



Comptroller and Auditor General  
Special Report

Department of Justice, Equality and Law Reform

## **Garda Interview Recording Systems**

December 2002

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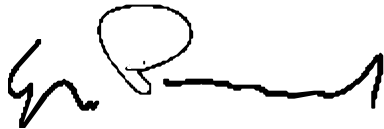
This report was prepared on the basis of information, documentation and explanations obtained from the public bodies referred to in the report. The draft report was sent to the Department of Justice, Equality and Law Reform and comments were requested. Where appropriate, the comments received were incorporated in the final version of the report.

## **Special Report of the Comptroller and Auditor General**

### **Garda Interview Recording Systems**

I have, in accordance with the provisions of the Comptroller and Auditor General (Amendment) Act, 1993, prepared a special report which sets out the results of an examination which I carried out on the procurement of audio-visual recording equipment for use in the interviewing of suspects by the Garda Síochána.

I hereby submit my report on the above examination for presentation to Dáil Éireann pursuant to Section 11 of the said Act.

A handwritten signature in black ink, appearing to read 'John Purcell', with a large, stylized initial 'J' and a long horizontal stroke extending to the right.

John Purcell

Comptroller and Auditor General

13 December 2002



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**Summary of Findings**

## Summary of Findings

Facilities to record evidence taken by Gardaí have been installed in 220 interview rooms in Garda Stations across the country. The equipment which was acquired in a procurement round conducted in 2001 consists of audio-visual recording systems using VHS. 252 systems in all were purchased for the national scheme.

Prior to the nationwide procurement round the Gardaí had engaged in pilot testing of the process and equipment. To facilitate this pilot testing 14 audio-visual systems were purchased between 1993 and the end of 2000.

Approximately €193,000 was spent on equipment acquired for pilot testing and €3.7 million on equipment acquired as part of the nationwide round.

The successful tenderer under the national scheme had also been the main supplier of the pilot stage equipment.

Concerns were raised about the fairness and objectivity of the procurement process.

As a result I examined the procurement focusing on two main issues

- whether the acquisition of equipment by the Gardaí complied with public procurement law
- whether the process for the identification and acquisition of the equipment represented good procurement practice.

### Compliance with Public Procurement Law

On the matter of compliance with public procurement law, I was advised by a firm of solicitors. The conclusion of the legal expert on a range of questions posed by me was that while there had been breaches of the rules, those breaches were not material in that they would not affect the ultimate contract award decision.

The breaches noted were the failure to

- ensure the publication of a contract award notice within the times specified and
- give adequate reasons for the award decision made within the specified time.

The non-publication of an indicative notice specifically relating to the type of equipment required may have constituted a further non-material breach of the Directive.

### Compliance with good Public Procurement Practice

I also examined the acquisition of the equipment from the viewpoint of good public procurement practice and noted that

- the whole of the pilot testing between 1994 and 2000 was conducted on the basis of a single equipment solution



- the relative merits of more modern DVD systems may not have been evaluated in sufficient detail to enable due consideration to be given to that option
- certain pilot stage acquisitions were not the subject of competitive tendering.

The lessons to be learned from a review of the national procurement round conducted in 2001 include

- the importance of ensuring that the definition of requirements is framed in a manner that maximises the number of technology and equipment solutions offered by tenderers
- the need to ensure that the terms and conditions in tender documents support the procuring organisation in its quest for the best offer and, conversely, do not risk ruling out acceptable bids by the inclusion of inappropriate or unnecessary terms
- the desirability of having an independent expert on the evaluation team.

## **National Guidance**

I noted that the national guidance on procurement is somewhat out of date. There is a need to update this guidance to assist procuring organisations in

- conducting pilot testing in a manner which both allows and encourages the identification of as wide a range as possible of acceptable technology solutions or equipment options
- drawing up appropriate specifications and tender documents
- specifying evaluation schemes for both the qualification of suppliers and the selection of proposals for the supply of equipment
- creating balanced evaluation teams which are, and can be demonstrated as being, simultaneously expert and objective
- complying with the provisions of public procurement law.



## **Garda Interview Recording Systems**



## Introduction

**1.1** In March 1990 a Committee to enquire into certain aspects of Criminal Procedure (“the Martin Committee”) reported to the Minister for Justice, who had established it. The terms of reference of the Committee had included an examination as to whether additional safeguards were needed to ensure that uncorroborated inculpatory admissions made by an accused to the Garda Síochána were properly obtained and recorded and to make recommendations accordingly. As a result facilities have now been put in place, following pilot testing, for the recording of evidence taken in Garda stations. Such evidence may be used in the course of court proceedings.<sup>1</sup>

## Interview of suspects

**1.2** In its report, the Committee strongly recommended that the questioning of suspects take place before an audio-visual recording device. The Committee did not consider the precise type of equipment to be a matter within its terms of reference. The Committee was of the view that audio-visual recording should be introduced into selected Garda stations, so that by way of a pilot scheme the experience thereby gained could be put to good use.

**1.3** On 26 May 1992 the Government approved the introduction, on a pilot basis in selected Garda Stations, of both audio and audio-video recording of the questioning of suspects subject to such special arrangements as might be necessary in respect of cases of organised crime and offences committed by terrorists<sup>2</sup>.

**1.4** In March 1993 the Minister for Justice appointed a Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Suspects to oversee the pilot implementation. The composition of the committee and its terms of reference are at Appendix A.

**1.5** The Steering Committee appointed an Implementation Group to organise the operational requirements including the architecture of interview rooms and the selection of electronic equipment. This Group included personnel from the Garda training, communications, accommodation and furniture sections and from the Office of Public Works in addition to the members of the main Steering Committee.

**1.6** The Steering Committee noted at an early stage in its deliberations that it would be necessary to provide equipment for the Gardaí in advance of any pilot scheme in order that they could familiarise themselves with electronic recording of interviews and consider what training should be provided<sup>3</sup>. To this end three audio-visual systems and one audio system were purchased in August 1993 at a cost of €23,831.

**1.7** In March 1994, the Steering Committee recommended that a preliminary pilot scheme be established in Tallaght Garda Station, using the test equipment which had been installed there in 1993. The pilot testing was subsequently extended as follows

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<sup>1</sup> The use, to date, of this form of evidence is rare in practice

<sup>2</sup> Secretary to the Government, 27 May 1992 <Reference S. 26382>

<sup>3</sup> Paragraph 2.7 (i) of the Steering Committee Report March 1994

- in November 1994 to three stations– Portlaoise, the Bridewell, Dublin and the Bridewell, Cork – three audio-visual systems were acquired at a cost of €36,071
- in January 1998 to two stations - Mill Street, Galway and Henry Street, Limerick – a further two audio-visual systems were procured at a cost of €24,463
- in June 2000 to six more locations – Garda College in Templemore, Terenure and Store Street in Dublin, the Bridewell in Cork, Sligo and Drogheda. Six audio-visual systems were purchased at a cost of €109,027.

**1.8** This latter purchase was made approximately 15 months after the Steering Committee published its Second Interim Report in March 1999 recommending that a national scheme of electronic recording of interviewing of suspects be implemented.

**1.9** 252 audio-visual systems were ordered in April 2001 under a contract for the national scheme at a cost of €3,674,901. Of the 220 interview rooms to be equipped, 214 in 120 Garda Stations have been fitted out as of 16 October 2002. 211 are presently operational.

