

Public Procurement

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Sources

- Topic not as such in the EC Treaty but flows from the free movement of goods and services and the freedom of establishment
- Dir. 2004/18/EC on the award of public works contracts, public supply contracts and public service contracts (**General Directive**)
- Dir. 2004/17/EC on the procurement procedures of entities operating in the water, energy, transport and postal services sectors (**Special Sectors Directive**)
- Case law

Most important steps (questions) of today

1. Who?
2. What?
3. Value?
4. (+ Teckal judgment)



wordpress.com

General directive (2004/18/EC)



ingenieurshuisdeblaey.nl

Step 1: Who has the obligation to put up for tender?

- a) “contracting authorities” (= aanbestedende dienst):
- b) central, regional and local authorities
- c) bodies governed by public law:
 1. established for meeting needs in the general interest
 2. having legal personality, and
 3. financed for the most part by the authorities, or supervised by the authorities , or authorities appoint majority of members in administrative, managerial or supervisory board

Step 2: What has to be put up for tender?

- “Public contracts”: contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive
- Exemptions e.g.
 - Service concessions (not public works concessions)
 - Public telecom networks (provision and exploitation)
 - Employment contracts
 - ‘In house’ awarding

Step 3: Threshold amounts (Value)

- Dir. 2004/18/EC only applicable to public contracts with a value of more than:
 - € 130.000 for supply and services contracts of the central authorities
 - € 200.000 for supply and services contracts of the regional and local authorities and bodies governed by public law
 - € 5.000.000 for works contracts
- Below thresholds → Directive not applicable, Treaty principles are
- Splitting up of contracts is prohibited

General principles

- Non-discrimination
- Transparency

➔ Note: principles for the contracting authorities in the treatment of the economic operators

Contract documentation

- Contract notice (aankondiging van de opdracht)
- Contract documents (bestek)
- Additional documents (aanvullende stukken)

- Technical specifications are included in this documentation

Procedures

1. Open
 2. Restricted
 3. Negotiated
 4. Competitive dialogue
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graph LR; 1[1. Open] --- A[]; 2[2. Restricted] --- A; A --> BR[Basic rule]; 3[3. Negotiated] --- B[]; B --> C[With publication of contract notice]; B --> D[Without publication of contract notice]; 4[4. Competitive dialogue];
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# Open procedure

- Any interested economic operator may submit a tender (offerte/inschrijving) directly after publication of the contract notice
- Criteria for selecting the tenderers must be published in advance and must be non-discriminatory and objective

# Restricted procedure

- Any economic operator may request to participate; only those economic operators invited by the contracting authority (candidates) may submit a tender
- Negotiations about the tender during the procedure are not allowed
- Criteria for selecting the candidates must be published in advance and must be non-discriminatory and objective
- Minimum of five candidates invited; amount can be maximized

# Negotiated procedure (with and without publication of a contract notice)

- Only in certain cases as described in the Directive (e.g. other procedures were not successful, urgency)
- Negotiations about the tender during the procure are allowed
- Criteria for selecting the candidates must be published in advance and must be non-discriminatory and objective
- With publication of contract notice: minimum of five candidates

# Competitive dialogue

- Particularly complex contracts for which the open or restricted procedure is not adequate
- Contract notice with award criteria
- Criteria for selecting the candidates must be published in advance and must be non-discriminatory and objective
- Dialogue with candidates (minimum of three) to determine which means satisfy the needs and requirements best
- When means are determined, the dialogue is closed and the candidates are requested to submit their final tenders
- The economically most advantageous tender is chosen

# Options in Dir. 2004/18/EC for Member States

- Contracting authorities may conclude **framework agreements** (Raamovereenkomst)(4 years max) to discuss the conditions for future tenders. → This f.a. has to be tendered out. Every contract falling under the f.a. can be directly awarded to the party/parties to the f.a.
- Contracting authorities may use **dynamic purchasing systems** (Dynamische aankoopstelsel)(completely electronic process for making commonly used purchases; 4 years max) → for the setting up of a d.p.s., the open procedure has to be followed. For each specific contract falling under the d.p.s., a simplified procedure can be used.

