

Special Report

**The EU institutions can do more to facilitate access to their public procurement**



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**Special Report****The EU institutions can do more to facilitate access to their public procurement**

(pursuant to Article 287(4), second subparagraph, TFEU)

The ECA's special reports set out the results of its performance and compliance audits of specific budgetary areas or management topics. The ECA selects and designs these audit tasks to be of maximum impact by considering the risks to performance or compliance, the level of income or spending involved, forthcoming developments and political and public interest.

This report was produced by Audit Chamber IV — headed by ECA Member Baudilio Tomé Muguruza — which specialised in auditing revenue, research and internal policies, financial and economic governance and the European Union's institutions and bodies. The audit was led by ECA Member Alex Brenninkmeijer, supported by the Head of his private office, Antonius Moonen, and Raphael Debets, Attaché; Paul Stafford, Principal Manager; Peter Schönberger, Head of Task; Tomasz Kapera and Jurgen Manjé, Auditors.



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**Contractor:** an *economic operator* that has been awarded a contract.

**Economic operator:** any natural or legal person or public entity or consortium of such persons and/or bodies which offers to execute works, supply products and provide services.

**Electronic procurement (e-procurement):** use of electronic communication and transaction processing by public sector organisations when buying supplies and services or tendering public works.

**E-notification:** electronic publication of notices announcing public procurement opportunities including a hyperlink to an e-tendering platform.

**E-submission:** electronic submission of tenders by economic operators when responding to a call for tenders.

**E-tendering** (also called e-access): platform for internet publication of public procurement documentation, such as terms of reference, and electronic communication between the tenderers and the contracting organisation.

**EU agencies and other EU bodies:** distinct bodies from the EU institutions — separate legal entities set up to perform specific tasks under EU law. In total 52 agencies and other EU bodies exist.

**EU Financial Regulation:** sets out the principles and procedures governing the establishment and implementation of the EU budget and the control of the European Union's finances.

**Financial Transparency System (FTS):** publicly accessible online database managed by the Commission which publishes the recipients of EU funding paid by the Commission directly.

**Framework contract:** is concluded with one or more economic operators to lay down the basic terms for a series of specific contracts to be concluded over a given period (normally 4 years).

**Institutions of the European Union:** Article 13 of the TEU lists the institutions of the European Union: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. In addition, the EU Treaties refer to a number of other bodies that play a specialised role such as the European External Action Service and the European Investment Bank.

**Nomenclature of Territorial Units for Statistics (NUTS):** single, coherent system for dividing up the EU's territory; set up in order to produce regional statistics for the EU.

**OLAF:** European Anti-Fraud Office (part of the European Commission); it investigates fraud against the EU budget, corruption and serious misconduct within the EU institutions, and develops anti-fraud policy for the European Commission.

**Procurement directives:** establish common rules which contracting authorities in EU Member States have to follow above a certain value. The EU institutions have adopted their own rules which are broadly in line with the directives but do not include all its provisions.

**Procurement procedures:** an overview of the procurement procedures is given in **Box 1**.

**Publications Office:** interinstitutional office whose task is to publish the publications of the institutions of the European Union among which **TED**.

**Public procurement:** the purchasing of works, supplies and services by public authorities and bodies at local, regional, national or Union level.

**Rules of application (RAP):** supplement the **EU Financial Regulation** with more detailed rules.

**SMEs:** small and medium-sized enterprises are defined in Commission recommendation 2003/361. Medium-sized enterprises have a headcount lower than 250 and a turnover equal to or less than 50 million euros or a balance total equal to or less than 43 million euros. Small enterprises have a headcount lower than 50 and a turnover equal to or less than 10 million euros or a balance total equal to or less than 10 million euros.

**Statement of assurance:** annual financial and compliance audit exercise where the European Court of Auditors audits the reliability of the EU's accounts and the regularity of the transactions underlying them (sometimes referred to as the 'DAS' from the French 'déclaration d'assurance').

**TED:** TED (Tenders Electronic Daily) is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European **public procurement**.

**TED eTendering:** **e-tendering** platform offered by the **Publications Office** that allows contracting authorities to publish tender documents and to answer questions from **tenderers** electronically.

**Tender:** the offer submitted by an **economic operator**.

**Tenderer:** an **economic operator** that has submitted a **tender**.



**CPO:** Central Procurement Office (ECB)

**CPV:** Common Procurement Vocabulary

**DAS:** statement of assurance (from French 'déclaration d'assurance')

**DG Budget:** Directorate-General for Budget (European Commission)

**DG COMM:** Directorate-General for Communication (European Parliament)

**DG Communication:** Directorate-General for Communication (European Commission)

**DG FINS:** Directorate-General for Finance (European Parliament)

**DG Internal Market, Industry, Entrepreneurship and SMEs:** Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (European Commission)

**DG INLO:** Directorate-General for Infrastructure and Logistics (European Parliament)

**DG Research and Innovation:** Directorate-General for Research and Innovation (European Commission)

**DG Taxation and Customs Union:** Directorate-General for Taxation and the Customs Union (European Commission)

**DG Informatics:** Directorate-General for Informatics (European Commission)

**ECB:** European Central Bank

**EuropeAid:** Directorate-General for International Cooperation and Development (DG DEVCO)

**JRC:** Joint Research Centre (European Commission)

**NUTS:** Nomenclature of Territorial Units for Statistics

**OIB:** Office for Infrastructure and Logistics, Brussels (European Commission)

**OIL:** Office for Infrastructure and Logistics, Luxembourg (European Commission)

**OJ:** *Official Journal of the European Union*

**OLAF:** European Anti-Fraud Office

**RAP:** Rules of application of the EU financial regulation

**SMEs:** Small and medium-sized enterprises

**TED:** Tenders Electronic Daily

**TEU:** Treaty on European Union

**TFEU:** Treaty on Functioning of the European Union

**I**  
Public procurement is a significant element of the national economies in the EU. Approximately one fifth of the EU's GDP is spent every year by public authorities in procuring works, supplies and services. The Court has recently published Special Report No 10/15 which focused on the public procurement by the Member States in the area of Cohesion expenditure co-financed from the EU budget. The current report looks at procurement by the four largest EU institutions which together amounted to some 4 billion euros in 2014.

**II**  
EU legislation on public procurement plays an important role in developing the single market and in ensuring the efficient and effective use of public funds. Whilst EU procurement directives apply to procurement activities of the Member States, including Cohesion expenditure, the institutions have their own procurement rules. These rules are broadly in line with the directives but there are some significant differences which the Court considers to be unwarranted.

**III**  
The EU institutions are required to put procurement contracts out to tender on the broadest possible basis to maximise competition. In our audit we examined to what extent the EU institutions facilitate access to their public procurement.

**IV**  
We found that the management and control arrangements of the EU institutions are robust and in general mitigate the risk of errors which could otherwise adversely affect the possibility for economic operators to participate and their fair treatment. However most EU institutions do not systematically monitor the level of participation.

**V**  
In 2014 the European Parliament and the Council adopted reformed directives to render procurement easier and administratively less burdensome, in particular with a view to increasing participation of small and medium-sized enterprises. However we found that, when revising their own procurement rules in 2015, the EU institutions did not facilitate such access by simplifying rules and clarifying grey areas to the fullest possible extent.

**VI**  
Not all procedural choices fostered competition on the broadest possible basis. Most EU institutions had no policy to undertake market consultation prior to starting the formal procurement procedure. Moreover contracts could have been divided into lots more frequently in order to stimulate participation, which would have had a positive effect in terms of access for economic operators such as SMEs.

### VII

Unnecessary hurdles make life difficult for potential tenderers who want to identify procurement opportunities offered by the EU institutions. The visibility of the EU institutions' procurement opportunities on the internet is poor. The information available is patchy and spread over many different websites. The search function of TED (Tenders Electronic Daily) did not always produce satisfactory results. Tools which allow tenders to be submitted electronically have not yet been rolled out in a comprehensive and harmonised manner.

### VIII

Economic operators who consider that they have been unfairly treated find it difficult to obtain a rapid review of their complaints and compensation for damages. Information on the outcome of the EU institutions' procurement activities is not accessible in a way that allows effective monitoring by the public.

### IX

The Court concludes that the EU institutions can do more to facilitate access to their public procurement and therefore makes the following recommendations so that they adopt a policy to systematically foster wider participation:

- (a) In order to facilitate the monitoring of the accessibility of their procurement activities, all EU institutions should collect and analyse data both on the initial number of requests to participate and offers received and the number of offers which were taken into account for the final award decision.
- (b) For the upcoming 2016 revision of the EU Financial Regulation the Commission should consolidate all relevant provisions into a single rulebook for public procurement. Participation of small and medium-sized enterprises should be explicitly encouraged.
- (c) The EU institutions should proactively use preliminary market consultations wherever appropriate with a view to preparing the procurement and informing economic operators of their procurement plans.
- (d) The EU institutions should divide contracts into lots wherever possible to increase participation in their procurement procedures.
- (e) The EU institutions should create a common electronic one-stop shop for their procurement activities allowing economic operators to find all relevant information in a single online location and to interact with the EU institutions through this website.
- (f) The Commission should propose a mechanism for a rapid review of complaints from economic operators who consider that they have been unfairly treated. Such a review should take place before economic operators may turn to the EU Ombudsman or to the EU Courts.
- (g) To allow effective *ex post* monitoring of their procurement activities the EU institutions should set up a single public repository of information related to their procurement contracts which could be developed as part of TED eTendering.
- (h) The European Anti-Fraud Office OLAF should produce reports and statistics on the different types of allegations under investigation and the outcome of these investigations.
- (i) The EU institutions should use peer reviews for mutual learning and exchange of best practice.

## 01

This report begins with a short overview of the framework for public procurement (tendering for works, supplies and services) by the EU institutions and of our audit approach. We explain the internal controls that the EU institutions apply to reduce the number of irregularities to a minimum. We then consider the different stages of the procurement process to assess the degree of accessibility of the institutions' procedures. Have clear and good rules been defined? Are these rules applied in a pro-competitive manner when EU staff prepare procurement procedures? Will economic operators find it easy to identify those procurement opportunities they might be interested in amongst the thousands of procurement opportunities that are published every week? Is it unnecessarily complicated to submit an offer? What happens if an economic operator feels that he has been treated in an unfair manner? And finally, do the EU institutions report on the results of their procurement activities in a way which ensures accountability?

## 02

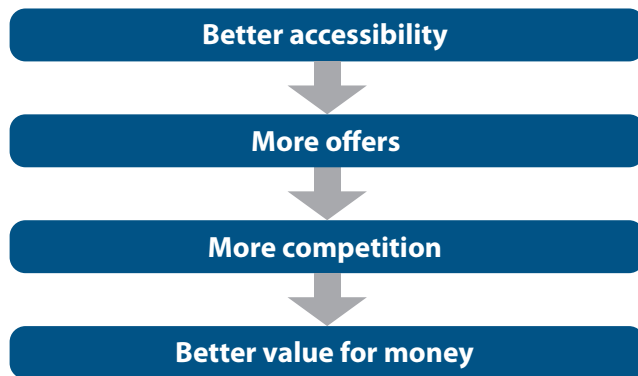
Public procurement policy is a key instrument in developing the single market and in achieving smart, sustainable and inclusive growth while ensuring the most efficient and effective use of public funds. Public procurement rules are designed to benefit both economic operators and contracting authorities. The objective is to develop market opportunities for the former whilst at the same time increasing the choice of potential contractors available to the latter. If the contracting authorities facilitate access to their public procurement, this is likely to trigger more offers in response to their procurement needs. More competition should then result in better value for money for the taxpayer (see **Figure 1**). The EU institutions are required to put public procurement contracts out to tender on the broadest possible basis<sup>1</sup>.

## 03

In 2014 the European Parliament and the Council agreed to reform public procurement policy in the EU. Amongst the main features of the reform package were measures to remove barriers to market access, in particular for small and medium-sized enterprises (SMEs). Our report examines to what extent the EU institutions' procurement practices facilitate such access.

<sup>1</sup> See Article 102(2) of the EU Financial Regulation which allows exceptions to this rule only when use is made of the negotiated procedure.

Figure 1

**Better access for economic operators, better value for money for the taxpayer**

Source: European Court of Auditors.

## The framework for public procurement by the EU institutions

### 04

The award of public contracts has to comply with the principles of the Treaties, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal access and equal treatment, non-discrimination, mutual recognition, proportionality, fair competition, publicity and transparency.

### 05

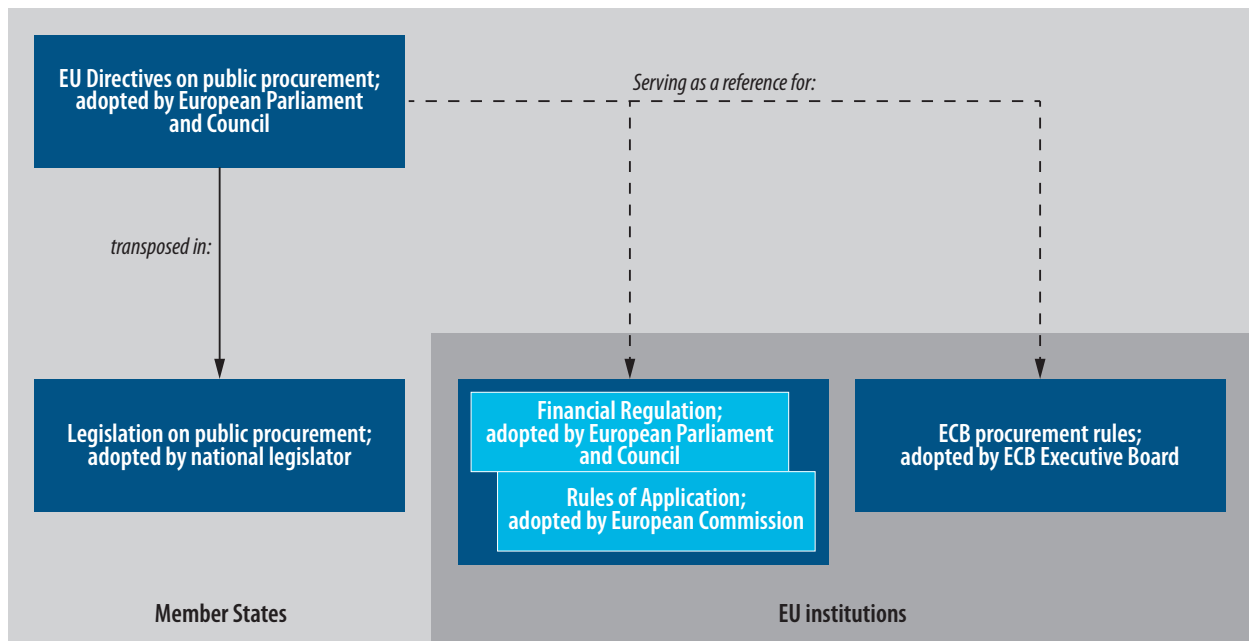
Public procurement in EU Member States is governed by Directive 2014/24/EU<sup>2</sup> (hereinafter referred to as the '2014 Procurement Directive') and a number of other directives which establish common rules which contracting authorities have to follow for procurements above a certain value. These rules have to be transposed in national legislation. Directives are not legally binding upon EU institutions. The latter have adopted their own rules which are broadly in line with the 2014 Procurement Directive with some important exceptions<sup>3</sup>. For the EU institutions financed from the general budget procurement rules are laid down in the financial rules as last amended in October 2015<sup>4</sup> (hereinafter referred to as the 'EU Financial Regulation') and in their rules of application as last amended in October 2015<sup>5</sup> (hereinafter referred to as the 'RAP'). The procurement rules of the European Central Bank are set out in a decision<sup>6</sup> (hereinafter referred to as the 'ECB rules on procurement'), adopted by its Executive Board in February 2016.

**Figure 2** shows the legal framework for EU public procurement.

- 2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).
- 3 See paragraphs 29 to 31.
- 4 Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union (OJ L 286, 30.10.2015, p. 1).
- 5 Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015 amending Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 342, 29.12.2015, p. 7).
- 6 Decision (EU) 2016/245 of the European Central Bank of 9 February 2016 laying down the rules on procurement (OJ L 45, 20.2.2016, p. 15).

Figure 2

Legal framework of EU public procurement



Source: European Court of Auditors.

Public procurement procedures: how do they work?

06

Based on the EU Financial Regulation the Commission’s internal procurement guide<sup>7</sup> distinguishes 10 different procedures for procurement (see **Box 1**). The choice to be made depends on various factors, in particular on the estimated value of the contract. The most important steps of the procurement process are shown in **Figure 3**.

7 Vade-mecum on public procurement in the Commission (November 2015, unpublished); made available to other EU institutions, bodies, offices and agencies.

### The procedural options under the EU Financial Regulation

**Open procedure:** Standard procedure that may be used for any contract starting with publication of a contract notice in the Official Journal (OJ). Any economic operator who is interested may tender.

**Restricted procedure:** Standard procedure in two steps starting with publication of a contract notice in the OJ that may be used for any contract. Any interested economic operator may ask to participate, but only those invited may submit a tender that will be evaluated in the second step. A variant of this procedure is the dynamic purchasing system with exclusive use of electronic means.

**Competitive procedure with negotiation:** A procedure which is similar to the restricted procedure and that may be used only under specific cases regardless of the value of the purchase. The submitted tenders (technical and financial offers) can be negotiated.

**Procedures following a call for expressions of interest (CEI):** The CEI preselects candidates or registers vendors who may later be invited to submit offers in different procurement procedures.

**Negotiated procedure without publication of a contract notice:** Exceptional procedure that can only be used in certain cases or circumstances (for example extreme urgency).