## **Specification of requirements – National Scheme**

**1.10** The Steering Committee’s Second Interim Report in March 1999 stated that on advice from the Garda Síochána and its technical advisor<sup>4</sup>, it considered that both the audio and audio-video recording equipment, currently in use in the pilot scheme Garda stations had proved satisfactory. Hence, it recommended that any national scheme of electronic recording should usefully exploit this learned experience and employ recording equipment of the same make and model, subject to procurement through a supplier by means of a competitive tendering exercise to ensure value for money<sup>5</sup>.

**1.11** The Garda Telecommunications team used the tender documentation previously employed in the earlier 1994 acquisitions of interview equipment as the template from which to draw up an Invitation to Tender for the national scheme. The First Interim Report of the Steering Committee issued in March 1994 proposed that the equipment installed in Tallaght should be used for the preliminary pilot and should be used to assist in drafting specifications for the purpose of seeking tenders for equipment for the full pilot scheme.

## **Invitations to Tender**

**1.12** Following completion of the technical specification for the recording systems and of the architectural considerations for interview rooms in the participating Garda Stations, the Department issued an Invitation to Tender Notice on 10 August 2000, to be published in the Official Journal of the European Communities (“OJ”). The Notice was published on 18 August 2000.

**1.13** Three companies of the 13 who expressed interest in the competition returned tenders by the closing date for receipt of tenders, 2 October 2000. The tenders from AV Niche (Recording Systems) Limited (AV Niche), SKS Communications Limited (SKS) and SPC Limited were opened on 3 October 2000 in the presence of three Garda members and two Department officials.

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<sup>4</sup> Professor James G. Lacy, member of the Steering Committee

<sup>5</sup> From paragraph 2.5.4 of the Steering Committee’s Second Interim Report March 1999

## Evaluation Arrangements

**1.14** Following the normal tender opening procedures all tenders were forwarded to the Superintendent of the Telecommunications Section for evaluation. The persons chosen for the evaluation of the tenders comprised four members attached to the Telecommunications Section who had extensive experience in telecommunications and video recording of interview equipment. None of these had been involved in the Steering Committee. Two had been present when the tenders were opened.

**1.15** The tenders submitted by AV Niche and SKS were deemed to meet the qualifying criteria. SKS offered two options, afterwards referred to as a “light-duty” option and “heavy-duty” option<sup>6</sup>. SPC Limited’s tender was deemed by the evaluation team not to qualify.

**1.16** The evaluation team requested both qualifying tenderers to provide sample systems for evaluation. Both firms were required to furnish additional information during the evaluation period which extended from November 2000 to January 2001.

**1.17** The tenders were evaluated using the “most economically advantageous tender” method. This involves allocating marks for each evaluation criterion weighted according to the relative priorities established in advance, including cost. The tender scoring the highest aggregate marks is awarded the contract.

**1.18** In February 2001, the Assistant Commissioner with responsibility for the Telecommunications Section forwarded the Tender Evaluation Report (TER) to the Department of Justice, Equality and Law Reform (the Department) for information and requested approval to purchase 252 systems (220 for phased deployment in Garda Stations and 32 backup systems) from SKS on the basis of its being the most economically advantageous tender.

## Government Contracts Committee approval

**1.19** After obtaining confirmation from the evaluation team that operational Gardaí had no complaints about the equipment proposed, the Department noted that, as the tender which was deemed most economically advantageous was not the lowest cost tender, the approval of the Government Contracts Committee (GCC) would be required before placing the contract. On 20 March 2001, the Department submitted details of the proposed contract to the GCC for its approval.

**1.20** The GCC, at its meeting of 28 March 2001, approved the contract with SKS in the amount of €3,674,901. The AV Niche tender amount was €2,872,058.

**1.21** On 26 April 2001, Garda Headquarters (Finance and Logistics Section) notified AV Niche that its tender had not been successful. It informed the company that the contract had been awarded to SKS and the reason for non-acceptance of the AV Niche tender was that it was not the most economically advantageous.

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<sup>6</sup> Designated as such by the Evaluation team to make a distinction between the recording units proposed by SKS – one a domestic type, the other of industrial standard.

## Concerns raised

**1.22** Concerns were expressed in Dáil Questions, media reports and queries raised by the unsuccessful tenderer in regard to the fairness and objectivity of the procurement process. The Public Accounts Committee in private session requested that I should examine the matter. The Secretary General of the Department also contacted me in connection with the carrying out of an examination of the award of the contract.

**1.23** The issues raised by the unsuccessful tenderer included

- an inference that an apparently close relationship developed between SKS and the Garda Síochána in the course of pilot testing of equipment by the Garda Síochána which resulted in SKS having an unfair advantage
- an allegation that information given by AV Niche to the Garda Síochána a year before the tender competition was announced was passed to SKS
- AV Niche was not informed appropriately of the reasons for not being successful in the tender competition.

## Evaluation Issues and Methodology

**1.24** My examination focused on two main issues

- Whether the acquisition of equipment by the Garda Síochána complied with public procurement law
- Whether the process for the identification and acquisition of the equipment represented good public procurement practice.

**1.25** Arising out of those issues I identified a set of sub issues which might potentially have impacted on the compliance by the Garda Síochána with EU procurement law.

**1.26** I then referred the sub issues to a firm of solicitors for their legal evaluation.

**1.27** Various documents were provided to the legal expert for the purpose of the review. The conclusions of the expert are based on the assumption that all documents relevant to the procurement process have been supplied, all signatures are authentic and all copy documents provided were complete and conformed to their originals. The legal expert was not in a position to provide advice on the merits of the technical equipment which was the subject of the tender.

**1.28** The examination of the transactions in terms of good public procurement practice was based on an evaluation by my Office.

**1.29** A further document was provided by the Garda authorities through the Department in August 2002 after the examination fieldwork had been completed. A copy of the document is at Appendix C.



## Report Structure

**1.30** The conclusions of the legal expert on the compliance of the transactions with public procurement laws are set out in Chapter 2. I concur with those conclusions which take account of EU Directives in place since the early 1970s to remove barriers to intra-EU trade by tackling discriminatory practices in contract awards, the promotion of cross-border competition for public contracts and the free movement within the EU of goods and services. The main provisions of EU law relating to public procurement are set out in detail in Appendix B.

**1.31** My conclusions on compliance of the transactions with good public procurement practice are set out in Chapter 3.

**1.32** The observations of the Department of Justice, Equality and Law Reform incorporating those of the Garda Síochána are set out in Chapter 4.

## **2 Compliance with Public Procurement Law**

**2.1** This chapter sets out the conclusions of a legal expert on potential compliance issues I identified from my initial review of the procurement transactions.

### **Potential Compliance Issues**

**2.2** The aspects of the transactions which I identified as giving rise to potential concerns about compliance with public procurement law were

- the non-tendering of pilot stage purchases
- whether the existing relationship established in the course of pilot testing conferred an unfair advantage on one tenderer for the nationwide equipping
- the propriety of referring an offer by AV Niche of alternative equipment for pilot-testing to SKS
- whether the Steering Committee's recommendation of a particular make and model of equipment could have biased the procurement process
- whether the awarding authority complied with advertising rules set in the EU Directive
- whether it is permissible to accept tenders from one firm which had not been submitted in the manner prescribed in the request for tenders
- whether the criteria for assessing whether tenderers were qualified were in compliance with the Directive
- whether the tender evaluation procedure was fair
- whether post evaluation information supplied to the unsuccessful tenderer was adequate.