# Service contracts: II-A and II-B

- Service contracts listed on Annex II-A are fully governed by Dir. 2004/18/EC
- For service contracts listed on Annex II-B, the contracting authority only has to send a notice with the results of the award procedure to the Commission; no obligation to use one of the procedures = 'light' procurement regime.



BIJLAGE II A (\*)

| Categorie | Benaming                                                                                                                       | CPC-indeling (*)                 | CPV-indeling                                                                                                                                      |
|-----------|--------------------------------------------------------------------------------------------------------------------------------|----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| 1         | Onderhoud en reparatie                                                                                                         | 6112, 6122, 633, 886             | 5010000 tot en met 50982000 (met uitzondering van 50310000 tot en met 50324200 en 50116510-9, 50190000-3, 50229000-6, 50243000-0)                 |
| 2         | Vervoer te land (*), met inbegrip van vervoer per pantserwagen en koerier, met uitzondering van postvervoer                    | 712 (m.u.v. 7123 5), 7512, 87304 | 60112000-6 tot en met 60129300-1 (met uitzondering van 60121000 tot en met 60121600, 60122200-1, 60122230-0), en 64120000-3 tot en met 64121200-2 |
| 3         | Luchtvervoer van passagiers en vracht, met uitzondering van postvervoer                                                        | 73 (m.u.v. 7321)                 | 62100000-3 tot en met 62300000-5 (met uitzondering van 62121000-6, 62221000-7)                                                                    |
| 4         | Postvervoer te land (*) en door de lucht                                                                                       | 71235, 7321                      | 60122200-1, 60122230-0, 62121000-6, 62221000-7                                                                                                    |
| 5         | Telecommunicatie                                                                                                               | 752                              | 64200000-8 tot en met 64228200-2, 72318000-7, en 72530000-9 tot en met 72532000-3                                                                 |
| 6         | Diensten van financiële instellingen:<br>a) verzekeringsdiensten<br>b) bankdiensten en diensten in verband met beleggingen (*) | Ex 81, 812, 814                  | 66100000-1 tot en met 66430000-3 en 67100000-1 tot en met 67262000-1 <sup>1</sup>                                                                 |
| 7         | Diensten in verband met computers                                                                                              | 84                               | 50300000-8 tot en met 50324200-4, 72100000-6 tot en met 72591000-4 (met uitzondering van 72318000-7 en 72530000-9 tot en met 72532000-3)          |
| 8         | Onderzoeks- en ontwikkelingswerk (*)                                                                                           | 85                               | 73000000-2 tot en met 73300000-5 (met uitzondering van 73200000-4, 73210000-7, 73220000-0)                                                        |
| 9         | Accountants en boekhouders                                                                                                     | 862                              | 74121000-3 tot en met 74121250-0                                                                                                                  |
| 10        | Markt- en opinieonderzoek                                                                                                      | 864                              | 74130000-9 tot en met 74133000-0, en 74423100-1, 74423110-4                                                                                       |

BIJLAGE II B

| Categorie | Benaming                                                                | CPC-indeling       | CPV-indeling                                                                                                                                                          |
|-----------|-------------------------------------------------------------------------|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 17        | Hotels en restaurants                                                   | 64                 | 55000000-0 tot en met 55524000-9, en 93400000-2 tot en met 93411000-2                                                                                                 |
| 18        | Vervoer per spoor                                                       | 711                | 60111000-9, en 60121000-2 tot en met 60121600-8                                                                                                                       |
| 19        | Vervoer over water                                                      | 72                 | 61000000-5 tot en met 61530000-9, en 63370000-3 tot en met 63372000-7                                                                                                 |
| 20        | Vervoersondersteunende activiteiten                                     | 74                 | 62400000-6, 62440000-8, 62441000-5, 62450000-1, 63000000-9 tot en met 63600000-5 (met uitzondering van 63370000-3, 63371000-0, 63372000-7), en 74322000-2, 93610000-7 |
| 21        | Rechtskundige diensten                                                  | 861                | 74110000-3 tot en met 74114000-1                                                                                                                                      |
| 22        | Arbeidsbemiddeling (*)                                                  | 872                | 74500000-4 tot en met 74540000-6 (met uitzondering van 74511000-4), en 95000000-2 tot en met 95140000-5                                                               |
| 23        | Opsporing en bevestiging, met uitzondering van vervoer per pantserwagen | 873 (m.u.v. 87304) | 74600000-5 tot en met 74620000-1                                                                                                                                      |
| 24        | Onderwijs                                                               | 92                 | 80100000-5 tot en met 80430000-7                                                                                                                                      |
| 25        | Gezondheidszorg en maatschappelijke dienstverlening                     | 93                 | 74511000-4, en 85000000-9 tot en met 85323000-9 (met uitzondering van 85321000-5 en 85322000-2)                                                                       |
| 26        | Cultuur, sport en recreatie                                             | 96                 | 74875000-3 tot en met 74875200-5, en 92000000-1 tot en met 92622000-7 (met uitzondering van 92230000-2)                                                               |
| 27        | Overige diensten (*)                                                    |                    |                                                                                                                                                                       |

