

Public Procurement Working Group

# **Guideline for Auditors**

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# 1. Introduction



- Public procurement accounts for a significant proportion of EU expenditure.
- For the year 2008 the total public expenditure on works, goods and services in the 27 EU Member States amounts to 2155,5 billion euros.\*
- Total expenditure on works, goods and services as a percentage of GDP in 2008 is 17,2%.\*

\* Source: European Commission, *Public Procurement Indicators 2008*, 27 april 2010

## **2. Importance of public procurement directives**



- Public Procurement Directives and principles derived from the EC Treaty are intended to ensure that contracts are awarded in open, fair and transparent manner
  - Thus allowing domestic and non-domestic firms to compete for business on an equal basis, with the intention of improving the quality and/or lowering the price of purchases made by Awarding Authorities.



# **3. Revision of procurement directives in 2004**



- A revision of the EU public procurement Directives was completed in 2004.
- Three former public sector Directives for works, supplies and services were consolidated in one text:
  - Public Sector Directive 2004/18/EC covering procurement procedures of public sector bodies.



# 4. Guideline for auditors





- The *Guideline for auditors* summarises the principal features and provisions of Directive 2004/18/EC.
- To aid comprehension additional information is provided in the appendices of this guideline.
  - These (sometimes voluminous) appendices can be found in the CD-ROM attached to the guideline
    - See e.g. case law Court of Justice concerning public procurement (1982-2009)



# **5. Scope of Directive 2004/18/EC**



- **Firstly**, the contract must be awarded by a *contracting authority*.
  - ‘Contracting authority’ means:
    - the State,
    - regional or local authorities,
    - bodies governed by public law,
    - associations formed by one or several of such authorities or one or several of such bodies governed by public law.
  - bodies governed by public law.
    - The definition of “bodies governed by public law” is not very clear and has been clarified by several judgments of the European Court of Justice (see CD-ROM).



- **Secondly**, the estimated value of the contract placed by a public body must have reached the financial thresholds mentioned in the Directive.
  - Thresholds applying from 1 January 2010 to 31 December 2011:
    - works: 4,845,000 euro's
    - supplies and services of Government departments and offices: 125,000 euro's
    - supplies and services of local and regional authorities and public bodies outside the utilities sector: 193,000 euro's
  - The thresholds in the Directives are revised by the European Commission at two-yearly intervals.



# **6. Obligations imposed by Directive 2004/18/EC**



Dir. 2004/18/EC imposes obligations on contracting authorities to:

1. advertise their requirements in the Official Journal of the European Union (OJEU);
2. use procurement procedures that provide open and transparent competition;
3. apply clear and objective criteria, notified to all interested parties, in selecting tenderers and awarding contracts;



4. use broadly based non-discriminatory technical specifications;
5. allow sufficient time for submission of expressions of interest and tenders.



# 6.1. Publicity





- Contracts whose estimated values have reached the thresholds set out in the Directive must be advertised in the *Official Journal of the European Union* (OJEU) and awarded in accordance with the provisions of the Directive.
- Advertisements in the OJEU may be supplemented by advertisements in the national media to ensure the widest possible competition for the contract.



- The estimation of contract values for OJEU publication purposes must be:
  - realistic and credible
  - take account of the total amount, including any form of option and any renewals of the contract.
    - Problems are fairly often found in those last cases.
- No project or purchase may be subdivided to prevent it coming within the scope of the Directives.



## **6.2. Use of procurement procedures that provide open and transparent competition**



## **(i) Open procedure**

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

## **(ii) Restricted procedure**

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



### **(iii) Negotiated procedure**

- Exceptional procedure that may be used only in the limited circumstances set out in Articles 30 and 31 of Directive 2004/18/EC.
- There are two types of negotiated procedure:
  - With publicity
  - Without publicity

### **(iv) Competitive Dialogue**

- This is a new procedure designed to provide more flexibility in the tendering process for more complex contracts, for example public private partnerships (PPP's).



## **6.3. Use broadly based non-discriminatory technical specifications**



- Technical specifications have to afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
- Interesting case law
  - Judgment of 22 September 1988, case 45/87, Commission/Ireland (Dundalk-case)
  - Judgment of 24 January 1995, case C-359/93, Commission /Netherlands (UNIX-case)



## **6.4. Use of clear and objective criteria in selecting tenderers and awarding contracts**





# (1) Criteria for qualitative selection

- Personal situation of candidate or tenderer
- Suitability to pursue the professional activity
- Economic and financial standing
- Technical and/or professional ability



## (2) Contract award criteria

- Where price is the sole criterion, the contract will be awarded to the lowest priced bid complying with the specified requirements.
- Where the ‘most economically advantageous tender’ is the basis, the contract must be awarded to the tender which best meets the relevant criteria.
  - Weighing of criteria



- Evaluation of tenders should be carried out by a suitably competent team which may include independent representation.
- The evaluation of tenders is an area where subjective judgement is used and therefore care and diligence should be exercised during the audit of this stage of the process.
- Tenders must be evaluated objectively and transparently against the published weighted criteria.
  - Objectivity and transparency is best achieved by the use of a scoring system or marking sheet based on the weighted criteria, indicating a comparative assessment of tenders under each criterion.



**6.5. Allow sufficient time for submission of expressions of interest and tenders**



Minimum time-limits must be respected:

(1) for receipt of expressions of interest

(2) for receipt of tenders



**7. Principles governing the tendering of contracts under the European thresholds or excluded altogether from the scope of the Community directives**



# Which contracts?

- the award of contracts below the thresholds;
- the award of services concessions;
- the award of contracts for services listed in Annex II B to Directive 2004/18/EC in respect of issues not dealt with by this Directive;
- The award of excluded contracts.



- The ECJ has stated explicitly that although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the EC-Treaty
- Cases:
  - C-324/98, Telaustria, judgment of 7 December 2000, paragraph 62;
  - C-231/03, Coname, judgment of 21 July 2005, paragraphs 16 to 19;
  - C-458/03, Parking Brixen, judgment of 13 October 2005, paragraph 49.





- Fundamental rules:
  - Principle of equal treatment
  - Principle of non-discrimination on grounds of nationality
- These principles imply an obligation of transparency
  - “*Obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed.*”



**Questions?**