### **Basis of legal evaluation**

**2.3** The legal expert engaged by me considered the procedure adopted by the Department of Justice, Equality and Law Reform and by the Garda Síochána in the award of the contract for the purchase, installation and commissioning of suspect interview recording systems to SKS Communications Limited in April 2001. The task of the expert was to examine the procurement process adopted commencing with the placing of a notice in the *OJ* and taking account of the previous course of dealing with SKS in order to identify whether the procedure adopted was substantially in accordance with the EC public procurement obligations set out in the Directive.

**2.4** The conduct of the procurement process was considered in order to identify whether it gave rise to a breach of the Directive. In respect of the concerns about procurement procedure identified by me, the expert considered whether there had been any breach of the principles underlying the public procurement rules, namely, equality of treatment (non-discrimination), transparency, proportionality and mutual recognition so as to give rise to a material breach of the Directive. These principles are defined at Appendix B.

**2.5** A breach of the public procurement rules can occur in the process leading up to contract award or in the post award period. In general, a breach of the rules which is of such importance that it is capable of affecting the ultimate award decision (i.e. the outcome) will, for the purposes of this report be termed a “material breach” of the rules. In general, breaches of the rules which are less serious and not capable of affecting the outcome are termed “non-material” breaches.

## Issues Considered by the Legal Expert

### *Issues arising out of the initial procurement of equipment 1993 - 2000 and related pilot-testing*

#### ***Application of EC Directives to purchases in 1993, 1994, 1998 and 2000***

#### **FACTS**

**2.6** The following procurements were made in the period 1993 to 2000.

- In August 1993, the Garda Telecommunications Section purchased four machines, three with audio-video and one with audio only at a cost of €23,831. Two machines were supplied by SVT (which also manufactured the equipment) and two were supplied by David Horn Communications Limited (“DHL”), the actual equipment was manufactured by NEAL/Lee James Limited (“NEAL”). There was no formal tender process to acquire the equipment.
- On 3 October 1994, the Garda Telecommunications Section issued an invitation to tender to 14 suppliers for audio-visual equipment to be installed in three Garda stations as part of the pilot scheme. The invitation to tender set out detailed requirements as regards technical specifications and stated that the procurement was being conducted pursuant to Council Directive 77/62/EEC. Six responses were received including a response from each of NEAL and SKS. In November 1994, an order was placed with NEAL for equipment at a cost of €36,071. NEAL appointed SKS, to carry out after sales service. Department of Finance and GCC approval was obtained for this purchase.
- In January 1998, the Department notified the Garda Síochána that the Steering Committee had decided to extend the pilot scheme to two additional stations. The Garda Síochána contacted NEAL for supply of the relevant NEAL equipment and was informed that SKS was the distributor in Ireland. The Garda Síochána subsequently procured equipment from SKS for €24,463. No other suppliers were invited to tender.
- On 13 June 2000, before the recommendation of the Steering Committee to go nationwide was put into effect, the Garda authorities wrote to the Department seeking permission to purchase six systems. The Department sought the approval of the GCC to place the contract with SKS on 13 June 2000. The GCC approved the contract with SKS on 20 June 2000 in the amount of €109,027. No other suppliers were invited to tender.

## RULES

**2.7** Acquisitions of equipment valued below the threshold set out in the EU Directives are excluded from the procurement regime in those Directives. The relevant threshold at all times was €200,000.

## LEGAL EVALUATION

**2.8** The value of the equipment purchased in 1993, 1994, 1998 and 2000 did not exceed the public procurement thresholds so that the Directives did not apply to them.

***Whether the prior dealings with the supplier of pilot-testing equipment gave rise to concerns under the Directive or the principles of equality of treatment, transparency, proportionality or mutuality in the context of the main (2001) procurement***

## FACTS

**2.9** The Garda Síochána experience of the pilot testing of NEAL equipment led the Steering Committee to recommend in its Second Interim Report at Recommendation 5 that *“The specialist audio/video recording and audio/video playback equipment currently in use in the pilot scheme has proved satisfactory from an operational and technical view point. As a consequence, equipment not only to the same technical specification but also of the same make and model should be employed in the national scheme of electronic recording”*. The Steering Committee did not recommend that SKS be the provider but SKS had been the Irish distributor of NEAL since 1997. The Request for Tender (“RFT”) did not follow the Steering Committee’s recommendation to require only NEAL equipment.

**2.10** NEAL products had been used by the Garda Síochána in its pre-pilot and pilot testing from 1993 to 2000<sup>7</sup>. SKS had a relationship with the Garda Síochána from 1994 to 2000, first as a provider of after sales service from 1994 to 1998 and subsequently as a supplier of NEAL equipment and a provider of after sales service. Apart from the supply relationship including related after sales service, the precise relationship between SKS and the Garda Síochána is not documented. AV Niche had no relationship with the Garda Síochána prior to 2000<sup>8</sup>.

## RULES

**2.11** Article 8 of the Directive prohibits the imposition of any requirement that goods of a particular make or source etc. be acquired. Such an obligation would constitute a material breach of the rules.

**2.12** The Directive does not provide any assistance on the issue of how previous or on-going relationships between the awarding authority and bidders should be considered in a procurement situation. However, to the extent that previous courses of dealings between an

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<sup>7</sup> Some of the audio-visual equipment procured by the Garda in 1993 was manufactured by NEAL (but supplied by David Horn Communications Limited)). The audio-visual equipment procured by the Garda in 1994, 1998 and 2000 was also manufactured by NEAL. SVT manufactured and supplied the other audio-visual equipment supplied to the Garda Síochána in 1993 (it was actually installed by Language Audio Office Systems Limited). In 1994, the equipment was purchased direct from NEAL but after sales service was supplied by SKS (initially a tenderer itself).

<sup>8</sup> As explained in paragraph 2.17 below, AV Niche wrote to the Garda Síochána in 1999 offering its equipment for pilot-testing.

awarding authority and bidders can give those bidders a number of advantages it is important that the principles of equality of treatment and transparency are adequately respected.

**2.13** A bidder which enjoys a relationship with the awarding authority could benefit from the following advantages as compared to other bidders so as to infringe the principles of transparency and equality of treatment

- information over and above that available to other bidders
- an opportunity to influence tender specifications and
- additional time to prepare responses due to forewarning of the opportunity.

**2.14** Therefore, the contracting authority is under a strict obligation to ensure that, notwithstanding a decision to purchase equipment from a particular entity in the context of the pilot testing process and its prior course of dealing with that entity, in its drawing up of the tender specifications in a subsequent procurement and in its treatment of that bidder throughout that subsequent tender process, it does not put it at any competitive advantage and treats all bidders in an equal manner.

## LEGAL EVALUATION

**2.15** The RFT did not require the provision of goods of a particular make or source. Therefore, there was no breach of the obligation in Article 8 of the Directive.

**2.16** It is clear that SKS had a relationship with the Garda Síochána from 1994 onwards and that the Gardaí were familiar with NEAL equipment since 1993. The documentation does not reveal whether SKS/NEAL actually gained any advantage in the main procurement process as a result of their prior course of dealing with the Garda Síochána.

***Consideration of the circumstances surrounding the Garda Síochána's passing on to SKS details of AV Niche's offer to supply equipment and SKS's subsequent conduct.***

## FACTS

**2.17** The documentation reviewed does not make clear SKS's precise relationship with the Garda Síochána apart from supply of the equipment and after sales service. However, the circumstances surrounding a letter from SKS to AV Niche in 1999 i.e. in the pilot test phase and before procurement of equipment for the national scheme indicates that the relationship between the Garda Síochána and SKS may have extended beyond a mere supply and after sales service relationship.