**Negotiated procedure for middle and low value contracts:** The contracting authority must invite economic operators to tender who have shown their interest during *ex ante* publicity, and can, in addition invite candidates of its choice. For very low value contracts negotiation with a single candidate chosen by the contracting authority is allowed.

**Competitive dialogue:** Used for complex procurements where the contracting authority is unable to define the means of meeting its needs or of assessing what the market can offer in terms of technical or financial or legal solutions without a dialogue with potential tenderers.

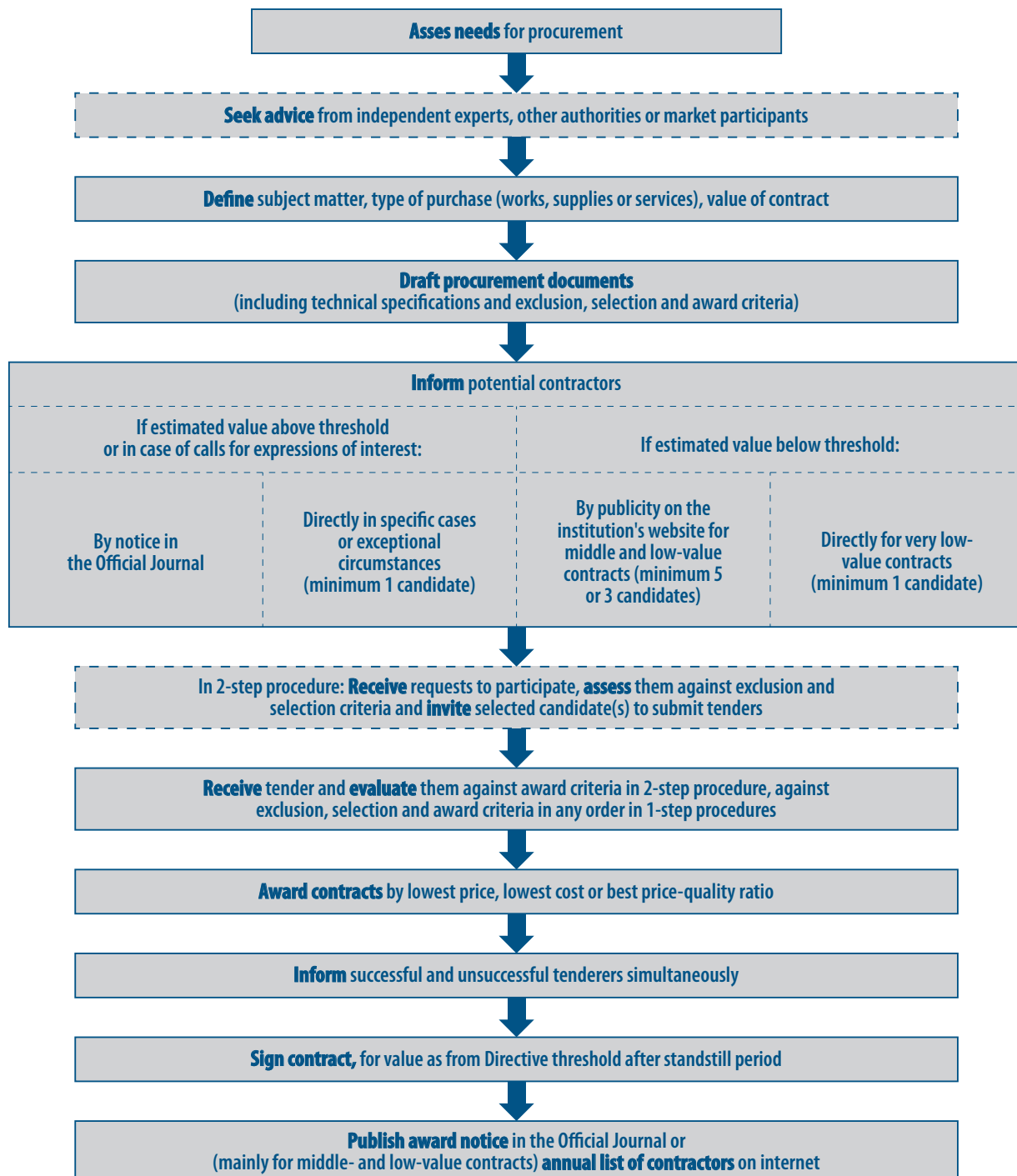
**Innovation partnership:** Two step procedure for the acquisition of an innovative product that still has to be developed and for which no equivalent product is available on the market.

**Design contest:** This enables the contracting authority to acquire a plan or design proposed by a jury after a competitive procedure with or without the award of prizes. The winner or winners are then invited to negotiate before signature of the subsequent contract.

**Negotiated procedure for building contracts:** Building contracts (purchase, long lease, usufruct, leasing, rental or hire purchase, with or without option to buy, of land, existing buildings or other real estate) can be concluded by negotiated procedure without publication of a contract notice, after the local market has been prospected.

Figure 3

## Overview of the procurement process under the EU Financial Regulation



Note: Boxes with dotted lines indicate a procedural step that is optional. The thresholds of the EU Procurement Directive are 5 225 000 euros for works and 135 000 euros for services or supplies. Middle-value between 60 000.01 euros and 5 224 999.9 euros for works and between 60 000.01 euros and 134 999.9 euros for services or supplies. Low-value between 15 000.01 and 60 000 euros. Very low value between 1 000.01 and 15 000 euros. For amounts up to 1 000 euros no procurement procedure is required.

Source: European Court of Auditors.



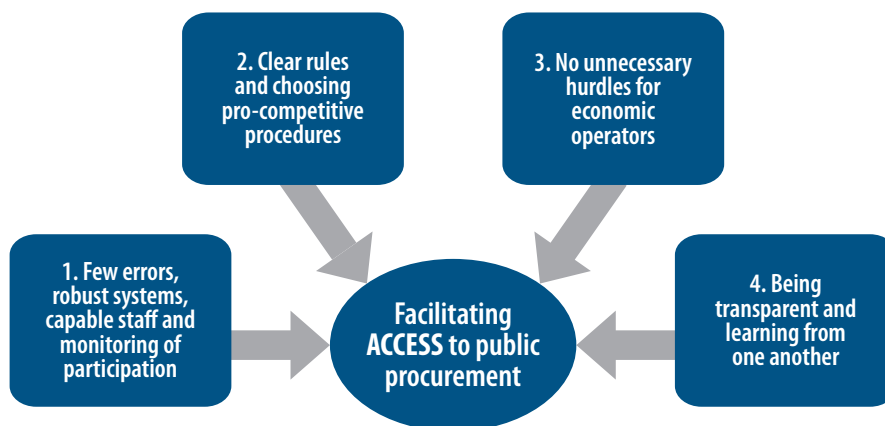
## Audit scope

### 07

We examined to what extent the EU institutions facilitate access to their public procurement. See **Figure 4** for the prerequisites for facilitating access to public procurement.

Figure 4

### Prerequisites for facilitating access to public procurement



Source: European Court of Auditors.

### 08

We therefore considered the following four questions:

- Do the EU institutions have robust systems that foster participation whilst protecting the Union's financial interests?
- Do the EU institutions make the right procedural choices to increase participation in their procurement procedures?
- Do the EU institutions to the greatest extent possible remove hurdles that make life difficult for potential tenderers?
- Do the EU institutions ensure in a comprehensive and systematic manner that the outcomes of their procurement procedures are transparent and that they learn from one another?

**Audit scope and approach**

**09**

We covered the procurement activities of the four largest EU institutions: the European Commission, the European Parliament, the Council of the European Union and the European Central Bank (ECB). In 2014 the total value of all contracts above 15 000 euros (above 10 000 euros for the ECB) of these four institutions is presented in **Table 1**:

**Table 1**

**Value of contracts in 2014**

Institution	<i>In million euro</i>
Commission	3 034
Parliament	497
ECB	515
Council <sup>1</sup>	171
<b>Total</b>	<b>4 217</b>

1 Council’s estimated value of procedures launched in 2014.  
 Source: European Court of Auditors based on data provided by the audited institutions.

**10**

In addition, the following EU institutions and bodies were included in our audit to examine specific issues: the Court of Justice of the European Union for its jurisprudence in relation to public procurement by the EU institutions, the European Ombudsman who deals with maladministration in procurement procedures, the European Anti-Fraud Office (OLAF) for its investigations in connection with irregularities in procurement procedures and the Publications Office which manages online services giving access to information on public procurement.

**11**

We did not look into public contracts concluded by the Commission on behalf of and on the account of beneficiaries in connection with external actions<sup>8</sup>, nor at procurements where the management of EU spending involves other organisations or bodies (so-called ‘indirect management’ by the Commission) or where the management is shared with Member States.

8 Specific rules apply which are laid down in Part Two, Title IV of the EU Financial Regulation.

## Audit scope and approach

### Audit approach

#### 12

We based our observations on the following main sources of audit evidence:

- (a) We carried out preliminary research with representatives of business organisations, national procurement experts and experts from the academic world;
- (b) We reviewed documentation relating to procurement policies, procedures and tools;
- (c) We analysed samples of procurement files covering the years 2013–2015 from the European Parliament (DG INLO and DG COMM), from the General Secretariat of the Council, from the Commission (DG Internal Market, Industry, Entrepreneurship and SMEs, Joint Research Centre (JRC)) and from the ECB;
- (d) We tested the EU institutions' online tools which are meant to assist in the identification of procurement opportunities;
- (e) We interviewed EU staff;
- (f) We analysed the EU institutions' replies to our questionnaires.

#### 13

In addition, we surveyed 47 smaller EU bodies to obtain their opinions and views with regard to procurement policies and processes. 40 replies were received (response rate 85 %). Results are summarised in **Annex II**.

## Section I — The EU institutions manage to keep the number of serious errors low in their procurement procedures but participation therein is not systematically monitored

### 14

The EU institutions should be able to demonstrate that they ensure accessibility in their procurement activities. To that end, they need information on the level of participation of economic operators in their procurement procedures. They must also prevent serious errors and irregularities whose occurrence could adversely affect the possibility for economic operators to participate and undermine their confidence and hence their interest in the EU institutions' procurement. We examined the information available on serious errors and irregularities, the systems to prevent them and the participation by economic operators in the EU institutions' procurement procedures.

### In contrast to the situation in shared management with Member States, few serious errors or irregularities are reported in connection with the EU institutions' procurement

### 15

In our annual Statement of Assurance<sup>9</sup> we detect few serious public procurement errors in the transactions directly managed by the EU institutions<sup>10</sup>. As in previous years, this contrasts with the situation in shared management with the Member States<sup>11</sup>.

### 16

At our request OLAF analysed its information on alleged irregularities received between 1 January and 30 April 2015 to identify cases related to public procurement. In total, OLAF counted 503 different incoming information items. Only 20 out of 503 notifications concerned procurement by the EU institutions, 16 of these were dismissed at the initial case selection phase and four led to the opening of an investigation. These figures imply that, compared to the total number of procurement procedures launched by EU institutions, the share of cases with potentially serious irregularities is in the order of 1 %, if one takes into account the approximately 2 000 procedures per year where a contract award notice is published in the Official Journal by the EU institutions.

- 9 See for example the most recent annual report of the Court of Auditors on the implementation of the budget concerning the financial year 2014, together with the institutions' replies (OJ C 373, 10.11.2015), paragraph 1.29.
- 10 Errors in direct management mostly occurred with grants financed from the EU budget.
- 11 See our Special Report 10/2015 'Efforts to address problems with public procurement in EU cohesion expenditure should be intensified', in particular paragraphs 19 to 24 and Table 1 which provide a typology of errors. The works, supplies and services procured in connection with cohesion expenditure in Member States include items such as road construction or waste water treatment plants which are normally not to be found in the procurement portfolio of the EU institutions (<http://eca.europa.eu>).

### 17

OLAF only produced these statistics at our specific request and they only represent a snapshot at a given point in time in order to have an idea of the number of potential cases brought to OLAF's attention. It would have been more useful if OLAF had been able to provide statistics which allow trends to be identified and the outcome of its investigations to be assessed.

### **The EU institutions have robust systems and capable staff to keep the risk of errors and irregularities under control**

#### **Procedural expertise and assistance is available to the operational services**

### 18

Successful procurement requires a combination of technical expertise concerning the specific works, supplies and services being procured and sound knowledge of the rules and procedures to be applied.

### 19

All entities whose procurement procedures we examined<sup>12</sup> have dedicated units of procurement experts who advise and assist the operational services on their procurement activities. We found that the procedural expertise of the procurement experts complements the technical expertise of the operational services and that the staff resources dedicated to procurement activities are appropriate. Furthermore, procedural advice and expertise is available from the EU institutions' legal services and/or central financial units.

### 20

Most of the audited entities have internal committees in place that aim to strengthen governance and control over procurement procedures. Typically these committees are composed of staff from other parts of the organisation. Such committees have decision-making powers or can issue recommendations and they tend to deal with the larger procurements and/or with procurements with a more limited form of competition. Prior to the signature of a contract, these committees provide additional assurance that applicable rules have been followed. Furthermore, their interdisciplinary composition makes them a platform for the exchange of views in the larger institutions where procurement is decentralised.

<sup>12</sup> See paragraph 9.

### **Advice from internal audit services played an important role**

#### **21**

The current organisational set-up and procedures for procurement activities are to a considerable extent the result of recommendations made by the internal audit services some years ago. In the meantime, most internal audit services have focussed their attention on other areas of their institutions' activities and allocated limited resources to public procurement. However, the internal audit services will have to revisit procurement to assess the implementation of the recent revision of the procurement rules and, based on the results of this reassessment, adjust their work programmes accordingly.

### **The ECB obtained external certification of its procurement activities**

#### **22**

In addition to internal advice, external certification can help to bring in outside knowledge and perspective and can be a driver for improvement. The Central Procurement Office (CPO) of the ECB applied for and obtained an external certification of its activities. The certification was awarded by the Chartered Institute of Purchasing & Supply (CIPS) in 2011. The ECB's certification, called the 'PPP Award' (Processes, Policies and Procedures) for achieving the standard of excellence in these fields, expired at the end of 2015 and the CPO has planned to undergo a full recertification process in the first quarter of 2016.

### **Most EU institutions do not systematically measure the level of participation in their procurement procedures**

### **Simply counting the number of offers received is not enough to reliably monitor the level of participation**

#### **23**

When they publish a contract award notice in the Official Journal, the EU institutions have to indicate the number of offers received for the contract in question. However, this information alone is not a sufficient basis to reliably assess the level of competition in a procedure. Competition might be weak even in cases where several offers have been received. This is in particular the case when only one offer can be taken into account for an assessment against the award criteria and the others have been eliminated before they reach the final stage of the evaluation. Offers can be eliminated from the final evaluation for various reasons, notably when they are incomplete or do not comply with the exclusion or selection criteria.

## Observations

### JRC data show that in half of the procedures only one offer could be taken into account for the final award decision

#### 24

Only the Commission's JRC compiles data, collected procedure by procedure and for each type of procedure, on the number of offers received, the number of offers in order, the number offers admissible, the number of offers found compliant and the number of offers ranked.

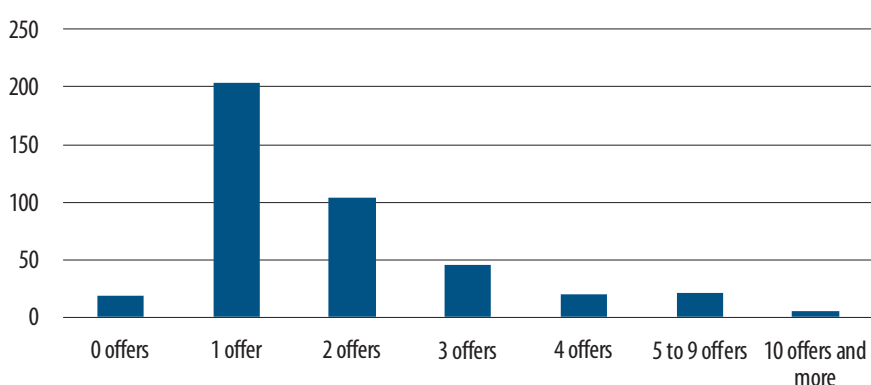
#### 25

We analysed JRC's statistics for 2013 and 2014 to compare the number of offers received with the number of offers which had made it to the final stage and could be assessed against the award criteria. 468 procedures for contracts over 60 000 euros were included in the analysis. In 50 of these procedures only one candidate could be taken into account from the outset, constituting an exception to the principle of broadest possible competition<sup>13</sup>. For the remaining 418 procedures in half of the cases (49 %) only one offer could be taken into account for the final award decision (see **Figure 5**).

<sup>13</sup> Most notably negotiated procedures where the contract could be awarded only to a particular economic operator for technical or artistic reasons, or because of the protection of exclusive rights.

Figure 5

#### Frequency of procedures by number of offers taken into account for the final award decision (418 JRC contracts signed in 2013 and 2014 over 60 000 euros)



Source: European Court of Auditors based on data provided by the JRC.

### **Section II — The rules to be followed and the procedural choices made at the start of the procurement process are not sufficiently geared towards increasing participation**

**When revising their procurement rules in 2015, the EU institutions did not facilitate access to procurement by simplifying rules and clarifying grey areas to the fullest extent possible**

**The EU Financial Regulation and its rules of application have not been consolidated into a single document and remain an unnecessarily complex piece of legislation**

#### **26**

The 2015 revision of the EU Financial Regulation has maintained the division of public procurement rules between, on the one hand, the Financial Regulation itself and, on the other, its rules of application. As we pointed out in our Opinion No 1/2015<sup>14</sup> this division was detrimental to the objective of clarification underlying the revision. Furthermore, there is no discernible advantage from this division. It renders the understanding of already complicated rules even more difficult, not only for EU staff but *a fortiori* for economic operators.