(\*) Met uitzondering van arbeidsovereenkomsten.

(\*) Met uitzondering van overeenkomsten voor de aankoop, ontwikkeling, productie of coproductie van programmatuur door radio-omroeporganisaties en overeenkomsten betreffende zendtijd.

# Selection of candidates and tenderers

The contracting authorities may require candidates and tenderers to meet certain conditions → suitability of candidates and tenderers on the basis of qualitative selection criteria:

- Corruption/fraud/money laundering/participation in a criminal organization
- Bankruptcy/professional misconduct/no payment of taxes or social security contributions
- Proof of economic and financial standing
- Proof of technical and/or professional ability
- Quality assurance and environmental management standards (certificates)

# Contract award criteria

1. Most economically advantageous from the point of view of the contracting authority; factors e.g.: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion

OR

2. The lowest price only

# Dir. 2004/17/EC: 'Special Sectors Directive'

- Sectors (Directive only applicable to sectors mentioned in Directive!):
  - Energy (gas, heat and electricity)
  - Water
  - Transport
  - Post

# Activities

- Activities in each sector are defined in the Directive, for example:
  - The provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water
  - The exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports, airports and other terminal facilities
- Works and services concessions (publieke werken) for the listed activities are excluded from the applicability of Dir. 2004/17/EC (not from Directive 2004/18/EC)

# Who has the obligation to tender?

- Contracting entities:
  1. Contracting authorities, and
  2. Public undertakings (dominant influence of a contracting authority)
  3. Undertakings with special or exclusive rights in the sectors concerned

→ Broader than Dir. 2004/18/EC

# What and thresholds

- Contracts in writing etc.
- € 400.000 in the case of supply and service contracts → no difference between central authorities and other contracting entities
- € 5.000.000 in the case of works contract

# Procedures

1. Open
  2. Restricted
  3. Negotiated
- Generally, there's always a prior call for competition
  - Contracting entities may choose procedure, provided that a call for competition is made (e.g. publication of contract notice)
  - No competitive dialogue (due to the general, instead of limited, possibility of negotiated procedure).



# Service contracts: XVII-A and XVII-B

- Service contracts listed on Annex XVII-A are fully governed by Dir. 2004/17/EC (so Directive procedures are applied)
- For service contracts listed on Annex XVII-B only a notice with the results of the award procedure has to be sent to the Commission; no obligation to use one of the procedures ('lighter' regime)