**2.18** On 26 July 1999, Mr Neil A Holmes, Managing Director of AV Niche wrote to the Garda Síochána. In that letter, AV Niche stated that it was aware that the Garda Síochána was evaluating a NEAL audio video interview recording system and had been doing so for some months. AV Niche stated that it "would be pleased to offer an alternative system for evaluation if this would benefit the trials being conducted." It also stated that it would "welcome the opportunity of quoting for any existing and future requirements for the above types of equipment/systems.

**2.19** Apparently, the Garda Síochána passed this information on to SKS. It did so because "it was felt [SKS] might be in a position to best inform him [Mr Holmes] of the then current

technical requirements of the pilot equipment as laid down by the Steering Committee”. On 5 August 1999, SKS in a letter to Mr Holmes of AV Niche requested that AV Niche forward to it relevant catalogues and make arrangements to send it a unit “for evaluation”. AV Niche did not send any equipment to SKS.

**2.20** SKS’s letter to AV Niche gives the impression that SKS was involved in the evaluation of equipment for the pilot testing and/or the pilot testing of equipment on behalf of the Garda Síochána rather than a mere supplier of the equipment and provider of after sales service as documented.

## **RULES**

**2.21** The public procurement rules are not directly relevant to the relationship that developed between SKS and the Garda Síochána in the course of the pilot testing. The passing by the Garda Síochána of information to SKS and its subsequent request to be provided with its competitor’s equipment for testing needs to be considered in the context of the equality of treatment principle.

## **LEGAL EVALUATION**

**2.22** No AV Niche equipment was provided to SKS for evaluation. Therefore, SKS did not gain a competitive advantage as a result of the information provided by the Garda Síochána.

**2.23** The letter from SKS to AV Niche gives the impression that it was involved in the evaluation/pilot testing. If SKS was supplying a service to the Garda Síochána in respect of pilot testing, there should be some agreement between the parties outlining the contractual relationship. It is unsatisfactory that the precise relationship would not appear to be documented. Outside of a consultancy arrangement or an agency agreement, a request by one competitor of another that it be provided with equipment for evaluation is highly unusual.

***Consideration of the impact, if any, of the Steering Committee’s recommendation of a particular make/type on the awarding authority’s selection of the technical specification and compliance of the specification as set out in the RFT with the Directive’s requirements***

## **FACTS**

**2.24** Recommendation 5 of the Steering Committee’s Second Interim Report stated that “equipment not only to the same technical specification but also the same make and model [as that used in the pilot scheme] should be employed in the national scheme of electronic recording”. The RFT for the supply and installation of interview recording equipment published by the Department and the Garda Síochána did not require that the equipment provided be NEAL 3325 Triple Video Interview Recording System.

**2.25** The RFT set out a detailed technical specification in Chapter III of the document. The technical specifications were very similar to those drawn up earlier by the Garda Telecommunications Section for the 1994 procurement as set out in Appendix 7 to the Committee’s Second Interim Report. It stated that the specification covered two systems: (1) the video recording system including the cameras, cassette drives, microphones, LCD monitors and picture-in-picture application; and (2) standard video playback system. The documentation contains over ten pages of information in respect of the technical specification required including a section recognising equivalent standards, material or articles.

**2.26** The technical specifications in the RFT do not mention goods of any specific make or source or of any particular process or the indication of trademark, patents, types or of a specific origin of production. As a matter of fact, SKS's bid related to NEAL equipment while AV Niche's related to its own equipment and both types were considered compliant with the specifications.

## **RULES**

**2.27** The Directive sets out detailed rules on use of technical specifications. Use of technical specifications which mention goods of a particular make or source or of a particular process and which tend to favour or eliminate certain suppliers or products are specifically prohibited by Article 8 of the Directive unless justified by the subject of the contract. The drawing up of technical specifications and the selection of award criteria with the effect of eliminating providers capable of meeting the awarding authority's performance targets or of favouring a particular technology or provider would constitute a breach of the principles of equality of treatment and mutual recognition.

## **LEGAL EVALUATION**

**2.28** The Department/the Garda Síochána did not follow Recommendation 5 of the Steering Committee to request provision of NEAL equipment. Therefore, there was no breach of Article 8 of the Directive. Provided that the technical specifications used and the award criteria selected were objectively set, there will be no breach of the principles of equality of treatment and mutual recognition.

### ***Issues arising out of the actual procurement process leading up to the award of contract***

#### ***Consideration of the awarding authority's compliance with the common advertising rules set out in the Directive leading up to the award of contract***

## **FACTS**

**2.29** An indicative notice (also known as a prior information notice or PIN) in respect of procurements for the Garda Síochána for 2000 and published in the OJ in March 2000 did not specify an up-coming procurement of video recording systems.

**2.30** The Department considers that this PIN, relating primarily to computer and telecommunication equipment, covers the purchase of suspect interview recording systems.

**2.31** The Department/the Garda Síochána issued a contract notice which it dispatched to the Office for Official Publications of the European Communities on 10 August 2000 and which was published on 18 August 2000 setting out its requirement for the supply of suspect interview video recording systems.

## **RULES**

**2.32** In regard to the annual procurement intentions of a contracting authority the Directive provides that "contracting authorities shall make known, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent twelve months where the

total estimated value, taking into account the provisions of Article 5, is equal to or greater than €750,000”. [Article 9(1)]

**2.33** In regard to each specific procurement transaction the Directive provides that “Contracting authorities who wish to award a public supply contract by open, restricted or negotiated procedure ... shall make known their intention by the means of a notice”. Notices should be drawn up in accordance with the model set out in Annex IV to the Directive and those notices be sent as rapidly as possible and using the most appropriate channels to the Office for Official Publications of the European Communities. [Article 9(2)]

## LEGAL EVALUATION

**2.34** The value of the contract at issue exceeded €750,000 so that Article 9(1) is relevant. There is some uncertainty about whether non-publication of an indicative notice in the *Official Journal* is a breach of the requirement set out in the Directive<sup>9</sup>. Non-publication of PINs is believed to be widespread. There is no evidence to suggest that any bidder was prejudiced by the non-publication of a notice in this case. Thirteen companies expressed an interest following publication of the contract notice in accordance with the requirements of Article 9(2). Publication of a contract notice is considerably more important than the publication of the indicative notice and the Department/Garda Síochána complied with this obligation. Therefore, in the circumstances of this case, such a failure (if indeed it was a failure) is not a material breach of the Directive.

## ***Consideration of the decision to accept tenders from one firm in a manner not in accordance with the Request for Tenders***

## FACTS

**2.35** Section 1.5 of the RFT provides as follows:

*“Format of tenders*

*Tenders must strictly adhere to the format and requirements stipulated in this document and must be completed in the English language.”*

**2.36** Section 2.2 of the RFT provides as follows:

*“Companies may submit more than one proposal if they wish, in respect of the equipment specified. However, any second or subsequent proposal must be prepared and presented under separate cover. Multiple proposals contained within the same document will not be accepted and will not qualify for evaluation.”*

**2.37** The Garda Telecommunications Section received thirteen expressions of interest in receiving the RFT and the RFT was sent to each one of these. Three companies of the thirteen who expressed an interest in the competition returned tenders. These were AV Niche, SKS and SPC Limited.