#### **27**

Further complication is added by the fact that not all relevant provisions are to be found in the titles and chapters of the EU Financial Regulation which specifically address public procurement issues. Important provisions feature elsewhere in the text, for example the provision concerning 'good administration', which is of particular importance to economic operators<sup>15</sup>.

#### **28**

The ECB rules on procurement demonstrate that it is possible to consolidate all relevant rules in a single text.

14 See paragraph 8 of the Opinion (OJ C52, 13.2.2015, p. 1).

15 Article 96 of the EU Financial Regulation on good administration provides *inter alia* that the institution has to ask the applicant or tenderer to provide missing information or clarify supporting documents in case of obvious clerical errors.



## Important deviations from the 2014 Procurement Directive are not explained

### 29

Although the procurement rules of the EU institutions broadly follow the provisions of the 2014 Procurement Directive, there are deviations from these provisions which are not explained. Two of these deviations are important for the accessibility of the EU institutions' procurement. One relates to the participation of SMEs, the other to the purpose of preliminary market consultations.

### Participation of SMEs is not specifically encouraged

### 30

One of the major objectives of the 2014 Procurement Directive is 'facilitating in particular the participation of small- and medium-sized enterprises (SMEs) in public procurement'<sup>16</sup>. In this connection, the legislator explicitly warned against the risks of excessive concentration of purchasing power from an aggregation of demand by public purchasers. Throughout the 2014 Procurement Directive, the term 'SMEs' appears more than 20 times. By contrast, the amendments made to the EU Financial Regulation and the recast ECB rules on procurement do not refer to SMEs at all. In our audit, we found that, with the exception of DG Internal Market, Industry, Entrepreneurship and SMEs<sup>17</sup>, none of the entities audited had issued specific guidance or instructions on how to facilitate the participation of SMEs or to monitor the level of their participation. In our survey only one out of 40 respondents indicated that SME participation was one of their priorities. Nevertheless some procurement procedures clearly provided opportunities for SMEs (see **Box 2**).

### Preliminary market consultations with the objective of informing economic operators are not mentioned

### 31

The 2014 Procurement Directive explicitly allows for preliminary market consultations before the procurement procedure itself and defines the principles to be respected<sup>18</sup>. The contracting authorities may seek or accept the advice from independent experts or authorities or from market participants to 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. The 2014 Procurement Directive states that such market consultations are conducted not only with a view to preparing the procurement but also to informing economic operators of the contracting authorities' procurement plans and requirements (see **Box 3**). The latter objective has not been taken over in the EU Financial Regulation<sup>19</sup>.

16 See recital 2 of the 2014 Procurement Directive.

17 In its communications with potential tenderers, DG Internal Market, Industry, Entrepreneurship and SMEs stresses that SMEs are particularly invited to participate. SMEs are encouraged to submit alone, in a consortium or as a sub-contractor.

18 See Article 40 of the 2014 Procurement Directive.

19 The ECB rules on procurement do not mention preliminary market consultations.

## Box 2

**Examples of procedures easily accessible for SMEs**

In 2014 the European Parliament needed expert advice for its Committee on Environment, Public Health and Food Safety. The total estimated value of the services was 2.5 million euros over a period of 4 years. Rather than looking for a single contractor, Parliament split up the services into five lots: environmental policy, climate change, sustainable development, public health and food safety. For each lot, several suitable contractors were identified. In total the Parliament concluded contracts with 17 different companies.

In 2014 the Council procured promotional products for a total value of 122 566 euros. The procurement was divided into 12 lots depending on the type of products needed (such as watches, t-shirts or pens). Competition between tenderers was possible on the level of each lot and contracts were signed with three different companies.

For its new premises in Frankfurt the ECB had at first failed to find a 'general contractor', as what was offered considerably exceeded the ECB's budget. The ECB then decided to tender the construction works in 14 packages with 4 to 10 lots within each package. As a result of the revised tendering strategy, SMEs could participate and were awarded contracts. The ECB was able to manage some 60 construction companies working in parallel.

## Box 3

**An unwarranted deviation from the 2014 Procurement Directive in the 2015 EU Financial Regulation**

'Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.' (from Article 40 of the 2014 directive, emphasis added)

'Before launching a procurement procedure, the contracting authority may conduct a preliminary market consultation with a view to preparing the procedure.' (from Article 105 of the 2015 EU Financial Regulation).

### How to prospect the local market for real estate has not been clarified

#### 32

The 2014 Procurement Directive does not apply to the acquisition or rental of land, existing buildings or other immovable property. Nevertheless, the procedures applied for such contracts should comply with the principles of the Treaty, and in particular with the principles of equal treatment and transparency.

#### 33

Neither the EU Financial Regulation nor the ECB rules on procurement set out how potential vendors or contractors are to be informed and contacted when the EU institutions are looking for land or for existing buildings. As a consequence this remains largely left to the discretion of the institutions' managers. In our audit, we found cases where the latter explored the market themselves and contacted potential vendors or contractors of their choice directly, cases where external consultants were used to help identify suitable offers as well as cases where a prospection notice was published in the Official Journal.

#### 34

Only the Commission has made a public commitment<sup>20</sup> that it will guarantee transparency by systematically publishing prospection notices in the Official Journal which indicate the minimum requirements of each specific project and the exclusion and prospection criteria that apply and also by publishing the outcome of the procedures. In our audit, we saw that the procedure was used for Commission building contracts in Brussels but not in Luxembourg. The European Parliament last issued a prospection notice in the Official Journal when it was seeking buildings in the Brussels-Capital Region in 2010.

20 See COM(2007) 501 final of 5 September 2007 on Policy for the accommodation of Commission services in Brussels and Luxembourg; in particular the section 'Increased competition on the marketplace: A revised methodology for buying and rental of buildings'.

## Observations

### **Only the ECB has set out the applicable language regime in its procurement rules**

#### **35**

The languages to be used for public procurement are not set out in the EU Financial Regulation. Only the ECB rules on procurement set out a language regime<sup>21</sup>. The procedures applied by most EU institutions risk creating an expectation gap with potential tenderers. The EU institutions publish their notices in TED in all official languages. In addition, economic operators may request translation of the detailed tender documents and may submit their tenders in any official language. Once the tenderers have become contractors, however, they often cannot continue in the official language of their choice but must fulfil the needs of the contracting authority as provided in the tender specifications. This usually includes a specific language for contacts (communication during contract execution) and for deliverables.

### **Not all procedural choices fostered competition on the broadest possible basis**

#### **36**

We found that many procurement officers are under pressure to avoid litigation and/or to reduce the time and resources needed to carry out procurement procedures. This may lead to procedural choices which are defensible from a legal point of view but where a more pro-competitive interpretation of the rules would be desirable from a sound financial management perspective.

### **Only the ECB had a policy to undertake preliminary market consultation prior to starting the formal procurement procedure**

#### **37**

Thorough market consultation before starting the formal procurement process is important for optimising the requirements and technical specifications set out in tender documents and for verifying the availability and willingness of potential tenderers to participate in a procedure.

21 The ECB rules provide that procurement procedures are conducted in English, unless there are exceptional circumstances relating to the procedure or the subject matter of the contract that require the use of other languages.

## Observations

### 38

Until the most recent revisions of the Procurement Directive and the EU Financial Regulation, market consultation prior to launching calls for tenders was not mentioned in procurement rules (see paragraph above). Moreover, with the notable exception of the ECB, internal guidance or instructions issued by the EU institutions with regard to market consultation put much emphasis on the risks associated with this approach and set restrictive conditions or even discouraged the option of approaching potential bidders. For example the Parliament's internal Vade Mecum on public procurement procedures (November 2014) recommended not to seek or accept opinions from individuals or operators with an interest in the relevant contract, as this might hinder competition.

### 39

This may trigger a risk-averse attitude amongst procurement officers. In the procurement files examined, we found little evidence that comprehensive market consultation had taken place. This was also confirmed by our survey. Many respondents indicated that they rarely made use of market consultation prior to launching a procurement procedure.

### 40

In contrast to the other EU institutions, the ECB's procurement unit has issued and implemented internal guidelines for a proactive approach with suppliers before starting the formal procurement process in order to get better value for money. This involves in particular holding informal meetings with both incumbent and potential contractors in order to gain market intelligence, to explain the ECB's requirements and to foster competition.

### **Contracts were not divided into lots as often as they could have been**

### 41

Dividing a contract into lots increases competition and makes it easier for small and medium-sized enterprises to participate. The larger a contract, the less likely it will be awarded to SMEs<sup>22</sup>.

22 See the study 'SMEs' access to public procurement markets and aggregation of demand in the EU' of February 2014 made at the request of the Commission by external consultants.

## 42

Article 168 of the RAP provides that ‘whenever appropriate, technically feasible, and cost efficient’ contracts are to be awarded in the form of separate lots within the same procedure. This wording leaves authorising officers with broad discretion whether or not to use lots. We found that dividing contracts into lots was not used to the fullest extent possible. Examples where lots could have been used are given in **Box 4**. Compared to the situation at central state level in Member States the share of contract notices with lots published in TED was markedly lower for EU institutions (see **Figure 6**).

## Box 4

**Cases where contracts could have been divided into lots**

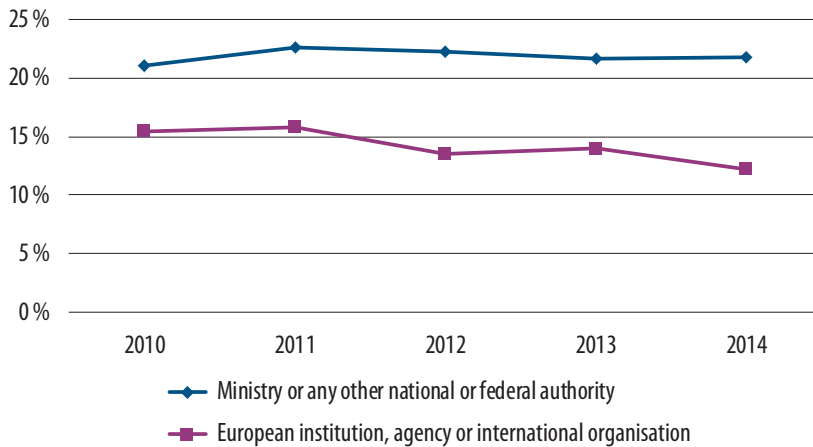
In 2014 the Council awarded a framework contract for 10 years and a value of over 93 million euros for management, maintenance, repair and adaptation of technical installations in its present or future buildings to a single company without splitting it into lots. The services to be provided include such diverse domains as: heating, ventilation, air conditioning, water and sanitary installations, electricity, emergency networks, photovoltaic, collective protective equipment, culinary equipment, emptying of grease separators, monitoring of consumption, technical assistance and works to adapt the installations.

The Commission did not use lots in 2015 for the 5-year contract ‘“Your Europe Advice” — the European Union’s free legal advice service’ with a value of over 8.9 million euros. This service is very complex as it concerns legal advice in all EU languages and expertise in all EU legal systems is required. The only tender was presented by the incumbent service provider as it was probably the only economic operator in a position to present a ready-made offer for such a wide scope of the service. However, the number of downloads of the tender documents (211 downloads) showed a big interest in this call. Splitting it into lots, for example by groups of countries, might have facilitated the participation of other economic operators.

In 2014 the European Parliament contracted a company for the cleaning of its buildings in Strasbourg with a value of over 19.8 million euros for a period of 5 years. The services requested were described as ‘Cleaning of offices, windows, joinery and metal cladding (interior and exterior), and other general hygiene services in the European Parliament buildings in Strasbourg’ and all placed in one lot. The window cleaning could have been awarded in a separate lot, increasing the number of companies that could have benefited from this opportunity. Window cleaning is often performed as an activity separate from office cleaning by different staff, with a different frequency and requiring different experience, skills and tools.

Figure 6

**Share of procedures with lots — comparison between contract notices of EU institutions and central national authorities**



Note: When no information on the use of lots was provided in the contract notice, we assumed that no division into lots had taken place. The TED reporting category 'European institution, agency or international organisation' includes a very small number of contract notices of international non-EU organisations.

Source: ECA based on data from the Publications Office.

**43**

Whereas dividing contracts into lots and publishing them simultaneously can increase the accessibility of procurement procedures, EU institutions must not artificially split a procurement in order to avoid the need to apply a more competitive procedure. For example, the European Parliament purchased office furniture in 2014 from one supplier through four different negotiated procedures with a single tenderer in a period covering less than 2 months. The four procedures all had contract values under the applicable threshold for wider publicity, ranging from 8021 to 14 110 euros and totalling 43 345 euros. All four procurements were very similar, each of them dealing with office furniture for directors and directors-general housed in one specific building.

**The use of restricted procedures risked discouraging potential tenderers**

**44**

The EU Financial Regulation provides that the contracting authority may use the open or the restricted procedure for any purchase. The ECB rules on procurement give priority to the open procedure as they provide that the open procedure is the standard procedure.

### 45

A restricted procedure<sup>23</sup> presents certain advantages, in particular if there is a need to limit the circulation of the tender documents for security/confidentiality reasons. However, at least before the latest revision of the procurement rules, there was a risk that potential tenderers refrained from participating because the invitation to tender with the detailed specifications were not available in the first phase and it was therefore difficult for them to get a clear view of what was expected by the contracting authority. Whether this will change with the revised RAP in force as from 2016 remains to be seen. The RAP provide that the procurement documents including the full tender specifications should also be made available from the start in the case of two-step procedures such as restricted procedures. The RAP include, however, an exception clause which allows derogations from this rule in justified cases, for example where there are confidentiality or technical issues.

### 46

Furthermore, a restricted procedure usually takes longer than an open procedure, which in itself might discourage potential tenderers. The minimum time limit for submissions under an ordinary open procedure with electronic access to tender documents is 47 days, for the restricted procedure it is 37 plus 35 days. In addition, the two steps of a restricted procedure are disrupted by the time needed for the processing of requests to participate. Further delays might occur when applications to participate are rejected and the operators concerned object to their exclusion. Finally, no flexibility is possible to assess tenders against the award criteria first without prior check on exclusion or selection criteria which will lengthen the process further as compared to the open procedure.

### 47

Over the years 2010 to 2014, for all EU institutions taken together, the number of contract awards following an open procedure has consistently been about three times higher than the number of awards under a restricted procedure. By contrast, the Council used restricted procedures in the vast majority of cases during that period. The length of these procedures was a major issue. During the period from 2011 to 2013 their average duration was almost 1 year, including an average of 170 days between the publication of the contract notice and the receipt of offers.

23 Contrary to the open procedure, the restricted procedure is organised in two phases. In the first phase any interested economic operator may ask to take part, but only those who meet the selection criteria can submit a tender.



**The use of negotiated procedures was in general closely monitored****48**

The 2014 reform of the procurement rules has increased the scope for procurement procedures which involve negotiations with tenderers, in particular through the new 'competitive procedure with negotiation'. For our audit it was too early to assess the impact of the new rules.

**49**

In the past, negotiated procedures without prior publicity have been used four times more frequently than negotiated procedures with publicity in the Official Journal. The main reason for negotiated procedures without prior publicity was that the works, supplies or services could only be provided by a single economic operator and no reasonable alternative or substitute existed.

**Box 5****Cases where wider publicity would have been appropriate**

The European Parliament used a negotiated procedure to conclude a 'building contract' for 133.6 million euros for a building in Brussels although the building did not exist when the contract was signed on 27 June 2012. As we explained in our Special Report No 2/2007<sup>24</sup>, only existing buildings are covered by the exception from tendering on the broadest possible basis provided in Article 134(1) of the RAP. Unfinished buildings or buildings not yet constructed should be subject to open and competitive award methods.

The ECB's Executive Board expressed the need for organisational consultancy services in order to fulfil the new mission of the Bank in the field of banking supervision just a few months before the start of the Single Supervisory Mechanism in November 2014. Five potential tenderers were directly approached and invited to submit offers, but no contract notice was published based on the exception 'when, for reasons of extreme urgency brought about by events unforeseeable for the ECB, the time limits for the procurement procedures cannot be complied with'. However, in 2013 already it was foreseeable that the creation of the Single Supervisory Mechanism would pose an organisational challenge to the ECB; and it was not demonstrated that the time limits for an accelerated restricted procedure (10 days for the receipt of applications, 10 days for the receipt of tenders) could not be complied with within the available timeframe. The value of the contract was 3.49 million euros.

<sup>24</sup> OJ C 148, 2.7.2007, p. 1, see paragraph 21.

### 50

The use of negotiated procedures without prior publicity was closely monitored by the audited institutions, as required by the EU Financial Regulation. However, at the European Parliament and the ECB we found two cases where wider publicity would have been appropriate (see **Box 5**).

#### **Duty to negotiate in negotiated procedures**

### 51

Contrary to what the name suggests negotiated procedures did not always involve negotiations. This was in particular the case in low-value procedures. Directorates-General of the Commission and of the Parliament dealt with negotiated procedures in such a way that the best offer amongst those submitted was chosen but no attempt was made to improve the offer by way of negotiations.

### 52

Tenderers might however expect that they will be given an opportunity to adjust their initial offer in price or quality following initial submission. In the absence of such a possibility these tenderers are deprived of a chance to win the contract and the institution might be missing out on a better deal.

### 53

Since its revision in 2015, the EU Financial Regulation explicitly provides that the contracting authority may award a contract in a negotiated procedure on the basis of the initial tender without negotiation where it has indicated in the procurement documents that it reserves the possibility to do so. From the perspective of a tenderer, this new provision does not however remove the uncertainty described above, as negotiation may or may not take place.

