modifications, no more than 10% of the initial contract?

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<sup>7</sup> A modification that changes the nature of the overall procurement is never possible.

- F/C** ● **Is the value of the modification to a works contract:**
  - Below the EU thresholds? and
  - Cumulated with the value of former modifications, no more than 15% of the initial contract?
- F/C** ● **Was the modification non-substantial?<sup>8</sup>**
- F/C** ● **Where the modification has been provided for in the initial procurement documents by a review clause, is the review clause clear, precise and unequivocal, stating the scope and nature of possible modifications or options as well as the conditions under which they may be used?**
- F/C** ● **In this case, have the assumptions and conditions described in the review clause actually occur?**
- F/C** ● **Where additional works, services or supplies were strictly necessary for the completion of performance under the contract, would a change of contractor:**
  - Oblige the contracting authority to acquire material having different technical characteristics resulting in incompatibility or disproportionate technical difficulties in operation and maintenance?
  - Cause significant inconvenience or substantial duplication of costs for the contracting authority?
- F/C** ● **In this case, did the additional works, services or supplies amount to no more than 50% of the value of the original contract?**
  - Where more than one of such additions occurred, is it clear that they were not aimed at circumventing the application of public procurement rules?
  - Was a notice about these modifications published in the OJEU?
- F/C** ● **Where the need for the modification has been brought about by unexpected circumstances, is it evident that a diligent contracting authority could not have foreseen them?**
- F/C** ● **In this case, was the increase in price resulting from the modification no higher than 50% of the value of the original contract?**
- F/C** ● **Where more than one of such unforeseen modifications occurred, is it clear that they were not aimed at circumventing the application of public procurement rules?**
  - Was a notice about these modifications published in the OJEU?
- F/C** ● **Where a new contractor replaced the one to which the contracting authority had initially awarded the contract, was that a consequence of either:**
  - An unequivocal review clause or option?
  - Succession into the initial contractor following corporate restructuring (e.g. takeover or merger)?
  - The contracting authority assuming the contractor's obligations towards its subcontractor?

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<sup>8</sup> A modification is substantial when it renders the contract materially different in character from the one initially concluded. A modification is always substantial when: conditions were introduced which had they been part of the initial procurement procedure would have allowed for the admission of other candidates than those initially selected, for the acceptance of a tender other than that originally selected or would have attracted additional participants in the procurement procedure; changes were produced to the economic balance of the contract in favour of the contractor in a manner that was not provided for in the initial contract; the scope of the contract was considerably extended; a new contractor replaced the initial one in other cases than the ones allowed.

- F/C
  - Where a new contractor replaced the one to which the contracting authority had initially awarded the contract due to succession into the initial contractor, following corporate restructuring:
    - Is it clear that this does not entail other substantial modifications to the contract?
    - Is it clear that this was not aimed at circumventing the application of public procurement rules?
    - Does the new contractor fulfil the criteria for qualitative selection initially established?
- F/C
  - Where a new contractor replaced the one to which the contracting authority had initially awarded the contract as a result of the contracting authority assuming the contractor's obligations towards its subcontractor, was this possibility provided for under the national legislation in line with the directive's rules on subcontracting?
- F/C
  - Where additional deliveries were a partial replacement of supplies or installations or an extension of existing supplies or installations:
    - Would a change of supplier oblige the contracting authority to acquire material having different technical characteristics resulting in incompatibility or disproportionate technical difficulties in operation and maintenance?
    - Was the duration of original and recurrent contracts no longer than 3 years?
- F/C
  - Where new works or services were the repetition of similar works or services previously awarded to the same economic operator pursuant to a competitive procedure:
    - Was the possibility of this additional award disclosed in the first project put up for tender?
    - Did that project indicate the extent of the possible additional works or services?
    - Did it describe the conditions under which they would be awarded?
    - Was the total estimated cost of subsequent works or services taken into consideration when holding the initial procedure?
    - Has the award of the additional works or services taken place within 3 years following the conclusion of the original contract?
- F/C
  - Were additional works charged at the unit prices agreed in the initial contract?
- F/C
  - Where a contract has been subject to a substantial modification that would have required a new procurement procedure, was it terminated?