**2.38** One of the tenderers, SPC Limited was deemed by the Garda Síochána evaluation team not to be qualified under the qualification criteria set out in the documentation. AV Niche

<sup>9</sup> In a case under the Works Directive, Case C-225/98, the European Court of Justice found that publication of a PIN is only compulsory where the awarding authority exercises its option to reduce the time limits for the receipt of tenders.



Limited submitted one bid in a single document in a single envelope. SKS offered two options, a “light duty” option and a “heavy duty” option in one single tender document. The decision to accept both of SKS’s offers for evaluation was not in accordance with the formalities specified in Sections 1.5 and 2.2 of the RFT. The Tender Evaluation Report did not allude to SKS’s non-compliance with the formality.

## **RULES**

**2.39** There is no requirement in the Directive to prohibit the submission of more than one bid by any tenderer or any requirement that each option be identified in separate documents. Indeed, the Directive permits contracting authorities to elect to seek variant bids and, as a matter of procurement practice, options are often set out in a single document.

**2.40** In general, formalities are imposed for the contracting authority’s own convenience. It is arguable that a contracting authority should be able to waive any formality imposed by it for its own convenience where such a waiver does not result in a significant unfairness in the treatment of bidders. Clearly, it is wasteful if awarding authorities must reject advantageous bids whenever there is a breach of some minor formality and it would be harsh on those providers to be excluded in such a case.

**2.41** However, the acceptance of a non-responsive/non-compliant bid may result in an unfair advantage for the other bidders in certain circumstances and a discretion to waive formalities can create the potential for abuse since it may only be exercised for particular favoured providers. For example, if a bid is accepted late, the bidder may have benefited in terms of preparation time in comparison with other bidders, and also gains an advantage over firms who were deterred from bidding by the relevant formality.

## **LEGAL EVALUATION**

**2.42** The decision to evaluate SKS’s bid notwithstanding its failure to comply with the formalities in Section 2.2 of the RFT is not in accordance with the formalities specified in the RFT. The decision to evaluate SKS’s bid in such circumstances does not constitute a breach of any provision of the Directive per se but it needs to be considered in the context of the principles which underpin the Directive, including, in particular, the principle of equality of treatment and proportionality.

**2.43** In the circumstances, expulsion of SKS’s bids on the grounds that SKS breached a minor formal requirement by failing to provide separate options in separate documents enclosed in separate envelopes would seem a disproportionate response to the failure to fulfil the formality required. Acceptance by the contracting authority of SKS’s bid did not appear to give rise to any significant unfair advantage for the other bidder evaluated as it did not appear to have suffered any disadvantage as a result (it prepared only one bid and there is no indication that it would have considered submitting a second option). Therefore, the failure of the awarding authority to comply with the requirements set out in the RFT did not give rise to a material breach of the public procurement rules in this case.

***Consideration of the request for sample equipment for evaluation and the manner in which the evaluation of equipment was carried out.***

**FACTS**

**2.44** Section 2.6 of the RFT indicated that systems might need to be supplied for evaluation. It provided that “An Garda Síochána will not be liable for any costs incurred by suppliers in the preparation of tenders or any associated work effort, including the supply of systems for evaluation and the return of such systems to suppliers, following such evaluation.”

**2.45** Section 2.20 of the Invitation to Tender provided as follows:

*“Delivery*

*Suppliers should state minimum delivery times. Suppliers may be requested to supply a unit for demonstration and test purposes at Garda Headquarters, Dublin.”*

**2.46** The RFT documents were sent to AV Niche on 5 September 2000. Tenders were to be submitted on 2 October 2000. On 10 October 2000, the evaluation team asked each of AV Niche and SKS to submit to it a complete sample of its proposed system to include recording unit, cameras, lenses, microphones, playback unit and any options to these. There was no delivery date specified in this notice. On 19 October 2000, the evaluation team asked AV Niche and SKS to ensure that the proposed equipment reach the Garda Headquarters by 12 noon on 27 October 2000. On 20 October 2000, AV Niche stressed that to supply the test equipment by 27 October 2000 was an “extremely ambitious target” but that it would attempt to meet the timescale. It is not known when AV Niche and SKS delivered their equipment to Garda Headquarters.

**2.47** The equipment provided by each of the parties was placed in similar but separate rooms at the site. This was stated to be in order to ensure that no bidder had an opportunity to see the products of its competitor. The marking sheets attached to the Tender Evaluation Report states the rationale behind the marks for each criterion in respect of each bid and the mark to be awarded. The marking sheets are not very detailed.

**RULES**

**2.48** Article 23(1)(a) of the Directive provides that evidence of the Supplier’s technical capacity may be furnished by a number of means. Article 23(1)(d) provides that samples can constitute evidence of the supplier’s technical capacity. Clearly, the evaluation of the samples was of great importance to the technical merit criterion which formed part of the award criteria. Evaluation must accord with the principles of equality of treatment, transparency, proportionality and mutual recognition and general principles of regularity.

**LEGAL EVALUATION**

**2.49** AV Niche was aware of the possibility that it would need to provide a sample system to the Garda Síochána for evaluation since its receipt of the RFT posted to it on 5 September 2000. If it is the case that SKS as a result of its earlier course of dealings with the Garda Síochána *knew* that a sample system would have to be provided while AV Niche were only aware of the *possibility* that it may need to be provided, then SKS may have been at an advantage in respect of the timely delivery of the equipment for inspection. However, under the award criteria specified in the tender documentation no marks were given in respect of

timeliness of submission of the equipment. Marks were only awarded for ability to meet installation timescales in accordance with each bidder's stated ability to complete ten stations per week. In fact, AV Niche received higher marks for this criterion than SKS.

**2.50** The documentation reviewed does not appear to suggest that there was any breach of the principle of equality of treatment as regards the conditions under which the equipment or its testing were evaluated, in terms of the principles of equality of treatment, transparency, proportionality and mutual recognition.

### ***Consideration of the evaluation procedure employed by the awarding authority under the criteria set for the assessment of qualified tenderers***

#### **FACTS**

**2.51** Section 2.10 of the RFT set out details of the qualifications required of tenderers. It provides as follows

#### **“2.10 Qualifications required of Tenderers**

*Evidence of companies' commercial status and competence in the technology concerned shall be supplied as specified in Articles 22.1(a) and 23.1(a) of Directive 93/36/EEC. Before a contract is awarded the successful contractor will be required to promptly produce a Tax Clearance Certificate. In addition, contractors must retain tax reference numbers for any sub-contractors where payments exceed £5,000 (include VAT). A successful non-resident contractor or sub-contractor will be required to produce a statement from the Irish Revenue Commissioners.*

#### **2.11 Evaluation Criteria**

*The evaluation will be carried out in two stages.*

#### **Stage 1 Qualification**

*This stage of the evaluation will include:-*

#### **Supplier qualification**

*Suppliers must satisfy conditions as set out at Part 2.10 above. Tenders may be disqualified at any stage in the evaluation process if suppliers are found to be unqualified under these conditions.”*

#### **RULES**

**2.52** Article 22.1(a) provides that evidence of the supplier's financial and economic standing may be furnished by appropriate statements from bankers.

**2.53** Article 23 of the Directive is intended to facilitate the awarding authority in understanding whether a potential contracting partner has the technical ability to perform the contract – that it has the skills, tools, manpower etc., to provide the goods or services as specified in the contract. These provisions limit the way in which the technical assessment may be carried out, and the criteria which may be used but make clear that a firm may be excluded for failing to meet technical requirements.