## Excessively long duration of framework contracts risks hampering competition

### 54

Framework contracts create a long-term relationship with one or more supplier(s) or service provider(s). It can be useful to conclude such contracts for the repetitive acquisition of supplies or services, when the contracting authority knows what it needs but does not know when and what quantity it will need during a certain period of time. As a rule, the maximum duration of framework contracts is 4 years<sup>25</sup> to avoid anti-competitive effects. Only in exceptional cases duly justified in particular by the subject of the framework contract may its duration exceed 4 years. Reducing administrative costs for the contracting authority should not be considered a valid reason.

### 55

In contrast to the other entities audited, during the years 2013 to 2015 the Council has frequently used the exception clause to extend considerably the duration of framework contracts awarded in connection with its buildings. **Box 6** lists such contracts with a duration of seven years or more.

25 The contractual relationship with the economic operator may last longer than 4 years as the duration of the individual contracts based on the framework contract does not need to coincide with the duration of that framework contract.

## Box 6

### Ongoing Council framework contracts with a duration of seven years or more

UCA 093/13: Management, maintenance, repair and adaptation of technical installations in the Council's present or future buildings with a maximum duration of 10 years. Total value: 94 million euros.

UCA 14/048: Modernisation and all-purpose maintenance of lifts at the Council of the European Union's Justus Lipsius Building with a duration of 10 years. Total value: 3.35 million euros.

UCA 14/100: Partitioning and finishing works in the buildings of the General Secretariat of the Council of the European Union with a maximum duration of 7 years. Total value: 6.66 million euros.

UCA 15/010: Replacement and maintenance of supervision and management equipment for electrical and electromechanical installations in the Justus Lipsius Building with a duration of 17 years. No contract award notice published.

UCA 15/011: Improvement and maintenance works for Council of the European Union buildings with a duration of 7 years. Total value: 31.2 million euros.

UCA 034/15: Purchase and maintenance of mobile explosive detection devices with a duration of 10 years. No contract award notice published.

Source: European Court of Auditors.

### Section III — Unnecessary hurdles make life difficult for potential tenderers who want to identify procurement opportunities offered by the EU institutions and benefit from them

#### 56

We examined how easy it was to identify procurement opportunities offered by the EU institutions and whether tools were available to help potential tenderers to submit their bid without unnecessary cost and to obtain an effective review in case of procedural problems.

#### 57

Best practice would be to offer a one-stop shop allowing economic operators to find all relevant information in a single online location (platform) and to interact with the EU institutions through this website. Ideally, procurement procedures including communication on rules applicable, business opportunities, relevant procurement documents, submission of tenders and all other communication between the institutions and economic operators should be handled via one electronic channel. Electronic procurement (see **Box 7**) provides the tools to meet this objective.

#### Box 7

### Electronic procurement — terminology explained

Electronic (public) procurement (e-procurement) is the use of electronic communication and transaction processing by public sector organisations when buying supplies and services or tendering public works.

All phases of the procurement process can be executed or supported by electronic means. Currently the focus is on:

e-notification: electronic publication of notices announcing public procurement opportunities including a hyperlink to an e-tendering platform

e-tendering (also e-access): platform for internet publication of public procurement documentation, such as terms of reference, and for electronic communication between the tenderers and the procuring organisation

e-submission: electronic submission of tenders by economic operators when responding to a call for tenders

*See the COM(2012) 179 final 'A strategy for e-procurement' and COM(2013) 453 final 'End-to-end e-procurement to modernise public administration'.*

### The visibility of the EU institutions' procurement activities on the internet is poor

#### 58

From the perspective of an economic operator, good visibility of the procurement activities of the EU institutions is important for three reasons: it facilitates access to information on contract opportunities, it helps to understand the rules and how to best submit an offer and it generates trust in a fair outcome of the procedures through transparency which will encourage operators to participate.

### The information available is patchy and spread over many different websites

#### 59

Europa.eu is the official website of the European Union. According to its own brief, it should be 'a good starting point if you are looking for information and services provided by the EU but you don't know your way around our sites'<sup>26</sup>. Beyond referring to the existence of procurement by EU institutions, Europa.eu does not give any introductory information on the EU institutions' procurement activities and the applicable rules. The visitor to the website will only find links to the procurement sections of the different EU institutions (a total of 11 links) and to the EU Bookshop for a free download of a 2009 booklet 'Doing business with the European Commission'.

#### 60

Another website which is likely to be visited as a first contact with the EU institutions' procurement is the Commission's central public procurement page<sup>27</sup>. This website shows a list of policy areas where the Commission might have procurement needs with links to the websites of the different directorates-general in charge of these policies. No further information is provided.

#### 61

In contrast to the central websites, the websites of the Commission's directorates-general and of the other EU institutions provide more information. However, the scope of the topics covered varies significantly, as can be seen from **Table 2**, which summarises the results of our analysis of 11 different websites.

26 [http://europa.eu/abouteuropa/index\\_en.htm](http://europa.eu/abouteuropa/index_en.htm)

27 [http://ec.europa.eu/contracts\\_grants/contracts\\_en.htm](http://ec.europa.eu/contracts_grants/contracts_en.htm)

Table 2

Analysis of procurement sections of the EU institutions' websites

	Total per category	Parliament	Council	ECB	Commission								
					DG Communication	DG Informatics	EUROPEAID	DG Internal Market, Industry, Entrepreneurship and SMEs	JRC	OIB	OIL	DG Research and Innovation	DG Taxation and Customs Union
General information about the EU institution's procurement	6		Y			Y	Y	Y		Y			Y
Guide for suppliers on how to submit a bid	5		Y			Y	Y			Y			Y
Information about the legal basis of EU institutions' procurement	8	Y	Y	Y		Y	Y	Y				Y	Y
General terms and conditions and/or template documents	8		Y	Y		Y	Y	Y		Y		Y	Y
Additional training or learning tools (e-learning, guide for internet users)	3		Y				Y			Y			
Opportunity to submit questions related to procurement	8		Y	Y		Y	Y	Y		Y	Y		Y
Registration for alerts about new opportunities	8		Y		Y	Y	Y	Y	Y	Y	Y		
Tender documents available electronically	12	Y	R	R	Y	Y	Y	Y	Y	Y	Y	Y	Y
Additional search options within website available	3		Y				Y		Y				
Information about current procurement opportunities of high value	12	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Indication of future or planned procedures of high value	4						Y		Y	P			Y
Information about current procurement opportunities of low value	6	Y	Y	Y			Y		Y			Y	
Indication of future or planned procedures of low value	4	Y					Y	Y	Y				
<b>Total per website examined</b>		<b>5</b>	<b>11</b>	<b>6</b>	<b>3</b>	<b>8</b>	<b>13</b>	<b>8</b>	<b>7</b>	<b>9</b>	<b>4</b>	<b>5</b>	<b>8</b>

Key:  
 Y – yes  
 P – partly  
 R – only after registration

Note: The analysis took place between 24 June and 6 July 2015.

Source: European Court of Auditors.

### 62

Among the websites analysed, EuropeAid's website is an example of best practice, as all necessary information is available. There is a user-friendly advanced system for searching for procurement opportunities with many search options. In addition, guidance and e-learning are available. Another important difference in comparison to other websites is that detailed guidelines for procurement procedures are published on EuropeAid's website<sup>28</sup>. Elsewhere such guidelines are treated as internal documents and not published on the official websites. This is for example the case with the Vade-mecum on Public Procurement in the Commission produced by the Central Financial Service of DG Budget. The latest version of this Vade-mecum is from November 2015, but only earlier versions of it can be found on the internet and then only because they have been published by a private law firm and a civil society organisation.

### The search function of TED (Tenders Electronic Daily) did not always produce satisfactory results

### 63

TED (Tenders Electronic Daily) is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement. Every day, from Tuesday to Saturday, around 1 800 public procurement notices are published on TED<sup>29</sup>. The bulk of these notices originate from contracting authorities of EU Member States. Contract notices from the EU institutions are also published via TED when their estimated value is equal to or above the thresholds of the 2014 Procurement Directive, except in the case of a negotiated procedure without publication of a contract notice, as provided for in Article 134 RAP.

### 64

Given the high number of procurement notices, an effective, intuitive search function is crucial for the user-friendliness of TED. Notices in TED can be sorted and searched by country, business sector, place of delivery and a number of other criteria. The TED search function allows different criteria to be combined to search for potentially interesting contract notices. Through tests we identified several issues concerning search options which returned unsatisfactory results. Examples are given in **Box 8**.

28 'Procurement And Grants for European Union external actions — A Practical Guide'.

29 <http://ted.europa.eu>

## Box 8

**Examples of unsatisfactory search results of TED search in ongoing contract notices**

A search in ongoing contract notices combining the business sector 'Construction and real estate' with 'European institution/agency or international organisation' provided a total of 124 hits. However, the elements displayed included numerous contract notices which clearly had nothing to do with 'Construction and real estate', e.g. contract notices related to the 'translation services', to a 'study to support the fitness check of EU consumer law' or to 'SME instrument business community and academy'.

Another search in ongoing contract notices limited to the business sector 'Mining and Ores' in combination with 'European institution/agency or international organisation' gave such unrelated elements as 'Sun protection devices' or 'Construction work for buildings relating to railway transport'. We tested this combination of search criteria on different dates. Several times the search function only retrieved contract notices which had nothing to do with 'Mining and Ores'.

The full text search function did not always produce satisfactory results. We followed the instructions to use inverted commas and typed in for example 'security services' in combination with 'European institution/agency or international organisation' and obtained 147 hits including such unrelated elements as 'Support for developing better country knowledge on public administration and institutional capacity building' or 'Technical assistance for water ambassador education and awareness-raising project'.

TED's search functionality for notices of a given EU institution was improved in December 2015 but was still not fully reliable. For example, ticking the box for Council of the European Union gave a mix of notices published by the Council and by the European External Action Service (EEAS). However, some of these EEAS notices were not shown when one directly ticked the box for the EEAS. Furthermore, finding contract notices of a given EU agency continued to be cumbersome.

(Test searches carried out in January/February 2016)

**Tools to identify business opportunities such as the 'Common Procurement Vocabulary' and the 'Nomenclature of Territorial Units' were not always correctly used****65**

The accuracy of TED results depends on the correct input of data by the contracting authorities, in particular as regards the classification tools used by TED.

**66**

The 'Common Procurement Vocabulary' (CPV) is the most important classification tool. The purpose of the CPV is to make it easier for bidders to identify relevant tender notices by business sector. There are about 10 000 codes structured in a five-level tree hierarchy. Each code is made up of eight digits and a wording that describes the type of works, supplies or services forming the subject of the contract.



## 67

A study commissioned by the European Commission<sup>30</sup> revealed that a relatively high proportion of contract notices contain inaccurate codes. A test with a sample of 405 contract notices showed that the code was inaccurate in about 23 % of the notices. In around 10 % of cases the code applied did not describe the work/supply/service procured; in some 8 %, the code applied was too general, and in about 4 %, the code was too specific. In our audit, we identified contract notices of the Commission with inaccurate codes. Examples are given in **Box 9**.

30 'Review of the functioning of the CPV Codes/System', December 2012, for DG Internal Market and Services.

### Box 9

#### Examples of inaccurate CPV codes used by the Commission

For a study contract related to 'Statistics and forecasts analysis of different markets for motor vehicles' the contracting authority used the code for 'public road transport services' (code 60112000). Value of the contract awarded: 429 300 euros.

For a study contract 'in the fields of emissions and competitiveness and economic analysis of the automotive industry' the code for 'transport equipment and auxiliary equipment to transportation' (code 34000000) was used. Value of the contract awarded: 5 000 000 euros.

For a contract 'Collection of key qualitative and quantitative information on the European Commission's merger decisions' the code for 'market research' (code 79310000) was used. The procedure was unsuccessful, no contract awarded.

## 68

The Nomenclature of Territorial Units for Statistics (NUTS) was established by Eurostat, the EU's statistical office, in order to provide a single uniform breakdown of territorial units for the production of regional statistics for the European Union. In contract notices it can be used to indicate the place of execution/performance of the works, for supply of products or of the provision of services. Most Commission services did not use NUTS codes in their contract notices. If a contracting authority has not specified a NUTS code indicating the place of delivery of the contract, it might escape the attention of potential tenderers.

## Observations

### For e-tendering and e-submission the EU institutions create unnecessary hurdles for economic operators by not using harmonised solutions in a swift manner

#### The TED eTendering platform is only used on a voluntary basis

##### 69

The TED eTendering platform can be used by all EU institutions and agencies and has the potential to become the central point of access to all their calls for tender. It is managed by the Publications Office and registration is free of charge for interested economic operators. The platform is synchronised with the TED website<sup>31</sup> and gives:

- (a) electronic access to all publicly available tender documents;
- (b) the opportunity to submit questions in any EU official language and to view other questions and answers;
- (c) real-time notifications when updates in selected calls for tenders are published.

##### 70

Using TED eTendering has been possible since April 2011 but is not compulsory for the Commission's directorates-general (DGs) and executive agencies, although DG Budget encourages them to use the system. The same holds for the European Parliament, where the aim is that all DGs use TED eTendering. The Council intends to start using TED eTendering in 2016. The ECB has no plans to use TED eTendering. *Annex I* provides a list of all entities which had used TED eTendering by mid-April 2016. The limited number of EU bodies and agencies on the list confirms the finding of our survey that about two thirds of them rarely or never use TED eTendering.

#### The EU institutions are struggling with the introduction of e-submission and lack a common approach

##### 71

Article 95(2) of the EU Financial Regulation<sup>32</sup> requires the institutions and bodies to establish and apply uniform standards for the electronic exchange of information with third parties participating in procurement and grant procedures. The objective is to put in place a single 'electronic data interchange area' for applicants, candidates and tenderers. Article 111(2) tasks the Commission with ensuring that tenderers may enter the contents of the tenders and any supporting evidence in an electronic format.

31 In addition, TED eTendering also provides access to lower-value calls for tenders if the contracting authority decides to publish them.

32 In force since October 2012.

### 72

At the Commission testing of e-submission started in November 2014. The full roll-out has not yet taken place and is planned to begin in July 2016.

### 73

At the European Parliament e-submission is possible for low value contracts only. For high value contracts, submission by electronic means is hindered by the fact that Parliament's e-mail system does not fulfil all requirements set out in the EU Financial Regulation (see **Box 10**). Since 2014 DG INLO has encouraged tenderers to submit parts of their tender files electronically on a memory stick.

#### Box 10

#### The requirements for e-submission

'(...) devices for the electronic receipt of tenders and requests to participate shall guarantee, through technical means and appropriate procedures, that:

- (a) the economic operator can be authenticated with certainty;
- (b) the exact time and date of the receipt of tenders and requests to participate can be determined precisely;
- (c) it may be reasonably ensured that, before the time limits laid down, no one can have access to data transmitted under these requirements;
- (d) only authorised persons may set or change the dates for opening data received;
- (e) during the different stages of the procurement procedure only authorised persons may have access to all data submitted and may give access to these data as needed for the procedure;
- (f) it may be reasonably ensured that any attempt to infringe any of the conditions set out in points (a) to (e) can be detected.'

*(Article 155(2) of the rules of application of the EU Financial Regulation)*

## Observations

### 74

Among the EU institutions the Council has been the pioneer of e-submission but with mixed results. E-submission has been possible since May 2009 with the introduction of the dedicated 'Consilium tendering' website. However submitting offers electronically was optional: procurement managers could decide not to use this option. Where the option was available, tenderers nevertheless were allowed to submit their offers on paper. According to the Council, less than half of the offers were submitted electronically. 'Consilium tendering' is no longer used and the Council is interested in joining the Commission's e-submission system.

### 75

The ECB plans to gradually roll out an electronic tendering system in 2016 which allows tenderers to submit offers electronically via a user account (user name plus password). When tenderers submit their offers electronically, the system will generate a standard unique identifier cover sheet that the tenderers can print out, sign and submit to the ECB in hardcopy to confirm that their offer is valid and legally binding.

### **For economic operators who consider that they have been unfairly treated it is difficult to obtain a rapid review of their complaints and compensation for damages**

### 76

Effective tools to deal with cases where economic operators consider that they have been unfairly treated are important both for the EU institutions and for the economic operators concerned. Such tools enhance the credibility of the EU institutions and strengthen the confidence of economic operators that they will be fairly treated and that it is therefore worth the effort to work with the EU Institutions.

### **Provisions of the Remedies Directives which could enhance the review process have not been incorporated in the procurement rules**

### 77

The Remedies Directives<sup>33</sup> set common standards to ensure that rapid and effective means of redress are available in all EU countries when bidders believe that contracts have been awarded unfairly. The review may be carried out by existing judicial or administrative review bodies. Alternatively an independent specialised non-judicial Review Body may be set up whose decisions can be subjected to judicial review. Another option foreseen in these directives is that the economic operator concerned first has to seek review with the contracting authority before he can resort to the Courts.

33 There are two directives laying down remedies in relation to public procurement: Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33), which covers the public sector; and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14), which covers the utilities sector. Both Directives were amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31).

## Observations

### 78

As is the case with all directives, the Remedies Directives do not apply directly to the EU institutions. Some elements from the directives have been incorporated in the EU Financial Regulation and in the ECB's Rules on Procurement whilst others have been left aside. In particular, no independent specialised non-judicial Review Body has been established to deal with procurement issues related to the EU institutions and whose decisions can be subjected to judicial review despite the fact that such bodies generally have a shorter review length for interim reviews and pre-contractual remedies<sup>34</sup>.