## DIENSTEN IN DE ZIN VAN ARTIKEL 31

| Categorie | Benaming                                                                                                                       | CPC-indeling (1)                | CPV-indeling                                                                                                                                                                                |
|-----------|--------------------------------------------------------------------------------------------------------------------------------|---------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1         | Onderhoud en reparatie                                                                                                         | 6112, 6122, 633, 886            | 50100000 tot en met 50982000 (met uitzondering van 50310000 tot en met 50324200 en 50116510-9, 50190000-3, 50229000-6, 50243000-0)                                                          |
| 2         | Vervoer te land (1), met inbegrip van vervoer per pantserswag en koerier, met uitzondering van postvervoer                     | 712 (m.u.v. 71235), 7512, 87304 | 60112000-6 tot en met 60129300-1 (met uitzondering van 60121000 tot en met 60121600, 60122200-1, 60122230-0), en 64120000-3 tot en met 64121200-2                                           |
| 3         | Luchtvervoer van passagiers en vracht, met uitzondering van postvervoer                                                        | 73 (max. 7321)                  | 62100000-3 tot en met 62300000-5 (met uitzondering van 62121000-6, 62221000-7)                                                                                                              |
| 4         | Postvervoer te land (1) en door de lucht                                                                                       | 71235, 7321                     | 60122200-1, 60122230-0, 62121000-6, 62221000-7                                                                                                                                              |
| 5         | Telecommunicatie                                                                                                               | 752                             | 64200000-8 tot en met 64228200-2, 72318000-7, en 72530000-9 tot en met 72532000-3                                                                                                           |
| 6         | Diensten van financiële instellingen:<br>a) verzekeringsdiensten<br>b) bankdiensten en diensten in verband met beleggingen (1) | Ex 81, 812, 814                 | 66100000-1 tot en met 66430000-3 en 67110000-1 tot en met 67262000-1 (1)                                                                                                                    |
| 7         | Diensten in verband met computers                                                                                              | 84                              | 50300000-8 tot en met 50324200-4, 72100000-6 tot en met 72591000-4 (met uitzondering van 72318000-7 en 72530000-9 tot en met 72532000-3)                                                    |
| 8         | Onderzoeks- en ontwikkelingswerk (1)                                                                                           | 85                              | 73000000-2 tot en met 73300000-5 (met uitzondering van 73200000-4, 73210000-7, 7322000-0)                                                                                                   |
| 9         | Accountants en boekhouders                                                                                                     | 862                             | 74121000-3 tot en met 74121250-0                                                                                                                                                            |
| 10        | Markt- en opinieonderzoek                                                                                                      | 864                             | 74130000-9 tot en met 74133000-0, en 74423100-1, 74423110-4                                                                                                                                 |
| 11        | Advies inzake bedrijfsvoering en beheer en aanverwante diensten (1)                                                            | 865, 866                        | 73200000-4 tot en met 73220000-0, 74140000-2 tot en met 74150000-5 (met uitzondering van 74142200-8), en 74420000-9, 74421000-6, 74423000-0, 74423200-2, 74423210-5, 74871000-5, 93620000-0 |

## DIENSTEN IN DE ZIN VAN ARTIKEL 32

| Categorie | Benaming                                                               | CPC-indeling       | CPV-indeling                                                                                                                                                          |
|-----------|------------------------------------------------------------------------|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 17        | Hotels en restaurants                                                  | 64                 | 55000000-0 tot en met 55524000-9, en 93400000-2 tot en met 93411000-2                                                                                                 |
| 18        | Vervoer per spoor                                                      | 711                | 60111000-9, en 60121000-2 tot en met 60121600-8                                                                                                                       |
| 19        | Vervoer over water                                                     | 72                 | 61000000-5 tot en met 61530000-9, en 63370000-3 tot en met 63372000-7                                                                                                 |
| 20        | Vervoersondersteunende activiteiten                                    | 74                 | 62400000-6, 62440000-8, 62441000-5, 62450000-1, 63000000-9 tot en met 63600000-5 (met uitzondering van 63370000-3, 63371000-0, 63372000-7), en 74322000-2, 93610000-7 |
| 21        | Rechtskundige diensten                                                 | 861                | 74110000-3 tot en met 74114000-1                                                                                                                                      |
| 22        | Arbeidsbemiddeling (1)                                                 | 872                | 74500000-4 tot en met 74540000-6 (met uitzondering van 74511000-4), en 95000000-2 tot en met 95140000-5                                                               |
| 23        | Opsporing en beveiliging, met uitzondering van vervoer per pantserswag | 873 (m.u.v. 87304) | 74600000-5 tot en met 74620000-1                                                                                                                                      |
| 24        | Onderwijs                                                              | 92                 | 80100000-5 tot en met 80430000-7                                                                                                                                      |
| 25        | Gezondheidszorg en maatschappelijke dienstverlening                    | 93                 | 74511000-4, en 85000000-9 tot en met 85323000-9 (met uitzondering van 85321000-5 en 85322000-2)                                                                       |
| 26        | Cultuur, sport en recreatie                                            | 96                 | 74875000-3 tot en met 74875200-5, en 92000000-1 tot en met 92622000-7 (met uitzondering van 92230000-2)                                                               |
| 27        | Overige diensten                                                       |                    |                                                                                                                                                                       |