**2.54** Under the Directive, the qualification process under which the bidders commercial status and technical merit is considered and on the basis of which a bidder can be excluded is entirely separate from the award criteria.

#### LEGAL EVALUATION

**2.55** The qualification criteria set out in the RFT would seem to be acceptable in all respects and in compliance with the Directive. Both SKS and AV Niche were deemed qualified.

#### ***Consideration of the bid evaluation procedure employed by the awarding authority under the award criteria resulting in the award of the contract to SKS***

#### FACTS

**2.56** The RFT set out seven award criteria. While it did not state the precise weighting to be applied to each criterion the weighting scheme which was used was as follows

Criteria		Percentage weighting
I	Technical merit and functional characteristics	35
li	Cost of provision of overall systems including all mandatory items	20
lii	Extent of compliance and cost of desirable options	10
lv	Ability to meet installation timescales	10
V	Supplier background/experience	10
Vi	Cost of support contract	10
Vii	Ongoing costs i.e., optional maintenance contract	5
		100%

**2.57** The process was carried out under the open procedure. The RFT provided that the Garda Síochána reserved the right to seek clarification or verification of any information supplied by tenders. The RFT also stated that tenders had to be complete and all specification clauses responded to. There seems to have been considerable correspondence between the Garda Síochána and AV Niche during the evaluation process including requests for clarification of items.

**2.58** A Tender Evaluation Report set out the marks given to each tender under the evaluation criteria. The inputs to most of the criteria were clear subject to the following observations in regard to

- the extent of compliance and cost of desirable options
- supplier background/experience

**2.59** The extent of compliance and cost of desirable options criterion merited 10% of the marks. There is no indication of how marks were allocated to each sub-criterion. The TER found that both AV Niche and SKS's equipment met the specification. The Garda authorities point out that AV Niche's cost for training was €254 per person compared to SKS's quotation

of €736 per day for the “heavy duty” equipment. The evaluation team estimated that as each operator would require 3 hours training it would be possible to train up to 20 people per day and that on this basis SKS got one mark more than AV Niche under this criterion. The evaluation marking sheets do not record this assessment.

**2.60** In respect of the supplier background/experience criterion, the RFT made clear that evidence of companies’ commercial status and competence in the technology needed to be provided. In its tender, AV Niche provided a user list under the heading “User List of AV Niche (Recording Systems) Limited audio and audio/visual recording equipments”. In pre-tender correspondence, AV Niche also noted in writing that it had recently completed contracts to supply, install and commission systems for a number of UK constabularies. The Garda Síochána evaluation team made a request for references from a random selection of police forces in the UK listed in AV Niche’s documentation. The TER stated that referees supplied by AV Niche Limited were contacted for feedback on their equipment and, in general, the response they received proved unsatisfactory; some of the references denied having AV Niche interview video recording equipment. Of two police forces that had purchased interview recording equipment from AV Niche Limited, one claimed to have had problems with the equipment (issues with maintenance and time/date stamp).

**2.61** In its bid, SKS provided a list of locations where NEAL recording systems had been installed in the UK. SKS did not state that it had itself installed the systems but it noted that it had supplied systems for similar applications including the units then present in Garda stations as part of the pilot scheme. The TER stated that SKS had a good record in previous Garda projects. The TER does not indicate whether references were sought from any other parties. However, it is understood that the Garda evaluation team contacted Grampian Police who were listed in the SKS tender documents as users of NEAL equipment. Grampian Police were not supplied with NEAL equipment by SKS.

**2.62** The evaluation team considered that AV Niche lacked experience in some technical areas and it received a lower marking for supplier background/experience than SKS.

**2.63** The TER drawn up by the Garda Síochána on 29 January 2001 was stated to be the result of the evaluation of tenders received and various marking sheets were attached to the report. It set out the marks received by SKS in respect of both the light duty and heavy duty equipment and the marks received by AV Niche in respect of its bid. The report sets out a table with scores under each of the evaluation criteria. SKS was allocated 80.8% for its heavy duty equipment and 71.8% for its light duty equipment and AV Niche was allocated a mark of 71.4% for its equipment.

**2.64** In February 2001, the Assistant Commissioner responsible for the Telecommunications Section forwarded the TER to the Department for information and requested approval to purchase. The Department advised that, as the tender which was deemed to be the most economically advantageous was not the lowest cost tender, the approval of the Government Contracts Committee would be required for the placing of the contract.

**2.65** On 20 March 2001, the Department prepared and submitted a GCC1 form for consideration by the GCC. The form made no reference to the SKS light-duty option which had been evaluated, although evidence of this was to be found in the TER which accompanied the GCC1. The Department noted that SKS equipment had performed better than AV Niche’s equipment in a number of ways and that the Garda Síochána had expressed satisfaction with the equipment which had previously been supplied by the company. In addition, it observed

that unsatisfactory replies to reference queries made in the case of AV Niche were noted for the GCC. On 28 March 2001, the GCC met to consider this contract among others. The minutes for that meeting show that the contract was approved in the amount of €3,674,901.

## **RULES**

**2.66** Article 26 of the Directive provides that the appreciation of what is the most economically advantageous tender is to be made on the basis of a series of criteria chosen by the contracting entities. The Directive offers a non-exhaustive example of the types of criteria which may be used. Those listed are as follows: price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance. The provision is to enable contracting authorities to use their own discretion to establish their priorities for choosing the offer they find the most economically advantageous. It is vital that the award criteria chosen are objectively set and consistently applied to all tenders and that the tender evaluation process adequately respects the EC Treaty principles relevant to procurement.

**2.67** Clarification of bids is permitted but, although it is not expressly stated in the Directive, once the deadline for the submission of bids has passed, it can be implied that there is no general power for the authority to allow alteration to bids in the open procedure. If bid alteration were permitted, the open procedure would be indistinguishable from the negotiated procedure (where discussions are allowed).

**2.68** The Council of Ministers and the Commission of the European Communities in a statement concerning Article 7(4) of the Public Works Directive 93/37/EEC stated that “*all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out*”. It provided that discussions may be held with such persons “*but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of contracting authorities, and provided this does not involve discrimination*”. The statement is of persuasive authority even though it did not refer to the Directive.

**2.69** Contracting authorities are permitted to seek and bidders can provide, additional information on the bid, whether this was required originally and omitted or was not requested and is subsequently required. A provider may wish to alter the bid where it fails to comply with formalities or other requirements. In relation to formalities authorities may choose to accept bids which do not comply with the formal requirements which it has set provided that this does not give rise to discrimination. Substantive alterations are not permitted.

## **LEGAL EVALUATION**

**2.70** The criteria chosen and the weightings apportioned would appear to be an appropriate exercise of the awarding authority’s discretion and there is no evidence that they were not objectively set. However, as outlined above it is regrettable that the marking sheets are not very detailed.

**2.71** The request by the contracting authority for additional information and the provision of information and of various options by AV Niche does not give rise to a breach of the Directive as they were merely clarifications/the provision of supplementary information which were not fundamental to the bid and there appears to have been adequate respect for the principle of equality of treatment.

**2.72** A breach of the Directive would only occur if the evaluation process undertaken by the Garda Síochána was demonstrably unfair. There is no evidence to this effect. In respect of the supplier background/experience award criterion for which 10% of the total marks were allocated, the Garda Síochána was entitled to seek references from all AV Niche's stated references and to seek references from personnel at those Garda stations familiar with SKS's experience.