### 79

In line with the Remedies Directives, the EU Financial Regulation provides for a standstill period of 15 calendar days before signature of the contract. This period is reduced to 10 days where the contracting authority uses electronic means to notify the successful and unsuccessful tenderers of its intention to sign a contract<sup>35</sup>. If unsuccessful or aggrieved tenderers or candidates submit requests or comments during the standstill period, the contracting authority **may** suspend the signing of the contract for additional examination. This provision of the Financial Regulation is less favourable for unsuccessful tenderers than the provisions of the Remedies Directives under which the submission of an application for review to the contracting authority results in the automatic suspension of the possibility to conclude the contract<sup>36</sup>.

### 80

Among the audited entities, only the ECB had a robust internal review mechanism to deal with complaints. This so-called 'appeal procedure' is described in **Box 11**.

- 34 See the Commission's final study report 'Economic efficiency and legal effectiveness of review and remedies procedures for public contracts', April 2015, p. 137.
- 35 There is no standstill period in the case of specific contracts based on framework contracts and of exceptional negotiated procedure under Article 134(1) RAP (except 134(1)(b)(one possible operator). There is also no standstill period if only one tender has been submitted.
- 36 The suspension will not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply.

#### Box 11

### The appeal procedure of the ECB

The ECB's rules on procurement allow unsuccessful candidates/tenderers to address an appeal to its Procurement Review Body (PRB). The PRB is an internal body composed of senior managers and supported by the Bank's legal service. If the PRB considers that the decision to reject the appellant's application or tender infringes the Rules on Procurement or general principles of procurement law it must either order that the tender procedure or parts of it are repeated or take a final decision. The PRB notifies the appellant in writing of its decision within 1 month following the receipt of the appeal.

Since 2007, 35 appeals have been received, of which one was pending as at December 2015, six were upheld, 20 were rejected and eight were forwarded to the responsible Procurement Committee and not further pursued by the appellant.

**Procedures before the EU Courts take a long time and compensation for alleged damages is rarely granted**

**81**

The General Court has inter alia jurisdiction to hear and determine at first instance actions brought by economic operators against acts or failures to act by the EU institutions. In the 6-year period from 2009 to 2014 the General Court completed 3 419 cases of which 106 dealt with public procurement by the EU institutions (3.1 %), or on average 17.6 cases per year<sup>37</sup>. The 106 cases relating to public procurement gave rise to a total of 123 decisions: 66 judgments and 57 orders. The breakdown by EU institutions or bodies concerned is shown in **Table 3**.

37 If one compares the number of cases relating to public procurement with the number of award decisions published by the EU institutions and bodies in Tenders Electronic Daily (TED), it can be concluded that the ratio between General Court cases and procurement procedures carried out by EU institutions and bodies is below 1 %. This is lower than in Member States where the ratio of review procedures to the total number of procurement procedures varied between 2 and 12.3 % according to the Annual Public Procurement Implementation Review 2013 (Commission staff working document SWD(2014) 262 final of 1 August 2014, p. 26).

**Table 3** Judgments and orders of the General Court by EU institution or body concerned

	Judgments	Orders
European Commission	41	40
European Parliament	5	4
Council	3	3
European Maritime Safety Agency	3	
Court of Justice of the European Union	2	
European Food Safety Authority	2	
European Medicine Agency	2	
European Central Bank	1	2
European Investment Bank	1	
European Centre for Drugs and Drug Addiction	1	
European Institute for Gender Equality	1	
Frontex	1	
European Environmental Agency	1	
Fusion for Energy Joint Undertaking	1	3
Europol	1	
European Court of Auditors		1
European External Action Service		1
Office for Harmonisation in the Internal Market		1
European Chemicals Agency		1
European Centre for Disease Prevention and Control		1

Source: European Court of Auditors.

## Observations

### 82

During the period examined, actions for annulment were successful in 13 cases, based on the finding that the contracting authority decided unlawfully<sup>38</sup>. The average duration of proceedings of the General Court in the area of public procurement (judgments) was around 35 months.

### 83

The most important damage suffered by participants in a tendering procedure is the loss of profit which they would have gained had they been awarded the contract. During the period examined (2009-2014) there were no successful actions for damages. However, in two more recent cases<sup>39</sup> the General Court ordered the contracting authority to pay compensation for the damages suffered by the economic operator for the loss of an opportunity to be awarded a contract. This may suggest that the General Court is now more inclined to award damages in such cases.

### 84

During the period examined there were no successful applications for interim measures<sup>40</sup> and all 16 appeals brought by economic operators to the Court of Justice against decisions of the General Court were unsuccessful. However, in one of the most significant decisions of 2015 concerning EU institutions' public procurement procedures<sup>41</sup>, the Vice-President of the Court of Justice ruled that, even if the harm invoked is not irreparable, the sufficiently manifest and serious nature of the illegalities identified *prima facie* may justify the imposition of interim measures. The Vice-President of the Court of Justice thus favourably received the General Court's new and more flexible approach as regards the conditions to grant interim measures referring to the right to effective judicial protection<sup>42</sup>.

### The Ombudsman sometimes found friendly solutions but rapid reaction in procurement cases is hampered by procedural rules

### 85

The European Ombudsman investigates complaints of maladministration in the EU institutions and bodies, including complaints concerning public procurement activities. Through a search on the Ombudsman's website, we identified 60 decisions related to public procurement over the period from 18 February 2008<sup>43</sup> to 17 February 2015<sup>44</sup>. The majority of these 60 decisions (34 cases) related to procurement activities outside the EU, frequently involving EU Delegations. The analysis of the 60 decisions is summarised in **Table 4**.

38 It is settled case-law that the EU institutions have broad discretion with regard to the factors to be taken into account for the purpose of awarding a contract. Review by the General Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers. In 10 out of the 13 cases the reason for annulment of the decision was non-compliance of the contracting authority with its duty to state reasons.

39 Case T-299/11 of 7 October 2015 (*European Dynamics v OHIM*) (subject to appeal in pending case C-677/15 P) and Case T-199/14 of 29 October 2015 (*Vanbreda Risk & Benefits v Commission*).

40 Except for one order which was subsequently annulled after appeal. Furthermore, in two cases the contracting authority annulled the tender procedure prior to the decision of the General Court.

41 C-35/15 P(R), *European Commission v Vanbreda Risk & Benefits*.

42 However, in the case at hand the Vice-President rejected the application for interim measures as the Commission had complied with the standstill period before the signature of the contract and the contract in question was concluded long before the application for interim measures was made.

43 First occurrence of a decision related to public procurement under the subject matter 'Award of tenders or grants'.

44 During this 7-year period the Ombudsman received 86 admissible complaints concerning tenders. These included the 60 decisions available from the internet database, 22 cases where the Ombudsman did not find grounds to launch an inquiry and 4 cases which were dropped by the complainants.

**Table 4** Ombudsman's decisions concerning public procurement — overview of results

Category	Number of occurrences	Explanation
<b>Total number of decisions</b>	<b>60</b>	Total number of decisions related to public procurement published on the Ombudsman's website under subject matter 'Award of tender or grants'.
<b>No maladministration</b>	<b>30</b>	The Ombudsman found no maladministration
<b>Friendly solution implemented</b>	<b>8</b>	A friendly solution or remedy action has been agreed and implemented. This category includes the following subcategories:
<i>Information provided</i>	6	The friendly solution consisted of making available satisfactory information or explanation of reasons.
<i>Payment of costs</i>	1	The friendly solution consisted of reimbursement of justified costs borne by the complainant.
<i>Solution not specified (under negotiation)</i>	1	Negotiations on a friendly solution took place but the result is not known.
<b>Maladministration</b>	<b>20</b>	The Ombudsman found maladministration in at least one of the aspects of the case. This category includes the following subcategories:
<i>Friendly solution rejected</i>	5	The proposed friendly solution was rejected by the institution concerned in four out of the five cases.
<i>Friendly solution not possible</i>	13	A friendly solution was no longer possible.
<i>Friendly solution not necessary</i>	2	A friendly solution was not necessary because the claim was not examined as the procedure had been cancelled or it was not needed because it had no consequence on the outcome of the procedure.
<b>Court of Justice case — not examined further</b>	<b>1</b>	The case was not examined by the Ombudsman because it was subject to proceedings by the General Court.
<b>Case withdrawn by complainant</b>	<b>1</b>	Case was withdrawn by the complainant without further explanation.

Source: European Court of Auditors.



## Observations

### 86

The average duration from the opening of a case to the decision was 20 months which is less than the duration of a Court case (see paragraph 82). However, complaints 'must be preceded by the appropriate administrative approaches to the institutions and bodies concerned'<sup>45</sup> before the Ombudsman may launch an enquiry. This means that the economic operator has first to address his complaint to the institution concerned and wait for a reply. This lengthens the process and virtually rules out a swift intervention of the Ombudsman before a contract is signed.

### 87

When a friendly solution was agreed on the basis of a proposal by the Ombudsman, it usually consisted of granting the complainant access to information or giving a satisfactory explanation of the reasons for rejecting his tender. No Ombudsman's inquiries have ever resulted in the cancellation of an award decision and the reopening of a procurement procedure by an EU institution. Remedial action has never consisted of compensation to the complainant for loss of a procurement opportunity or loss of profit. Reimbursement of costs incurred by the complainant because of his participation in a procurement procedure was granted once. The Ombudsman is proactive and includes in her decisions 'further remarks' which are recommendations that are intended to encourage the EU institutions to change their practices in the future. Examples of 'further remarks' are in **Box 12**.

### The Committee on Petitions of the European Parliament excluded petitions against EU institutions

### 88

The right to petition is one of the fundamental rights of European citizens<sup>46</sup>. Any citizen and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament. However, the Committee on Petitions of the European Parliament stated on its Petitions Portal that petitions concerning cases of maladministration by the EU institutions would be inadmissible: 'Inadmissibility of a petition (...) Please note that questions concerning maladministration within the Institutions or bodies of the EU should be addressed to the European Ombudsman.' In this way it excluded petitions concerning allegations of maladministration in public procurement by the EU institutions.

45 See Article 2(4) of the Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113, 4.5.1994, p. 15).

46 See Article 44 of the Charter of Fundamental Rights of the European Union.

### Examples of Ombudsman's further remarks

'Subject to the terms of the contract, in future cases in which contractors ask whether or not their contract will be renewed, the Publications Office could at least indicate the approximate timeframe within which it intends to take a decision.' (*Decision of the European Ombudsman closing the inquiry into complaint 1922/2010/(VIK)ER against the Publications Office of the European Union (19/12/2013)*)

'In cases, such as the present one, where, after having cancelled a tender procedure, an EU Delegation chooses to proceed to a negotiated procedure with some of the initial tenderers, the Delegation would be well advised to consider informing the unsuccessful tenderers openly and proactively about that development. Doing so would further strengthen the perception of legality and transparency of tender procedures implemented by EU Delegations'. (*Decision of the European Ombudsman closing his inquiry into complaint 1325/2011/VL against the European Commission (17/05/2013)*)

'In view of the terminological confusion that the present case revealed and in order to avoid any possible misunderstandings in the future, the Ombudsman considers it useful to invite the Commission to review the documentation it provides in the context of its procurement procedures, so as to eliminate any lack of precision and terminological inconsistency and to ensure that tenderers are clearly and unambiguously informed of the eligibility conditions relating to their establishment/incorporation/registration/nationality. It would also be useful if, in the context of this review, the Commission could ensure that such key terms in the procurement process are clearly defined either in the procurement notice itself or in a document to which it makes clear reference and which is easily accessible.' (*Decision of the European Ombudsman closing his inquiry into complaint 920/2010/VIK against the European Commission (18/07/2011)*)

### Section IV — Transparency of results and mutual learning are not systematically enforced

#### Information on the outcome of the EU institutions' procurement activities is not accessible in a way which would allow effective monitoring by the discharge authority and the wider public

#### 89

One of the most effective ways of fighting corruption and malpractice in public procurement and of preventing unjustified restrictions on competition is by increasing the transparency of processes and procedures. Transparency is not only important for economic operators but also for the discharge authority and the wider public who can contribute to improving the performance of the EU institutions by monitoring procurement activities.

#### Effective monitoring requires harmonised information to be found in a single place on the internet

#### 90

To allow effective monitoring by stakeholders the following minimum information needs to be available in a single place on the internet and continually updated for every contract above 15 000 euros once it has been signed by an EU institution, indicating:

- (a) the subject of the contract;
- (b) the type of contract;
- (c) the value of the contract;
- (d) the duration of the contract;
- (e) the type of award procedure (with a justification in the case of the negotiated procedure without prior publication);
- (f) the award criteria and their weighting;
- (g) the number of tenders received and the number of tenders taken into consideration for the final award decision (with a breakdown by Member States/ third countries and indicating the number of tenders from SMEs);

- (h) the name and address of the successful tenderer including information whether the successful tenderer is an SME;
- (i) the proportion of the contract likely to be subcontracted to third parties.

### 91

Such a repository of information related to EU contracts should also provide relevant links to other documents (e.g. procurement documents, notices in TED, copies of the contracts signed).

### Information is provided piecemeal

### 92

Currently there are no tools which allow an overall view of the outcome of the EU institutions' procurement activities. Information is provided piecemeal and most of the time not in a harmonised manner. Not all closed procurement procedures can be found in TED as the publication of contract award notices is not mandatory in all cases. Searching for those procedures which are included in TED is difficult as the search results are not always satisfactory (see paragraphs 63 to 65). The TED eTendering platform is not used by all EU institutions. Furthermore, some institutions block the possibility to download tender documents from the platform once the deadline for submitting tenders has elapsed.

### 93

The European Parliament publishes a complete annual list on its website of all its contractors who obtained contracts with a value of more than 15 000 euros. This list indicates the name and address of the contractor, the type and subject of the contract, its duration, its value, the procedure followed and the relevant directorate-general. The list is part of the annual report on the contracts awarded by the European Parliament. It is more comprehensive and detailed than the consolidated information published by the other institutions audited and goes beyond the transparency requirements set out in the EU Financial Regulation.

### 94

As procurement activities at the Commission are decentralised, reporting takes place in the annual activity reports (AAR) of the different directorates-general but in a standardised manner. However, not all the information from the different AARs is consolidated into a single report at central Commission level. At Commission level, the Commission includes in its Annual Synthesis of the Commission's management achievements an analytical report on the negotiated procedures. The Commission's Financial Transparency System (FTS) is designed to provide information on recipients of EU funds. However, it does not include any information on the type of procurement procedure which led to the award of contracts.

### 95

The ECB publishes on its website annual lists of contracts with a value above 50 000 euros that were awarded without publication of a contract notice. The lists specify the name of the contractors to whom contracts were awarded, the subject and the estimated value of the contracts and indicate whether the duration of a contract was longer than 12 months. Past contract notices and contract award notices from TED and past voluntary contract notices are centrally available in the archive section.

### 96

The Council's secure tendering website for contracts above 60 000 euros provided a search function not only for calls in progress but also for closed calls and for cancelled calls. However, not all closed calls were retrieved when we tested the search function. Annual lists of contracts for which no specific award notice was published have been published via TED. However, there was no link to these lists on the Council's website.

### 97

The EU Open Data Portal, which is managed by the Publications Office, holds datasets relating to public procurement. The most comprehensive datasets are directly based on TED. These datasets suffer from the same issues as described in paragraphs 63-64, i.e. not always producing satisfactory results and sometimes incompleteness of data.

### Learning from best practices is not fully exploited

#### 98

As the public procurement of the EU institutions is largely decentralised, co-operation between different organisations can bring improvements thanks to mutual learning and cross-fertilisation. We noted considerable cooperation and exchange of experience between the different institutions and, in the case of the bigger institutions, between the different procurement units. Interinstitutional procurement procedures take place. Channels for asking questions and discussion fora exist.

#### 99

Peer reviews permit a structured exchange of best practices between participating organisations. In the field of EU procurement this tool has not yet been applied. A good example of improvements introduced thanks to peer reviews is the European Statistical System<sup>47</sup>. The JRC periodically carries out *ex post* checks of its procurement files in the framework of checks of payments. The set-up of these *ex post* checks has some similarities with peer reviews<sup>48</sup>.

47 See our Special Report No 12/2012 'Did the Commission and Eurostat improve the process for producing reliable and credible European statistics?' (<http://eca.europa.eu>).

48 In 2014, such checks were carried out on 55 procurement files. These checks concerned the respect of rules and requirements. They were carried out by nine groups of three staff to cover all JRC locations. The controllers came from different units and locations. Inside each team there was a designated team leader. The different teams used the same detailed checklists and applied standardised reporting.

## 100

Public procurement in the EU is governed by rules which are intended to remove barriers and open up markets in a non-discriminatory and transparent way to foster competition. The objective of public procurement is to increase the choice of potential contractors available to public bodies, resulting in better value for money, whilst at the same time developing market opportunities for companies.

## 101

The Court concludes that the EU institutions can do more to facilitate access to their public procurement.

## 102

The EU institutions have robust systems and capable staff to keep the risk of errors and irregularities under control. We detect few serious public procurement errors in the transactions directly managed by the EU institutions which we examine as part of our annual Statement of Assurance. Few allegations are sent to OLAF which suggests that the number of serious irregularities and fraud cases is limited in this field (see paragraphs 15 to 22).

## 103

To monitor and demonstrate the accessibility of their procurement activities the EU institutions need information on the level of participation by economic operators in their procurement procedures. Most EU institutions do not systematically measure the level of participation in their procurement procedures. Among the entities we audited only the Joint Research Centre of the Commission collects comprehensive statistics on this. The others comply with the minimum requirement to indicate the number of offers received in the contract award notices published in TED (see paragraphs 23 to 25).

### Recommendation 1

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In order to facilitate the monitoring of the accessibility of their procurement activities, all EU institutions should collect and analyse data, procedure by procedure and for each type of procedure, not only on the number of offers or requests to participate initially received but also on the number of offers which were taken into account for the final award decision.