## Guidance

- **Directive:**
  - For modification of contracts during their term, see article 72.
  - For additional deliveries, see article 32(3/b).
  - For new works or services, see article 32(5).
  - For termination of contracts, see article 73.
- **Guideline for Auditors:**
  - See n.º 17 (Contract performance).
- **CJEU Case-Law:**
  - For «substantial changes in the scope of the contract or in the scope of the competition as a new award», see cases C-337/98, C-496/99 and C-454/06.
  - For «subsequent replacement of a subcontractor», see case C-91/08.
  - For «non-admissible direct award of additional works or services», see cases C-423/07 and C-601/10.
  - For «material amendment to contract», see case C-549/14



- Audit reports and studies:**

**For jeopardizing competition through delivering additional works:**

Report	SAI
Procurement of the Troop Radio System CONRAD, 2015	Austria
Final payment on some large-scale public works contracts	Belgium
Dredging works in Flanders, 2016	»
Final statement of public road and motorway contracts in the Walloon Region.	»
Performance audits of state owned companies' public procurement 2011-2016	Croatia
Organisation of public procurement in local governments, 2010	Estonia
Construction of the Modlin Airport	Poland
Implementation of the "National Reconstruction Programme of Local Roads 2008-2011"	»
Additional public works contracts	Portugal

**For reasons leading to the delivery of additional works or supplies:**

Report	SAI
General Refurbishment and Extension of the Museum of Contemporary Art (21er Haus)	Austria
ASFINAG Bau Management GmbH (Highway and Road Construction Financing Company Construction Management Corporation) regarding the construction of the 2nd tube of the Tauern Road Tunnel	»
Innsbruck Cable Railways Company – Reconstruction of the Hungerburgbahn and the Nordkettenbahnen Cable Railways	»
Special Report No 8/2003 concerning the execution of infrastructure work financed by the EDF (OJEU, C181, 31Jul2003)	ECA
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Simplified procurement procedures	Lithuania
Expo 98	Portugal
Euro 2004	»
Large public works financial slippage	»
Additional public works contracts	»

**For undue delivery of additional works:**

Report	SAI
Dredging works in Flanders	Belgium
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Poland
Port Maritime Institute	Portugal
Rail Transport Institute	»
Additional public works contracts	»
Autonomous (regional) and local public sectors, financial years 1999 and 2000. Itens concerning "Public Procurement"	Spain

**For deviations to the price of the initial contract:**

Report	SAI
Reconstruction of the Salzburg Central Station	Austria
Construction of the "Deurganckdock" (Antwerp Container Terminal Complex)	Belgium
Final statement of public road and motorway contracts in the Walloon Region	»
Contract Variation Costs met by the Flemish Inland Waterway Agency "De Scheepvaart"	»
Contract variation costs met by the Flemish Agency for Sea and Shores Services	»
Implementation of investment tasks related to water and sewage infrastructure by small municipalities	Poland
Rail Transport Institute	Portugal
Public-owned company	»
Large public works financial slippage	»
Additional public works contracts	»
Ministry of Defence: major Projects report 2004	UK
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

**For extension of contracts' time limits:**

Report	SAI
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Report	SAI
Final statement of public road and motorway contracts in the Walloon Region.	Belgium
Procurement procedures and inventory management of the Athens General Hospital "Hippocrateion", 2013	Greece
Comparative financial audit on expenses regarding expropriations, design project of works and supply of consumables in 3 municipalities in Northern Greece, 2014	»
Contracts awarded in 1999 and 2000 on the activities and services susceptible of generating revenues in a sample of public hospitals of the National Health System, with special reference to the contracts that have the realization of clinical tests as an object	Spain
Building works of the high-speed line Madrid-Barcelona-years 1999 and 2000	»
Public Procurement in Western Balkans (Albania, Bosnia-Herzegovina, fyr Macedonia, Kosovo, Montenegro and Serbia)	Parallel audit

**For modification of contractors:**

Report	SAI
Compliance of the operation of municipal joint-stock company “ <i>Daugavpils siltumtīkli</i> ” with the planned goals and requirements of regulatory enactments	Latvia