**2.73** However, since the NEAL equipment supplied to Grampian Police was not supplied by SKS, this reference cannot be taken into account in determining SKS's background or experience. Such a reference is only relevant to the actual equipment and since marks are already allocated to this important criterion under the heading "technical merit" it would seem inappropriate to give marks under two headings for the same element.

**2.74** The Garda Síochána were justified in taking account of references from relevant Garda personnel with experience of SKS. It is unfortunate that no other references appear to have been sought. However, to the extent that Garda Síochána references were positive, the allocation of high marks to SKS would not appear to have been unfair. The documentation reviewed was insufficient to determine whether there had been any unfairness in the marks allocated for extent of compliance and cost of desirable options.

### ***Issues arising out of the procurement process after the award of the contract***

#### ***Compliance by the awarding authority with the requirement to inform tenderers of its contract award decision and its responses to a request for further information***

#### **FACTS**

**2.75** Contracting authorities are required to

- promptly inform candidates of their award decision
- to publish the result of the tender competition in a notice in the Official Journal of the European Communities
- upon request by a candidate who supplied a qualifying bid, to inform him within 15 days of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

**2.76** On 26 April 2001, Garda Headquarters (Finance and Logistics Section) notified AV Niche that its tender had not been successful. It informed the company that the contract had been awarded to SKS and the reason for non-acceptance of their bid was that it was not the most economically advantageous tender.

**2.77** Neither the Department nor the Garda Síochána appear to have forwarded to the Office of the Official Journal of the European Communities a contract award notice.

**2.78** On 1 May 2001, AV Niche wrote to the Department and the Garda Síochána asking whether it could be confirmed that AV Niche's tender was not the lowest wholly compliant tender and, if not, for the reasons which made the AV Niche offer not the most economically

advantageous tender. They also sought confirmation that their offer was treated, for a number of specified points, in the same way as that of the successful tenderer.

**2.79** The Department acknowledged this letter from AV Niche on 9 May 2001 and informed AV Niche that material was awaited from the Garda Authorities before it could respond.

**2.80** While the Department was awaiting material from the Garda Authorities to respond to these queries, AV Niche wrote to the Secretary General on 30 May 2001. This letter complained that the Department had breached the Directive by not supplying the information requested in its letter of 1 May 2001 within the 15 day limit provided for.

**2.81** On 14 June 2001 AV Niche again wrote to the Department complaining that some 44 days had elapsed since its original request for information.

**2.82** The Secretary General of the Department responded to the correspondence on 20 June 2001 stating that the appropriate national and EU procedures had been adhered to and that there was no inequality of treatment involved. He explained that the evaluation of the tenders had been carried out in accordance with a pre-defined list of criteria to which weightings were applied in accordance with their relative importance and that on that basis the evaluation team had assessed the SKS tender to be the most economically advantageous. He also responded to a number of other questions raised by AV Niche relative to costing for modifications identified as necessary to the AV Niche proposal.

**2.83** Correspondence continued between the Department and AV Niche up to the commencement of this evaluation. In addition, a Freedom of Information request was lodged and complaints were made to the Ombudsman and the Information Commissioner.

## **RULES**

**2.84** Article 7 and Article 9 of the Directive deal with various procedures to be followed after a contract award. Both articles allow for the withholding of information where the release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.

**2.85** The key provisions of the Directive in this regard are:

- Article 7(1) of the Directive provides that a contracting authority shall, within fifteen days of the date on which the request is received, inform any eliminated candidate or tenderer of the reasons for rejection of his application or his tender and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer
- Article 7(2) provides that contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract award
- Article 9(3) of the Directive provides that contracting authorities who have awarded a contract shall make known the result by means of a notice. The notice should be sent to the Office for Official Publications of the European Communities at the latest 48 days after the award of the contract in question.



**2.86** The Directive also imposes on the awarding authority the obligation to keep a record of all award procedures so that if the Commission makes a request a written report containing the information set out in the Directive can be supplied to it.

## LEGAL EVALUATION

### *Notification of Result*

**2.87** The letter of 26 April 2001 which informed AV Niche that the contract had been awarded to SKS complies with the obligation set out in Article 7(2) of the Directive that contracting authorities promptly inform candidates and tenderers of the decisions taken on contract awards.

### *Publication of Result*

**2.88** The awarding authority appears to have failed to comply with its obligations under Article 9(3) by failing to publish a contract award notice.

### *Request for Information*

**2.89** Article 7(1) provides that the information should state the “characteristics and relative advantages of the tender selected”. The statement in the Garda Síochána’s letter of 26 April 2001 that “*the reason why your tender was not accepted on this occasion is that it was not the most economically advantageous tender*” and the Secretary General’s explanation of the evaluation process in his letter of 20 June 2001 do not provide a substantive or detailed reason for the decision bearing in mind that the award criterion was the most economically advantageous tender. Therefore, unless the awarding authority benefited from an exemption<sup>10</sup> in Article 7(1) failure to comply with this obligation constitutes a breach of the Article.

**2.90** The documentation provided does not indicate any grounds on which the contracting authority was entitled to refuse to provide the information requested under the exemptions and exclusions. On the basis of the information available, it appears to have taken the view that its initial letter fulfilled the Article 7 requirements. On the information available, there is no obvious reason why the contracting authority would feel itself justified in relying upon any of the exclusions in the article.

**2.91** The failures to comply with Articles 7(1) and 9(3), as they are post contract award failures, are, of their nature, less serious than breaches of procedures leading to the award of a contract as they do not have any bearing on the outcome of the bid. However, the obligation to provide reasons facilitates the monitoring and enforcement of the rules, encourages purchasers to act lawfully and enables providers to decide whether to challenge decisions so that a failure to give reasons for the selection is a notable failure by the contracting authority.

## **Overall Conclusions of the Legal Expert on Compliance with Public Procurement Law**

**2.92** On the basis of the documentation reviewed, the procurement process adopted by the Department/Garda Síochána leading up to the eventual award of a contract to SKS, the highest bidder, did not give rise to a material breach of the public procurement rules as set out in the Directive or the general EC Treaty obligations on procurement although some non-

<sup>10</sup> See paragraph 2.83. The exemptions and exclusions are similar in Articles 7 and 9.

material breaches were identified. In this context, a “material breach” of the rules is a breach of such importance that it is capable of affecting the ultimate award decision (i.e. the outcome) and a “non-material” breach of the rules is a less serious breach which is not capable of affecting the outcome.

**2.93** However, certain non-material breaches of the procurement process were identified. These breaches were

- the failure to ensure the publication of a contract award notice within the time specified and
- the failure to give adequate reasons for the award decision within 15 days of a request being made by an unsuccessful tenderer.
- Non-publication of an indicative notice specifically relating to the type of equipment being procured may have constituted a further non-material breach.

### **3 Conduct of Procurement**

**3.1** The purpose of this chapter is to review whether and to what extent the acquisition of interview recording systems was conducted in accordance with good public procurement practice.

**3.2** It is the responsibility of the Garda Síochána and the Department to ensure that resources acquired by them are procured efficiently and effectively. In general, this is achieved by taking measures designed to ensure that

- the goods are best suited to their intended purpose
- cost is minimised consistent with the achievement of the appropriate quality
- the process of procurement respects public procurement rules and norms.

#### ***Suitability of Technology***

**3.3** In the course of my review of the departmental papers I noted that the technology employed in the pilot scheme used the VHS recording system, with videocassette tape as the recording medium and hi-fi stereophonic sound – a technology that dates from the 1970s.