(1) Met uitzondering van arbeidsovereenkomsten.

# When are you allowed to have no prior call for competition?

- In case there are no (suitable) tenders (in an previous used procedure)
- In case of urgency
- Due to artistic or safety reasons, there is only one suitable economic operator
- In case of bargain purchases, due to e.g. bankruptcy
- ....

# Options in Dir. 2004/17/EC

- Framework agreements
- Dynamic purchasing systems

# Selection of candidates and tenderers

- According to objective rules and criteria which are available to interested economic operators
- ➔ No further criteria in Dir. 2004/17/EC

# Contract award criteria

- Most economically advantageous
- The lowest price only

# Both directives not applicable, then what?

- Examples (of Directive 2004/18/EC):
  1. Service concession
  2. Below thresholds
  3. Annex II-B services
- Are contracting entities bound by certain Community rules or principles or are they free to choose their contracting parties?

# Treaty principles

- When the Directives do not apply, the Treaty principles (non-discrimination and transparency) apply!!!
- A contracting authority is **not** free to award the contract to the contractor of its choice



# Contract of interest to other economic operators

- Legal basis is free movement and internal market: principles of equal treatment and non-discrimination
- These principles imply an obligation of transparency for contracting entities
- Contracting entities have to publish a contract notice to start up competition
- Awarding takes place on the basis of objective criteria and in a transparent manner
- Judicial review
- ✓ See Interpretative Communication (OJ 2006, C 179/2)

# Judgment *An Post*

- II-B service
- Starting point is that there is an underlying assumption that no real cross border interest yet on services listed on Annex II-B due to their specific nature
- However, when there is a clear cross border interest, the Treaty principles apply and then there is need to provide adequate information for other economic operators that may have an interest in the service
- Commission has to prove that such clear cross border interest exists

# Other types of contracts

- Contracts below the threshold amounts → Commission/Italy: “where it is *established* that such a contract is of certain cross-border interest”
- Service concessions → Stadler: “the contract concerned has a *certain* transnational dimension”

# No Community rules or principles

- When a contract award would be of no interest to economic operators located in other Member States, Community law is not applicable (no cross border aspect)
- Assess on the basis of the individual circumstances of the case (amount of money involved, location of the project, sector or market characterized by fierce competition, ...)

# 'In house' awarding

- The awarding of a contract by a contracting entity to an agency, department, section etc. **of its own** ('in house') is not subject to the procurement rules
- But when it is, strictly speaking, 'out of the house' but there is strong influence of the contracting entity, so in effect 'in house', are the procurement rules then applicable?

# Teckal judgment (1)

- Procurement directives are applicable when a contracting entity plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of goods, provision of services or execution of works
- It is in principle sufficient if the contract is concluded between, on the one hand, a contracting entity and, on the other, a person legally distinct from that entity

# Teckal judgment (2)

- However, when an entity is formally (legally) distinct from the contracting entity, the procurement directives do not apply when:
  1. The contracting entity exercises over the entity concerned a control which is similar to that which it exercises over its own departments, and
  2. That entity carries out the essential part of its activities with the controlling entity
- Very narrow interpretation
- If the two conditions are met, then it's 'Quasi in house'

# Summary

- Layered regime:
  1. **Strict:** Directives apply (who, what, value (thresholds))
  2. **Less strict:** Treaty principles apply (service concessions, B-services, below thresholds)
  3. **Least strict:** No Union rules or principles:
    - No cross border interest
    - In house
    - Quasi in house (Teckal)
    - Justifiable (Treaty or Rule of reason)