**Target implementation date:** As from 2017

## Conclusions and recommendations

### 104

When revising their procurement rules in 2015, the EU institutions did not facilitate access to their public procurement by simplifying rules and clarifying grey areas to the fullest extent possible (see paragraphs 26 to 35):

- (a) the EU Financial Regulation and its rules of application have not been consolidated into a single document and remain an unnecessarily complex piece of legislation;
- (b) deviations from the new procurement directive are not always clearly indicated or explained;
- (c) participation of small and medium-sized enterprises is not explicitly encouraged;
- (d) how to prospect the market prior to the conclusion of building contracts has not been clarified;
- (e) only the ECB has set out the language regime applicable to its procurement procedures in its procurement rules.

### Recommendation 2

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For the upcoming 2016 revision of the EU Financial Regulation the Commission should propose a single rulebook for public procurement. Therein, participation of small and medium-sized enterprises should be explicitly encouraged. Furthermore, rules on market prospection prior to building contracts and on the language regime for procurement procedures should be included. Deviations from the 2014 Procurement Directive should be justified.

**Target implementation date:** 2017 as part of the revised EU Financial Regulation

### 105

Not all procedural choices fostered competition on the broadest possible basis. Most EU institutions had no policy for preliminary market consultations prior to starting the formal procurement procedure. Such consultation is important to inform potential tenderers and to optimise requirements to be set out in the tender documents. EU institutions must not artificially split a procurement in order to avoid the need to apply a more competitive procedure. However dividing contracts into lots and publishing them simultaneously can increase the accessibility of procurement procedures, in particular for SMEs. This practice was not sufficiently used by the EU institutions (see paragraphs 37 to 55).



## Conclusions and recommendations

### Recommendation 3

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The EU institutions should proactively use preliminary market consultations wherever appropriate with a view to preparing the procurement procedure and informing economic operators of their procurement plans and requirements.

**Target implementation date:** Immediately

### Recommendation 4

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The EU institutions should divide contracts into lots wherever possible to increase participation in their procurement procedures.

**Target implementation date:** Immediately

## 106

Unnecessary hurdles make life difficult for potential tenderers who want to identify procurement opportunities offered by the EU institutions and benefit from them. The visibility of the EU institutions' procurement opportunities on the internet is poor. The information available is patchy and spread over many different websites. The search function of TED (Tenders Electronic Daily) did not always produce satisfactory results. Tools which allow tenders to be submitted electronically have not yet been rolled out in a comprehensive and harmonised manner (see paragraphs 56 to 75).

### Recommendation 5

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The EU institutions should create a common electronic one-stop shop for their procurement activities allowing economic operators to find all relevant information in a single online location and to interact with the EU institutions through this website. Procurement procedures including communication on rules applicable, business opportunities, relevant procurement documents, submission of tenders and all other communication between institutions and economic operators should all be managed via such a one-stop shop.

**Target implementation date:** 2018

## Conclusions and recommendations

### 107

For economic operators who consider that they have been unfairly treated it is difficult to obtain a rapid review of their complaints and compensation for damages. Only the ECB has a robust internal complaint procedure in place (see paragraphs 76 to 88).

#### Recommendation 6

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The Commission should propose amendments to the EU Financial Regulation to allow for a rapid review of complaints from economic operators who consider that they have been unfairly treated. Such a review should take place before economic operators may turn to the EU Ombudsman or to the EU Courts.

**Target implementation date:** 2017 as part of the revised EU Financial Regulation

### 108

Information on the outcome of the EU institutions' procurement activities is not accessible in a way that allows effective monitoring by the discharge authority and the wider public in order to increase transparency and build up confidence. Such information is only provided piecemeal and most of the time not in a harmonised manner (see paragraphs 89-97). OLAF's reporting on its investigations does not allow trends over time to be assessed (see paragraphs 16 to 17).

#### Recommendation 7

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To allow effective *ex post* monitoring of their procurement activities the EU institutions should set up a single public repository of information related to their procurement contracts which could be developed as part of TED eTendering.

**Target implementation date:** 2018

#### Recommendation 8

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OLAF should improve its case management system to produce reports and statistics on the different types of allegations under investigation and the outcome of these investigations.

**Target implementation date:** 2017

## Conclusions and recommendations

### 109

As the procurement activities of the EU institutions are largely decentralised co-operation amongst them can bring improvements thanks to mutual learning and cross-fertilisation. We noted considerable cooperation and exchange of experience between the different institutions and, in the case of the bigger institutions, between the different procurement units. However peer reviews, which are the most advanced tool for a structured exchange of best practices, were not used (see paragraphs 98 to 99).

### Recommendation 9

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The EU institutions should use peer reviews for mutual learning and exchange of best public procurement practice.

**Target implementation date:** First peer review to start in 2018

This report was adopted by Chamber IV, headed by Mr Baudilio TOMÉ MUGURUZA, Member of the Court of Auditors, in Luxembourg at its meeting of 24 May 2016.

*For the Court of Auditors*



Vítor Manuel da SILVA CALDEIRA  
*President*

**Users of TED e-tendering (April 2016)**

European Parliament, DG Communication  
European Parliament, DG Infrastructure and Logistics  
European Parliament, DG Innovation and Technological support

Council of the European Union

European Commission, DG Agriculture and Rural Development  
European Commission, DG Budget  
European Commission, DG Communication  
European Commission, DG Communications Networks, Content and Technology  
European Commission, DG Environment + DG Climate Action  
European Commission, DG Employment, Social Affairs and Inclusion  
European Commission, DG Energy  
European Commission, DG Financial Stability, Financial Services and Capital Markets Union  
European Commission, DG Health and Food Safety  
European Commission, DG Human Resources and Security  
European Commission, DG Humanitarian Aid and Civil Protection  
European Commission, DG Informatics  
European Commission, DG Internal Market, Industry, Entrepreneurship and SMEs  
European Commission, DG International Cooperation and Development  
European Commission, DG Justice and Consumers  
European Commission, DG Mobility and Transport  
European Commission, DG Regional and Urban Policy  
European Commission, DG Research and Innovation  
European Commission, DG Trade  
Joint Research Centre  
Office for Infrastructure and Logistics in Brussels  
Office for Infrastructure and Logistics in Luxembourg  
Executive Agency for Small and Medium Sized Enterprises (EASME)

European Court of Auditors

European Investment Bank

European Anti-Fraud Office (OLAF)  
Eurostat  
Publications Office of the European Union

EUROJUST

European Agency for the Management of Operational Cooperation at the External Borders (Frontex)  
European Centre for Disease Prevention and Control (ECDC)  
European Chemicals Agency (ECHA)  
European Defence Agency (EDA)  
European Environment Agency (EEA)  
European Fisheries Control Agency (EFCA)  
European Food Safety Authority (EFSA)  
European Insurance and Occupational Pensions Authority (EIOPA)  
European Medicines Agency (EMA)  
European Police Office (EUROPOL)  
European Railway Agency (ERA)  
European Securities and Markets Authority (ESMA)  
European Union Agency for Network and Information Security (ENISA)  
Fusion for Energy (F4E)  
Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

## Summary of Survey results

### Context

In connection with the performance audit on public procurement of the EU institutions, it was deemed valuable to include the opinions and views on the procurement processes of smaller EU bodies in order to obtain a broader picture. The survey was sent to 47 such bodies, with a response rate of 85 %.

### I. Procurement policies

#### 01

Procurement policies are relevant because they show the thinking behind EU institutions' procurement practices. They are particularly relevant in terms of improving access to the procurement process and building confidence, as they increase the accountability of the tendering institutions and the trust of those interested in submitting bids.

#### 02

The three main priorities listed by agencies, joint undertakings and other EU institutions were (in descending order): achieving a high price/quality ratio, ensuring impartiality and simplifying administration.

#### 03

When asked whether they had a procurement policy, a majority of respondents (57 %) answered in the affirmative. However, the remaining respondents (43 %) had no policy at all.

#### 04

With regards to public availability, 56 % of the respondents made their policies publicly available.

### II. Streamlining public procurement

#### 01

There are various ways of making procurement easier and less burdensome, such as providing guidance on tendering methods, using eProcurement tools, monitoring participation or conducting market consultation.

#### 02

When asked whether they provided documents to procurement staff offering guidance on selecting tendering methods, a majority (60 %) replied they made use of this practice.

#### 03

eProcurement is recognised by the Commission as a key to making procurement easier. It includes e-Submission of tenders, e-Tendering and e-Contracting, among other things. However, only 35 % of respondents used any of these tools.

### III. Market consultation

#### 01

It is vital to conduct market consultation prior to starting a tender process, in order to know the market and prepare a successful tendering process. However, almost half of the agencies surveyed either did not conduct or rarely conducted market consultation. In this regard, the use of market consultation templates is also relevant, but only three respondents made use of such templates.

#### 02

Monitoring participation and keeping lists of suppliers can also help to make the pre-tendering phase less burdensome. 15 % of respondents said they kept lists of suppliers and over 75 % stated that they monitored average participation.

### IV. Participation

#### 01

From the outset, participation did not pose a particular problem to respondents, but they sought to improve it nevertheless. They identified the following problems with participation: poor competition, complex legislation and the fact that local markets are often too small.

#### 02

In order to counter the detrimental impact of these problems on participation, respondents provide ethical guidance to their staff, aim to make their administrative processes less complex and standardise their requirements.

### V. Transparency

#### 01

Transparency is key to achieving impartiality — one of the procurement priorities.

#### 02

Disclosure of subsidiaries and parent companies could help to make the process more transparent, and 94 % of the respondents agreed that this should be mandatory.

#### 03

Almost half of the respondents (47 %) still do not publish their procurement policies.

## 38

A legal basis clarifying the regime for a preliminary market consultation has only been introduced by the modifications of the Financial Regulation (FR) and Rules of Applications (RAP) and entered into force on 1st January 2016. Since the involvement of potentially interested economic operators in drafting the tender documents raised several questions concerning equal treatment, non-discrimination and transparency, the EP was very prudent in using this possibility also with regard to Article 107 FR.

## 39

Parliament is adapting the Vademecum on public procurement and has adapted trainings, emphasizing the use of preliminary market research, yet informing about risks and stressing procedures to avoid risks.

## 42

The choice of a single lot facilitates the organisation of the services before and during the Parliamentary session, which is peculiarly intense given that the bulk of services are concentrated on 4 days per month. This in turn allowed for the introduction of a productivity plan of 1% per year. This means that there will be a yearly reduction of the prices by 1%, starting from the second year. Moreover, given the large number of tenders received (6), the single lot has not reduced the competition.

Parliament notes the emphasis of the revised rules on the use of lots and will take it into account in revised guidance, but as also point n° 43 of the Observations shows, a decision on any division always depends on the circumstances of the case in view of the nature of the deliverable, taking into account a fair balance between access for SME's on the one hand, and cost-efficiency on the other hand.

## 43

These purchases for comparatively small amounts were made in exceptional circumstances when certain services had moved to a new building in which works were still ongoing and represent one-off purchases to satisfy specific needs. Moreover, the limit of EUR 60.000 was respected. The institution's future needs in this area will be covered by a framework contract, to be awarded under a competitive procedure which is still ongoing.

## 50

As indicated in point n° 34 of the Observations, the prospection for inter alia this building was published in the OJ. From a legal point of view, the contractual setup whereby this 'turn key' project was offered complies with the applicable provisions (Article 121 of the RAP and its predecessor, applicable then).

It is noted that within the parameters set by the institution and in view of the particularities of the market, the prospection was as wide as possible and within the legal limits, rightly with a view to increase participation, which is a key parameter in the audit scope (point n° 8, sub b of the Observations).

## 51

Parliament's services have issued guidance on negotiations. However, when conducting negotiations, the Parliament must also take into consideration the principle of proportionality, and respect the balance between the resources used and the value of the contract. Pursuing negotiations might be time and resources consuming, especially in case of low and very low value contracts.

### 73

Parliament has already established internal recommendations and DGs have prepared internal policies to use electronic means for the communications with the tenderers for all contracts below Directive threshold. The use of TED-e-tendering is gradually rolled out and the use of a comprehensive e-tendering platform is in a preparatory stage.

Until this issue is resolved, the use of the EP's internal mail system is in general against the rules of the RAP.

### 88

Public procurement by the EU institutions falls under the activities of the European Union and petitions in this field are admissible under the rules.

However, each petition is assessed on its own, individual content. Depending on the content of the petition, the Committee on Petitions may recommend to the petitioner to lodge a complaint with the European Ombudsman. In such cases, the petition is usually declared admissible, but the petitioner himself needs to lodge a complaint with the Ombudsman; the Ombudsman does not carry out investigations for the Committee on Petitions.

Rather than discouraging, the information in this section aims at informing the citizen on follow-up and appropriate accessible remedies in individual cases in the absence of a review mechanism which requires a legal basis.

### Recommendation 1

Parliament takes note of this Recommendation. Its existing contract management and reporting tool *WebContracts* provides already for the possibility of collecting data, compulsory in negotiated procedures. A further development in retrieving metadata will however also need to be assessed in the light of cost-effectiveness seen the limited resources available.

### Recommendation 3

See the reply to points n° 38 and n° 39 of the Observations. Parliament is adapting the Vademecum on public procurement and has adapted trainings, emphasizing the use of preliminary market research, yet informing about risks and stressing procedures to avoid risks.

### Recommendation 4

Parliament notes the emphasis of the revised rules on the use of lots and will take it into account in revised guidance, but any division always depends on the circumstances of the case in view of the nature of the deliverable, taking into account a fair balance between access for SME's on the one hand, and cost-efficiency on the other hand.

### Recommendation 5

Parliament takes note of this Recommendation and will look in a first stage on the improvement of the information on its Website in the framework of a revamping in preparation, and the introduction and roll-out of an e-tendering-system.



### **Recommendation 7**

Parliament takes note of this Recommendation.

### **Recommendation 9**

Parliament takes note of this Recommendation and will focus on existing structures of cooperation between its services and, as mentioned in the Observations as to JRC), ex-post verifications. Further measures will be assessed under the requirements of cost-efficiency and effectiveness as foreseen in the FR.

The Council welcomes the report of the Court. It brings up a number of issues important to the field of public procurement. The spirit underlying the report, namely that the EU institutions can do more to facilitate access to their public procurement is fully shared with the Court. The Council will study the Report with great care and do its best to put the recommendations addressed to it into practice. It looks forward to receiving the final observations of the Court in due course.

On some specific issues, the Council wishes to make the following comments.

The Council has changed its internal rules on public procurement twice within the last year. The first change led to a simplified procedure and strengthening the legality internally. The second change was made to ensure that the internal rules are compatible with the new Financial Regulation. When the internal rules need to be changed next time, the Council expects that the Report of the Court will be able to be taken into account, for instance in relation to market consultations. Work on this will already begin. In the meantime, it is expected, for instance, to draw up guidelines on market consultation before starting with formal procurement procedures. This should be done both with a view to preparing the procurement and informing economic operators of their procurement plans.

The Council also intends to examine how it can make the visibility on the internet better. It notes however that among the institutions it seems to have a well functioning website according to the Report.

The Council also intends to reflect on how it can collect and analyse data on the initial number of requests to participate and offers received which were taken into account for the final award decision. Peer reviews should also be reflected upon.

The issue of division into lots is constantly examined within the Council's procedures and where possible this is also done. One on-going procedure (on IT) has 17 lots.

The Council has noted the Report's comments on the use of restricted procedures. It considers that more open procedures will be undertaken with the new Financial Regulation which provides for a publication of all procurement documents at the same time.

As regards the length of framework contracts in connection with its buildings, the Council has taken note of the Court's comments. This issue has been argued extensively by the General Secretariat. The Financial Regulation accepts that contracts can be concluded for a longer period than four years in duly justified cases. The Council maintains that for reasons of sound financial management and in cases which are duly justified in particular by the object of the Framework Contract, sometimes a longer period than 4 years may be justified. In relation to contracts regarding buildings, this has often been the case. The Council will keep the matter under review.

In so far as the Recommendations addressed inter alia to the Council, the following comments can be made.

### **Recommendation 1**

(monitoring of procurement activities). The Recommendation is accepted. The Council will reflect on how to organise this in practice.

### **Recommendation 3**

(market consultations). The Recommendation is accepted. A Circular will be issued and the matter will be raised in internal training.

### **Recommendation 4**

(division into lots). The Recommendation is accepted. The issue will form part of specific guidelines which will be issued.

## Replies of the Council

### **Recommendation 5**

(common electronic one-stop shop). The Recommendation is accepted in principle. The Council will participate in any work initiated to this effect.

### **Recommendation 7**

(ex-post monitoring). The Recommendation is in principle accepted. The Council will participate in any work initiated to this effect.

### **Recommendation 9**

(peer reviews). The Recommendation is in principle accepted. Reflection needs to be undertaken on how this could be organised.

Other Recommendations are not addressed to the Council.

## Executive summary

### II

Procurement rules in the Financial Regulation (FR) and Rules of Application (RAP) as recently amended are mostly in line with the directives. The divergences constitute for the vast majority stricter rules based on the principle of sound financial management.

In case of significant difference an explanation is provided in the recitals where necessary. One such example is recital (23) RAP on the distinction between selection and award criteria.

### V

The purpose of the revision of 2015 was to align the procurement rules with the directives of 2014. Simplification and clarification in the directives are reflected in the revised rules.

The objective of widening competition remains one of the driving principles in procurement. However, the objective of reaching targeted economic operators, notably SMEs, should not prevent economies of scale and must be weighed against the principle of sound financial management of the FR as well as the principle of equal treatment of tenderers which must be applied to all companies regardless of their size.

### VI

Procedural choices should be based on a balanced approach taking into account not only broadest possible competition but also the other principles applicable to procurement: sound financial management, transparency, proportionality, equal treatment and non-discrimination.

The procurement rules clearly link the choice of the procedure to the value of the contract (and in some cases its subject matter) in application of the principle of proportionality.

The Commission draws attention to the provision applicable from 1.1.2016 on preliminary market consultation introduced in Article 105 FR that is to take place where relevant in view of the subject matter of the contract. Division into lots is also to be envisaged only where appropriate, as provided in Article 102(2) FR and is often applied by the Commission services.

### VII

The information is not fully harmonised because procurement procedures are decentralised in the Commission.

However, the Commission is committed to delivering effective, user-centred online services and is currently developing improved centralised pages on funding as part of its digital transformation programme for websites (see Commission replies to paragraphs 58-59).

Moreover, the institutions use the same website as Member States (Tenders Electronic Daily-TED) for large procurement and provide an entry point<sup>1</sup> for procurement below the threshold laid down in the Procurement directive.

As regards the search functionality of TED, please refer to the Commission's reply to paragraph 106.

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<sup>1</sup> [http://ec.europa.eu/contracts\\_grants/contracts\\_en.htm](http://ec.europa.eu/contracts_grants/contracts_en.htm)

## Replies of the Commission

In addition, the Commission is currently working on the implementation of an e-procurement system for the end-to-end management of procurement procedures and contracts (from the publication of the call for tenders to the payment of invoices with a number of intermediary modules). The implementation of such a system, to be used by all Commission services, will contribute to facilitating access for economic operators to public procurement and as to increase transparency.

### VIII

Administrative and judicial means of redress are included in the procurement documents and the notification of the outcome of procurement procedures. Information on the award of contracts is published in TED or on the contracting authorities' website. The Commission and executive agencies publish relevant information on recipients of EU funds on the Financial Transparency System (FTS) in accordance with the principle of transparency as laid down in Article 35 FR.

### IX (a)

As far as it is concerned by it, the Commission partially accepts this recommendation and will implement it as outlined below and explained in its reply to Recommendation 1.

The Commission will perform a cost-benefit analysis to assess the feasibility, the costs and the potential benefits from the centralisation of information on procurement for the purpose of monitoring participation. The action as recommended will be implemented subject to the outcome of this assessment.

As procurement is decentralised in the Commission at the level of authorising officers there is no centralised information system on procurement procedures to monitor participation and there is no legal obligation to do so.

### IX (b)

The Commission partially accepts this recommendation as explained in its reply to Recommendation 2.

The Commission accepts the part of the recommendation that concerns the proposal of a single rulebook.

One of the major pillars of the upcoming 2016 proposal for revision of the FR is to propose a "single rule book" which would improve the overall readability and could lead to a substantial shortening of the text, fully in line with the concept of better regulation.

This single rule book will consolidate, in a unique legislative act, both the procurement rules presently laid down in the FR and the more detailed rules of the RAP. Furthermore, specific provisions related to procurement in external action presently in Part Two of the FR would be merged with the general procurement rules to further facilitate the reading to all economic operators.

The Commission does not accept the part of the recommendation which refers to the participation of SMEs. The Commission considers that the Financial Regulation is not a policy instrument for this purpose and therefore should not proactively encourage participation of SMEs.

As regards the language regime and the market prospection, the Commission does not accept the recommendation (see Commission reply to Recommendation 2).

### IX (c)

As explained in its reply to recommendation 3, the Commission partially accepts the part of the recommendation which refers to the proactive use of preliminary market consultations whenever it's adapted to the tender procedure to be launched, for the purpose of preparing the procurement procedure as it is already implemented by the Commission in some areas like acquisition or rental of real estate projects (as foreseen by the methodology detailed in COM (2008)2299) and decommissioning.

However the Commission considers that preliminary market analysis should not be used for informing economic operators of procurement plans and requirements in view of the risk of distortion of competition.

### IX (d)

Insofar as it is concerned by it, the Commission partially accepts this recommendation as explained in the Commission reply to Recommendation 4.

Division in lots is justified to increase competition but this division must be weighed against the principle of sound financial management of the Financial Regulation. Large contracts may lead to economies of scale (lower prices) and lighter administration (fewer contracts to manage).

### IX (e)

Insofar as it is concerned by it, the Commission accepts this recommendation as a long-term target and it will implement it as outlined below and as explained in the Commission reply to Recommendation 5.

The Commission will carry out an assessment to appraise the feasibility, the costs and the potential benefits of such a system. The action as recommended will be implemented subject to the outcome of this assessment and with the agreement of the other institutions.

The Commission underlines that the partial implementation of the Court's recommendation as regards the Commission's procurement procedures has already started. As explained in its replies to paragraphs 58 – 62, under the Web rationalisation – Digital Transformation Programme the Commission has already started to work on the transformation of its online content from an organisational chart -based structure into a thematic one. This structure will include the theme 'Funding, Tenders' that is already under conception.

Access to business opportunities and relevant procurement documents is available via existing tools and platforms - TED and TED eTendering, which give access to procurement notices and procurement documents of the institutions. The Commission will assess to what extent further features could be offered to provide for access to a wider range of information, taking into account budgetary and human resources constraints.

### IX (f)

As explained in its reply to Recommendation 6, the Commission does not accept this recommendation.

The Commission does not consider necessary to propose amendments to the FR on the review of complaints.

The Financial Regulation already provides that the unsuccessful tenderers are notified of the grounds and details reasons for their rejection and they may request additional information in accordance with Articles 113(3) FR and 161(2) RAP. Such requests are subject to a strict deadline: the contracting authority must provide this information as soon as possible and in any case within 15 days of receiving the request.

## Replies of the Commission

### IX (g)

As far as it is concerned by it, the Commission partially accepts this recommendation and will assess to what extent TED eTendering can provide cost-efficient collection of this data, as explained in the Commission reply to Recommendation 7.

### IX (h)

The Commission accepts this recommendation.

OLAF is currently in a transitional phase in improving its capacity in reporting and analyses. The new OLAF Content Management system (OCM) is expected to be in place by July 2016. The module foreseen for statistics and reports will be available with a later release in 2017. In the meantime OLAF is exploring possibilities to improve the use of the current reporting tools and options.

### IX (i)

Insofar as it is concerned by it, the Commission accepts this recommendation under the condition that the peer review is conducted on a need basis and does not become a permanent process that would require additional budgetary and/or human resources.

## Introduction

### 02

EU institutions are also required to apply the principle of sound financial management as well as the procurement principles of transparency, proportionality, equal treatment and non-discrimination.

### 06

The Vademecum on public procurement in the Commission is available to all the other Union institutions, bodies, offices and agencies.

## Observations

### 17

The current OLAF Case Management System in place is primarily a management tool, therefore only a small number of pre-defined reports are available in it. Any additional reports or more complex analyses, such as the one requested by the Court, need to be produced manually and therefore require resources which unfortunately are not currently available.

### 23

The Commission emphasises that there is no automatic link between the number of offers and the existence of competition.

### 26

The purpose of the revision of 2015 was to align the procurement rules with the procurement directives of 2014. Simplification and clarification in the directives are reflected in the revised Financial Regulation (FR) and Rules of Application (RAP) amended in 2015.

One of the major pillars of the upcoming 2016 proposal for revision of the FR is to propose a "single rule book" which will improve the overall readability, will reduce the length of the text and will mainly seek simplification, fully in line with the concept of better regulation.

This single rule book will consolidate, in a unique legislative act, both the procurement rules presently laid down in the FR and the more detailed rules of the RAP. Furthermore, specific provisions related to procurement in external action presently in Part Two of the FR would be merged with the general procurement rules to further facilitate the reading to all economic operators.

### 27

The upcoming 2016 proposal for FR revision will create a common set of rules to be applied to more than one EU budget instrument (procurement, grants, prizes, etc.) with the aim to remove unjustified inconsistencies, align provisions and improve the readability of the text. The provisions concerning good administration do not apply only to procurement and would be moved to these common set of rules.

### 29

Procurement rules in the FR and the RAP as recently amended are mostly in line with the directives. The divergences constitute for the vast majority stricter rules based on the principle of sound financial management.

In case of significant difference an explanation is provided in the recitals where necessary. One such example is recital (23) RAP on the distinction between selection and award criteria.

### 30

The FR is not the appropriate instrument to target specific economic operators.

Equal treatment should apply to all companies whatever their size. The purpose of the procurement rules under the Financial Regulation is not to foster a particular policy objective. SMEs, like other economic operators, may participate in procurement procedures as a single tenderer or in a joint tender, or as subcontractors.

SMEs are de facto favoured by simplification and lighter rules even if they are not specifically mentioned.

Please also refer to paragraph IX (b).

### 31

It is on purpose that preparation of the procedure and publicity measures are clearly separated in the procurement rules.

In addition to the risk of distortion of competition, equal treatment would not be respected if some economic operators contacted for preliminary consultation of the market would have access to early information about the planned procurement.



## Replies of the Commission

The procurement rules provide the necessary publicity measures for advertising contracts in full respect of the equal treatment principle.

The publication of the Commission's annual and multiannual work programmes and financing decisions further facilitates the access to information for economic operators.

### 32

Pursuant to art. 134.1 g) of the RAP, the institutions may use the negotiated procedure without prior publication of a contract notice "for building contracts, after prospecting the local market".

The Commission adopted a methodology for the implementation of these provisions (C(2008)2299), in order to enhance the information to the market and transparency. As such, the market is informed of Commission's real estate needs and prospecting notices.

At present, this methodology is being reviewed to address the difficulties in the current real estate market while ensuring transparency and continuing to ensure equal treatment.

### 34

In the last 4 years, three building prospecting procedures were launched in Luxembourg, including the multiple building prospecting for moving out of the Jean Monnet building. For all of these building prospecting procedures, the derogation foreseen by the (C(2008)2299) was applied and building prospecting notices were not published in the Official Journal. The Real Estate Committee gave a positive opinion on these derogations.

### 35

The Commission considers that there is no need to lay down a specific linguistic regime at the level of the FR since there is a general EU legislation - Regulation 1/1958 - which has defined the linguistic regime of the institutions and which applies also to procurement.

### 36

Procedural choices are to be made in view of the value and subject matter of the contract, respecting the applicable procurement rules.

### Common Commission reply for paragraphs 37 to 40

Preliminary market consultation is regulated under "preparation of the procedure". Where necessary, its main purpose is to gain knowledge of the market for drafting appropriate tender specifications and correctly estimating the value of the contract. Using the market consultation as a pre-information tool involves the risk of impairing competition.

Informing economic operators of procurement plans is regulated by "publicity measures". Prior information, ex-ante publicity and other forms of advertising provide information on planning and launching of procurement procedures on an equal basis.

The publication of the Commission's annual and multiannual work programme and financing decisions further facilitates the access to information for economic operators.

The preliminary market consultation is particularly relevant for non-standard or non-recurrent purchases.

Contacting potential tenderers involves the risk of breaching the principles of transparency and equal treatment and may impair fair competition.

The legislator has made market analysis mandatory in the specific case of innovative partnerships where the objective is to finance research and where the market consultation will aim at ensuring that the product does not yet exist on the market.

### 42

The division into lots is widely used in practice by the Commission yet only where appropriate in line with Articles 102 FR and 168 RAP as recently amended.

Procedural choices should be based on a balanced approach taking into account not only the broadest possible competition but also the other principles applicable to procurement: sound financial management, transparency, proportionality, equal treatment and non-discrimination.

### Box 4 - Cases where contracts could have been divided into lots - Second indent

The Commission considers that for this contract, using lots was not an option for the following reasons:

- There needs to be a single entry point for enquiries and a single management tool for the attribution of the enquiries to the experts.
- The attribution of enquiries to the experts is based on a mix of several criteria: language of the enquiry and language chosen for the reply, specific legal expertise for certain issues as well as Member State(s) concerned (it should be noted that some enquiries concern more than a Member State). The division of this contract into lots according to unambiguous geographical or other criteria was therefore neither possible nor advisable.
- Working with more than one contractor could lead to different unit prices to be paid by the Commission which may be seen as unfair, create tensions and affect good cooperation;
- When lots are inter-dependant, the risk of affecting the performance of the contract must be taken into account (risk of dilution of responsibility delayed execution).

### 44

Next to the Financial Regulation, the procurement directive 2014/24/EU also considers the open and restricted procedures to be equivalent.

### 46

The time-limits are indeed slightly longer in a two-step procedure, but this difference can be negligible compared to its overall duration.

## Replies of the Commission

As for the assessment of criteria, flexibility has been introduced in the revised Financial Regulation (2015) which provides that no particular order has to be followed when evaluating the exclusion, selection and award criteria.

However, it is clear that in two -step procedures it will always be necessary to first check the exclusion and selection criteria as this is the basis for selecting the candidates who will be invited to submit a tender.

### 47

The Commission underlines in its internal guidelines that giving more time for tendering would in principle favour participation regardless of the choice of procedures and the minimum time limits set in the rules.

### 51

Negotiation was never indicated as an obligation for the contracting authority or a right of the tenderer. Negotiating can only be decided in view of the tenders received.

### 52

It is expected from tenderers, in the context of competitive tendering, that they submit their best offer from the outset. If the submitted tenders are of sufficiently good quality and below the expected budget, entering into negotiation, especially for low value contracts, would be disproportionate in view of the time and resources needed on both the contracting authority's and the tenderers' side.

### 53

The contracting authority should not commit itself to negotiate the tenders received in all cases but where it is considered appropriate and necessary. In any case, equal treatment is always to be respected.

### 58

The Court's observation regarding importance of good visibility of procurement activities is consistent with the results of a recent research done by the Commission to understand the most important reasons why people want to interact with the Commission online. 'Funding and tenders' (including procurements) was identified as one of the most important reasons.

Transparency of the procurement process and its outcome has been identified as a prominent institutional goal for the Commission, through interviews with 12 of its Directorates-General (DGs) and Executive Agencies.

### Common reply to paragraphs 59 to 62

The Commission takes note of the Court's analysis concerning the websites of its departments from a procurement point of view, and will consider the relevant observations in the framework of the Digital Transformation programme outlined below.

The Commission started in 2013 an ambitious initiative called "Web Rationalisation – Digital Transformation" to improve its external digital communication. The overall objectives of the initiative are to bring about more coherence, both in messaging and in navigation/look and feel, relevance to users and cost effectiveness in the Commission's web presence.

The Commission will take account of the Court's observation on the official website of the EU and review the relevant pages on europa.eu in relation to the structure and content of the Commission's new web presence under construction in order to avoid duplication and ensure consistency. A first beta/test version of the new website is available online on beta.ec.europa.eu, which contains newly arranged content on procurement in the structure outlined in paragraph 58 ( ([http://beta.ec.europa.eu/funding-tenders\\_en](http://beta.ec.europa.eu/funding-tenders_en) ).

### 60

The website with new content will replace the current central public procurement page<sup>2</sup> referred to by the Court.

### Box 8 - Examples of unsatisfactory search results of TED search in ongoing contract notices

This problem may have one of two causes:

- 1) CPV code grouping issue; indeed there was a problem in the way TED functioned, which in the meantime was corrected to allow search at code level only;
- 2) CPV code input mistake by contracting authority: the data entered by the contracting authority is incorrect, which has a negative impact as regards search results.

The first possible cause has already been corrected.

After a preliminary analysis it appears that the error may have been caused by mistakes at data input. The Commission will further analyse the issue and take the necessary measures.

As regards results involving the European External Action Service (EEAS), it should be noted that in the past EEAS was considered to be an entity dependent of the Council (thus a search by "Council" would include also notices of the EEAS). Later it was decided that EEAS should be dealt with as an autonomous entity. Previous notices of the EEAS continue to be linked to the Council.

### Box 9 - Examples of inaccurate CPV codes used by the Commission

Search results depend heavily on the correct input of data by the contracting authorities. The cases mentioned refer to situations where the code chosen by the contracting authority were inappropriate.

### 72

In 2015 e-Submission was rolled-out in six DGs/agencies (each of these having launched at least one call for tender using e-Submission during the year). The roll-out of e-Submission will continue (10 additional DGs/agencies are foreseen in 2016).

### 78

As far as the EU institutions are concerned, the Commission considers that the setting-up of a non-judicial review body, in addition to the already existing review mechanism provided for in the Financial Regulation, is neither needed nor appropriate as it would generate disproportionate costs for the benefits sought.

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<sup>2</sup> [http://ec.europa.eu/contracts\\_grants/contracts\\_en.htm](http://ec.europa.eu/contracts_grants/contracts_en.htm)

## Replies of the Commission

The Financial Regulation already provides that the unsuccessful tenderers are notified of the grounds and details reasons for their rejection and they may request additional information in accordance with Articles 113(3) FR and 161(2) RAP. Such requests are subject to a strict deadline: the contracting authority must provide this information as soon as possible and in any case within 15 days of receiving the request.

In addition, whenever an act adversely affecting the rights of the candidates or tenderers is notified to the economic operators in the course of a procurement procedure (e.g. rejection), such notification will refer to the available means of redress (Ombudsman complaint and judicial review).

The Commission considers that the limited number of actions before the General court which dealt with procurement by the Union institutions (17) and the fact that compensation for alleged damages is rarely granted by the Court are strong indicators that the system in place is efficient and fit for purpose. Hence, the setting up of the suggested rapid review is not only not needed but it would also represent a disproportionate measure, not in line with cost-efficiency and not a good use of administrative resources.

### 79

The submission of requests or comments to the contracting authority (under the Financial Regulation) and the application for review to the contracting authority (under Article 1(5) of the Remedies Directives) are different actions, since only the latter is, under the Remedies Directives, a prerequisite for asking the review from an external independent body.

The consequences of such actions as to the signing of the contract are therefore different:

- under the Remedies Directives: the application for review automatically suspends the signing of the contract in order for the review to be effective.
- under the FR: after an assessment of the requests or comments, the contracting authority may suspend the signing of the contract if this is the appropriate response to the requests or comments. A systematic suspension for any type of request or comments made by unsuccessful tenderers during the standstill period would have been disproportionate as such suspension is to be decided by the contracting authority on a case-by-case basis and where justified by the nature of the submitted requests or comments.

### 90

Procurement is decentralised in the Commission at the level of each responsible authorising officer. There is no legal obligation for a "single repository" so there is no budget appropriations to develop such a system. Depending on the value, information on the award of contracts is published in TED or on the contracting authorities' website (or made available through the FTS for the Commission and executive agencies), in line with publicity rules. However the FTS is designed to provide information on recipients of EU funds, and not on the specific budget implementation instrument it was financed from, or on the type of expenditure the funds incurred.

### 91

A platform serving this purpose is already available, namely the TED database. The Commission agrees that this database is an appropriate entry point for information on procurement as it contains a lot of information, including procurement documents via eTendering. These contain the draft contract that will be signed with the successful tenderer. The tenders are also part of the final contract but the Commission treats them as confidential documents in accordance with Article 4(2) of Regulation 1049/2001 (where disclosure would undermine the protection of commercial interests of a natural or legal person.)

### 92

It should be noted that although the use of eTendering is currently not compulsory, all Commission Directorates-General and all institutions are encouraged to use this application.

The functionality to download tender documents from the TED eTendering platform has been modified since January 2016. The default option offered by the system enables the downloading of documents after the deadline for submitting tenders. It is up to the contracting authorities to choose to switch it off.

### 94

As regards reporting, the summary of the annual activity reports referred to in Article 66(9) FR includes, as annex, the list of negotiated procedures without prior publication of a contract notice. See also the Commission reply to paragraph 90.

### 97

As a metadata catalogue, the Open Data Portal registers the existing TED dataset offered via the TED site as well as some derived datasets produced by DG GROW of the Commission.

### 99

The Commission provides, through the Central Financial Service of DG BUDG, central information, guidance and models as well as helpdesk and training services on procurement which is open to, and largely used by, the contracting authorities – not only the Commission services but also by other institutions, agencies and bodies. Information and documentation provided includes recommendations and highlights best practices.

Other fora for the exchange of information between the Commission and the other Union contracting authorities already exist, notably the Network of Finance Units (RUF) which meets every month and the NAPO network of the agencies' procurement officers which covers also the decentralised agencies and the other Union bodies (PPPs) and which meets at least once a year.

The Commission considers that further structured exchange of best practices would be of interest in particular for high amounts procedures. However, setting up the suggested peer reviews on a permanent basis would require additional budgetary and human resources which are not available at present. Ad hoc meetings could be organised on an ad-hoc basis whenever the need arises.

## Conclusions and recommendations

### 101

Access to public procurement of contracting authorities is granted through publicity measures in compliance with the applicable rules. Furthermore, procurement in the Commission is decentralised (see Commission replies to paragraphs VII, 58 to 72 and recommendation 1).

### 103

The Commission underlines that there is no legal obligation for such monitoring.

In any case, considering that economic operators may participate in a call for tenders in different ways (by means of joint tenders or with subcontractors), monitoring of the number of requests to participate or tenders can never provide complete information on the composition of candidates or tenderers.

### Recommendation 1

As far as it is concerned by it, the Commission partially accepts this recommendation and will implement it as outlined below.

Considering the significant administrative burden that would result from the setting-up of such centralised information system as well as the resources constraints, the Commission will perform a cost-benefit analysis to assess the feasibility, the costs and the potential benefits from the centralisation of information on procurement for the purpose of monitoring participation. The action as recommended will be implemented subject to the outcome of this assessment.

As procurement is decentralised in the Commission at the level of authorising officers there is no centralised information system on procurement procedures to monitor participation. There is neither a legal obligation to do so, nor the budget and human resources needed for such large scale data analysis.

The level of participation in procurement procedures may depend on various factors. Therefore the number of tenders or the number of admissible tenders would not constitute as such valid indicators for demonstrating the accessibility of procurement activities. For any type of procedure and type of purchase (services, supplies, works, buildings) there is no restriction on economic operators as to how they participate to a call for tenders (through joint tenders or as subcontractor). Therefore the number of tenders cannot systematically provide complete information on the number of participating economic operators.

### 104

The purpose of the revision of 2015 was to align the procurement rules with the directives of 2014. Simplification and clarification in the directives are reflected in the revised FR and RAP as amended in 2015 and further improvements will be reflected in the upcoming 2016 proposal for revision of the FR.

#### 104 (a)

See Commission reply to paragraph 26.

#### 104 (b)

The Commission considers that deviations are explained in the recitals of the FR where necessary.

#### 104 (c)

Equal treatment should apply to all companies whatever their size. The purpose of the procurement rules under the Financial Regulation is not to foster a particular policy objective. SMEs, like other economic operators, may participate in procurement procedures as a single tenderer or in a joint tender, or as subcontractors.

SMEs are de facto favoured by simplification and lighter rules even if they are not specifically mentioned.

#### 104 (e)

There is no need to lay down a specific language regime at the level of the FR as the language policy applicable derives directly from Regulation 1/1958.

### Recommendation 2

The Commission partially accepts this recommendation.

The Commission accepts the part of the recommendation that concerns the proposal of a single rulebook.

Indeed, one of the major pillars of the upcoming 2016 proposal for revision of the FR is to propose a "single rule book" which will improve the overall readability, would reduce the length of the text and will mainly seek simplification, fully in line with the concept of better regulation.

This single rule book will consolidate, in a single legislative act, both the procurement rules presently laid down in the FR and the more detailed rules of the RAP. Furthermore, specific provisions related to procurement in external action presently in Part Two of the FR would be merged with the general procurement rules to further facilitate the reading to all economic operators.

The Commission does not accept the part of the recommendation which refers to the participation of SMEs. The Commission considers that the Financial Regulation is not a policy instrument for this purpose and therefore should not proactively encourage participation of SMEs.

As regards the language regime and the market prospection, the Commission does not accept the recommendation. As regards the former, the language regime as laid down in Regulation 1/1958 must apply. As regards the latter, clarifications will be provided in the context of the upcoming revision of the methodology for the implementation of the provisions of art. 134.1 g) of the RAP (C(2008)2299) as explained in paragraph 32. See also Commission replies to paragraphs 32-34.

As regards justifying the deviations from the 2014 Directive, the Commission agrees with the recommendation in principle and considers it to be partially implemented. Deviations are explained in the recitals of the revised Financial Regulation where it was considered necessary. The need for further deviations will be explored and indicated or explained, as necessary, in the course of the on-going revision of the Financial Regulation.

### Recommendation 3

The Commission partially accepts the part of the recommendation which refers to the proactive use of preliminary market consultations whenever it's adapted to the tender procedure to be launched, for the purpose of preparing the procurement procedure as it is already implemented by the Commission in some areas like acquisition or rental of real estate projects (as foreseen by the methodology detailed in COM (2008)2299) and decommissioning.

However the Commission considers that preliminary market analysis should not be used for informing economic operators of procurement plans and requirements. In fact, the preparation of the procedure and the publicity measures are clearly separated in the existing procurement rules.

In addition to the risk of distortion of competition, transparency and equal treatment would not be respected if some economic operators contacted for preliminary consultation of the market were given access to early information about the planned procurement.

The procurement rules provide the necessary publicity measures for advertising contracts in full respect of the procurement principles.



### Recommendation 4

Insofar as it is concerned by it, the Commission partially accepts this recommendation and will continue implementing it to the extent it is appropriate..

The Commission considers that, when dividing contracts into lots, it already follows an approach that balances the need to increase competition with other principles applicable to procurement, in particular sound financial management and proportionality. Division into lots is therefore indeed ensured where appropriate, in view of the subject matter and value of the contract, as well as the risk for the implementation of the contract in case of inter-dependent lots.

### 106

Search results of any tool, including TED, heavily depends on the quality of the input data recorded. In the case of the public procurement notices, non-mandatory fields are often not filled in and sometimes the contracting authorities input data incorrectly.

Nevertheless, the Commission is aware that the search experience in TED can be improved. The Publications Office conducted a user survey in March 2016 and a usability study on TED is currently ongoing. The findings of both exercises will be implemented later this year to improve users' experience and satisfaction with TED services.

### Recommendation 5

Insofar as it is concerned by it, the Commission accepts this recommendation, as a long-term target (beyond 2018) and will implement it as outlined below.

Having regard to the significant administrative burden that would result from the setting-up of such a system, and the fact that the inter-institutional dimension is not budgeted under the current MFF, the Commission will carry out an assessment to appraise the feasibility, the costs and the potential benefits of such a system. The action as recommended will be implemented subject to the outcome of this assessment and with the agreement of the other institutions.

With respect to the Commission procurement activities, the Commission has already started implementing the Court's recommendation: a single entry point for the Commission's procurement is currently being developed by the Commission, as part of the Digital Transformation. It will include links to all relevant information on procurement (communication on applicable rules and business opportunities) and to the existing tools for accessing procurement documents and submitting tenders.

Please refer to the related page on the test version of the new Commission web presence: [http://beta.ec.europa.eu/funding-tenders\\_en](http://beta.ec.europa.eu/funding-tenders_en)

This new web presence is due to go live in 2016, including this page. Work is on-going in order to produce the related content, in coordination with the SEDIA initiative (assessment made by Commission services to identify the corporate solution to support the full funding and tenders life cycles) and Participant Portal (IT solution currently supporting call for proposals and grant management for several important EU programs, including Horizon 2020) team.

Access to business opportunities and relevant procurement documents is available via existing tools and platforms - TED and TED eTendering, which give access to procurement notices and procurement documents of the institutions. The Commission will assess to what extent further features could be offered to provide for access to a wider range of information, taking into account budgetary and human resources constraints.

### Recommendation 6

The Commission does not accept this recommendation.

The Commission does not consider necessary to propose amendments to the FR on the review of complaints

The Financial Regulation already provides that the unsuccessful tenderers are notified of the grounds and details reasons for their rejection and they may request additional information in accordance with Articles 113(3) FR and 161(2) RAP. Such requests are subject to a strict deadline: the contracting authority must provide this information as soon as possible and in any case within 15 days of receiving the request.

In addition, whenever an act adversely affecting the rights of the candidates or tenderers is notified to the economic operators in the course of a procurement procedure (e.g. rejection), such notification will refer to the available means of redress (Ombudsman complaint and judicial review).

See also the Commission replies to paragraphs 78 and 79.

### Recommendation 7

As far as the Commission is concerned, it partially accepts this recommendation and will implement it as outlined below.

Considering the significant administrative burden that would result from the setting-up of such monitoring system, the Commission will assess to what extent TED eTendering can provide cost-efficient access to further procurement data, taking into account budgetary and human resources constraints.

### Recommendation 8

The Commission accepts this recommendation.

OLAF is currently in a transitional phase in improving its capacity in reporting and analyses. The new OLAF Content Management system (OCM) is expected to be in place by July 2016. The module foreseen for statistics and reports will be available with a later release in 2017. In the meantime OLAF is exploring possibilities to improve the use of the current reporting tools and options.

### Recommendation 9

Insofar as it is concerned by it, the Commission accepts this recommendation under the condition that the peer review is conducted on a need basis and does not become a permanent process that would require additional budgetary and/or human resources.

## 50

The ECB is of the view that the procurement procedure was conducted in compliance with the ECB procurement rules. In this respect, the ECB notes that the urgency argumentation was used in a sound and adequate manner and diligently reasoned. The underlying event causing the extreme urgency was not attributable to the ECB and there was an evident causal link between the unforeseeable developments and the urgency resulting therefrom. Due to the extreme urgency of the matter the time limits for an accelerated public tender, which in practice still requires three to four months at the best from dispatch of the contract notice until contract signature, could not be complied with. In fact, in the chosen competitive five quotes tender procedure the contract was awarded and signed within six weeks as of the date of tender dispatch. Moreover, the chosen procedure ensured a sound level of competition and the resulting contract was strictly limited to address the immediate needs. The ECB would also like to recall that once it became evident that the respective type of consultancy services may be required on a more continuous supply basis, it tendered out these services via a public tender procedure.

Furthermore, please find below the ECB's comments on some of the recommendations issued by the ECA.

### Recommendation 1

The ECB in principle agrees with the recommendation. The ECB plans to gradually roll out an electronic tendering system in the course of 2016. In this context the ECB will investigate how to measure, in a more systematic yet still efficient manner, the level of participation in its public tender procedures with regard to the number of applications and tenders received.

### Recommendation 3

The ECB agrees with the recommendation to follow a more proactive approach with regard to market consultation prior to starting the formal procurement process in order to gain market intelligence, facilitate requirements engineering and eventually obtain better value for money.

### Recommendation 4

The ECB in principle agrees with the recommendation, subject to the understanding that the division of contracts in lots must be effective and efficient from a business perspective in terms of contract execution and management. If dividing contracts into lots, whilst theoretically possible, could imply the risk that the contract execution would become technically too complex or would not ensure good value for money, or that the coordination of several contractors would undermine the sound management and execution of the contract, the division in lots is not deemed effective.

### Recommendation 5

The ECB procurement section of the ECB website provides the public with a central, single repository of notices and publications ('one-stop-shop'), published by the ECB in the context of procurement, in an easily accessible manner. In addition, the ECB plans to gradually roll out an electronic tendering system in the course of 2016. Furthermore the ECB has its own dedicated procurement rules.

Therefore, the ECB partially agrees with the recommendation, provided that the envisaged website would be a simple and straight forward information portal, avoiding any additional overhead and complexity layers. Regarding the ECB, such a portal would simply link to the procurement section of the ECB's website for further information about ECB procurements. This would avoid duplication and proliferation of information and related inefficiencies. Economic operators interested in ECB procurements would continue to interact with the ECB via the ECB's website and the established communication channels.

Given that TED (Tenders Electronic Daily) is the official and central online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement, it may also be advisable to investigate how TED could be further improved to provide for an appropriate overview on the procurement opportunities of the institutions.

### **Recommendation 7**

See the ECB reply to recommendation 5.

The ECB partially agrees with the recommendation, provided that the envisaged repository would be a simple tool that would not add additional overhead and complexity layers. Regarding the ECB, the public repository would simply link to the procurement section of the ECB's website that entails relevant information regarding its procurement activities.

### **Recommendation 9**

The ECB agrees with the notion to facilitate and foster mutual learning and exchange best practices. The instruments that would be most effective in meeting that purpose would need to be further investigated.

For example, the ECB participates in an active network of procurement experts across the European System of Central Banks that permits for a structured exchange of best practices.

Moreover, the ECB's central procurement unit has undergone an external certification related to best procurement practices in the past, and is currently undergoing a recertification process.

# Replies of the European Ombudsman

83

The European Ombudsman is at present the only external non-judicial review body accessible to economic operators who consider they were unfairly treated in the public procurement procedures organised by EU institutions and bodies. If necessary, the European Ombudsman investigates such complaints and addresses recommendations to the institutions and bodies concerned. Neither Article 228 TFEU nor the Ombudsman's Statute<sup>1</sup> provides for an appeal or other remedy against the Ombudsman's decisions.

## Paragraph 85 -87

The factual findings concerning the European Ombudsman made in paragraphs 85, 86 and 87 are accurate and provide a fair picture of the Ombudsman's activity on complaints relating to public procurement.

The Ombudsman agrees that the procedural requirement from Article 2.4 of the European Ombudsman's Statute may indeed hamper the Ombudsman's quick reaction to a complaint concerning a public procurement procedure. However, an effective internal complaints mechanism can help to narrow down and clarify the issues to be addressed in the event of a referral to the Ombudsman.

## Recommendation 6

The Ombudsman welcomes the Court's recommendation, that the Commission should propose amendments to the EU Financial Regulation to allow for a rapid review of complaints about public procurement procedures, and that such a review should take place before economic operators may turn to the EU Ombudsman or to the Courts. The public interest in efficient and speedy administration would be better served by setting up internal review mechanism accessible for tenderers who have concerns about the procurement process. In the Ombudsman's view, once the institutions, bodies and agencies do have robust internal review mechanisms, the procedural requirement from Article 2.4 of the Statute would have been complied with before any complaint was made to the Ombudsman. In fact, if the internal mechanism itself were truly effective, the need to complain to the Ombudsman would be avoided.

In taking this work forward, the Ombudsman would be willing to offer advice and assistance on the design of an effective complaint mechanism based on our extensive experience.

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<sup>1</sup> European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 1994, L 113/15.



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Event	Date
Adoption of the Audit Planning Memorandum/Start of audit	10.2.2015
Official sending of draft report to Commission (or other auditee)	31.3.2016
Adoption of the final report after the adversarial procedure	24.5.2016
Commission's (or other auditee's) official replies received in all languages	EP: 23.5.2016 Council: 3.6.2016 EC: 14.6.2016 ECB: 27.5.2016 Ombudsman: 11.5.2016

EU institutions procurement rules are broadly in line with the general EU legislation on public procurement which requires putting procurement contracts out to tender on the broadest possible basis to maximise competition. The management and control arrangements of the EU institutions are robust and in general mitigate the risk of errors. We found however that EU institutions can do more to facilitate access of economic operators (especially of small and medium-sized enterprises) for example by simplifying the rules to the fullest possible extent and by removing unnecessary hurdles which make life difficult for potential tenderers who want to identify procurement opportunities offered by the EU institutions.



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