**3.4** The Steering Committee in its March 1999 report recognised the advent and relevance of digital technology to this field but, given the considerable experience gained with the VHS system and the still emerging nature and costs of the new recording technologies - in particular the digital video disc (DVD), was satisfied that the national scheme should proceed on the basis of the equipment used in the pilot scheme.

**3.5** While it is not my function to second-guess the recommendations of the expert group I would draw attention to the following findings of the Committee

- DVDs would achieve operational efficiencies – secure copies could be made after interview
- DVDs would provide a higher level of security – available software renders altering video recordings on videocassette a trivial matter
- DVDs would require less storage
- the cost of DVD equipment would be expected to fall rapidly
- DVD recordings cannot be easily erased.

**3.6** In addition to these comments, obsolescence of videocassette equipment with attendant maintenance difficulties may emerge sooner rather than later as a problem.

#### ***Economy***

**3.7** While at first sight the Garda Síochána and the Department appeared to have put adequate measures in place to test and validate the quality of the equipment being offered and by using the most economically advantageous tender basis for awarding the contract could be regarded as having taken reasonable steps to ensure economic acquisition of the equipment closer examination suggests a viable alternative approach.

**3.8** It is reasonable to expect that, while piloting a scheme which would ultimately be rolled-out to Garda stations countrywide and would be in operation for many years, every effort would be made to subject a range of equipment types to test during the pilot. Such an approach would have the dual benefit of informing the specification of requirements and ensuring industry-wide involvement in the final tender process. More competitive tendering would ensue.

**3.9** The tender evaluation documentation prepared for the purchase made for the pilot in 1994, noted that a second solution acquired in the 1993 preliminary phase had proven satisfactory in the tests. Despite this, only one equipment type was selected for the continuing pilot test phase. The whole of the pilot was in effect conducted using a single equipment solution.

**3.10** Failure to seek out other potential technical solutions can give rise to bias or allegations of bias in the final selection of equipment for the implementation phase of a scheme as well as not optimising price/technology outturn.

### ***Public Procurement Norms***

**3.11** Chapter 2 dealt with the contracting authority's compliance with EU procurement rules. That chapter reports the conclusion of the legal expert that while breaches had occurred those breaches were not material in that they were not capable of affecting the ultimate contract award decision.

**3.12** Notwithstanding this overall conclusion any legal breach by public bodies is of concern. The breaches identified largely related to information not supplied to the market or to the unsuccessful tenderer.

### ***Communication with Suppliers and the Market***

**3.13** A cornerstone of the competitive tendering purchase process is the existence in the particular market-place of a sufficient number of informed, willing participants from which the purchase will be made. Public procurement will yield best value and consistent quality when the market has sufficient notice of well-specified requirements. The procedural rules of the Directive, which the legal expert has advised were breached in a non-material way by the Department/Garda Síochána, are designed to contribute to the creation of favourable market conditions for achieving value for money in public procurement. These rules oblige contracting authorities

- to make known, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent twelve months where the total estimated value, taking into account the provisions of Article 5, is equal to or greater than €750,000
- to inform any eliminated candidate or tenderer of the reasons for rejection of his tender and of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer
- to make known the result of a contract competition, by publishing a notice in the *Official Journal* within 48 days of the contract award.

**3.14** The Department/Garda Síochána were in a position to have given the indicative notice of its specific equipment requirement as soon as Department of Finance had approved its annual budget.

**3.15** The proper notification to unsuccessful bidders of the reasons for not getting the business helps ensure their goodwill to the Department/Garda Síochána as potential future suppliers.

**3.16** The publication of a results notice should be used as an opportunity for the Department/Garda Síochána to enhance the competitive nature of the tendering mechanism by keeping the market informed of their existence and the nature of their purchases.

### ***Encouraging Competition***

**3.17** It is a basic principle of Government procurement that, where possible, a procedure based on competitive tendering be used. Every effort should be made to identify as wide a range of potential sources of supply as possible. Ideally, this should involve public advertisement. Identifying a wide range of potential suppliers is particularly important when the service or goods to be supplied are unusual or in limited supply.

**3.18** While acknowledging that the procurement of equipment was only one element of the examination of arrangements for evidence taking during the pilot stage it is nonetheless important that all procurement be conducted within the basic procedures outlined in government guidance on procurement. The procedures outlined in the Public Procurement guidance should be adhered to as a minimum standard unless a compelling and substantiated case can be made for doing otherwise.

**3.19** Although the Technical Advisor to the Steering Committee indicated during the conduct of the 1993 purchase that there was only one serious British manufacturer of recording equipment there is no evidence of the steps taken by the Garda Síochána/Department to identify other potential suppliers. In any event, they did not seek competitive tenders. There is no indication in the documentation available to indicate how the two suppliers, from whom purchases were made, had been identified, nor is it clear how the price of the equipment bought was set.

**3.20** While the 1994 purchase was conducted by way of competitive tender, the subsequent purchases from SKS in 1998 and 2000 were made without recourse to a tender process.

### ***Generic Specification***

**3.21** Before advancing to the final tender for supplies, it is essential that the requirement is robustly defined in technical terms and that the use of proprietary names or solutions are avoided or are qualified to show clearly that any equivalent is acceptable.

**3.22** In its Second Interim Report issued in March 1999, recommending the implementation of the National Scheme, the Steering Committee unequivocally proposed that the same equipment as had been tested in the pilot phase be acquired.

**3.23** While it is accepted that, in this instance, a generic specification was issued to the market, recommendations of this nature, from a high level committee should be avoided so as

to ensure that the subsequent evaluation process is not, and is seen not to be, unduly influenced.

### ***Efficient Tender Documents***

**3.24** The RFT for the national scheme which issued in August 2000, while allowing multiple bids, asked that tenderers should use a separate cover for second or subsequent proposals. The tender response from SKS comprised two bids in one envelope. Although this was technically in breach of the RFT requirement no action was taken.

**3.25** As there were only two qualified bidders, it would have been inappropriate to disallow SKS's bids on the basis of a minor breach of a discretionary rule. Since ignoring the rule had no apparent impact on the evaluation team's ability to carry out its functions, the requirement should not have been introduced into the RFT.

**3.26** Terms and conditions specified in RFT should comprise only those necessary for the conduct of the tender process. The inclusion of unnecessary requirements, which if breached, could give rise to the rejection of an otherwise acceptable bid or result in the requirement itself having to be ignored, can result in failure to optimise the bid process or undermine the credibility of the evaluation process.

### ***Objective Evaluation***

**3.27** In general, a tender evaluation should involve an independent and impartial examination of proposals. It should, at a minimum, be conducted by a team which includes persons who have sufficient technical expertise in the equipment being evaluated and representatives of the end users of the equipment. It is particularly important that the team is seen to be capable of making an unbiased evaluation of what is being offered.

**3.28** While the tenders received for this competition were opened in the presence of independent witnesses, the actual evaluation of the tenders was carried out by members from the Telecommunications Section of the Garda Síochána. This team clearly comprised both technical experts in the field and the lead users of the equipment being evaluated.

**3.29** However, given the apparent close involvement of the Telecommunications Section in defining the specifications and evaluating test equipment with one of the bidders it would have been preferable if the team had included a person chosen on the basis of his/her independence in order to avoid the potential allegation of a biased outcome *e.g.* an expert from an external police force.

**3.30** The Department, while noting that the specifications for this equipment were defined by a representative Steering Committee and were put together by the Garda Telecommunications Section before any involvement by SKS in the process, acknowledges the need to have external expertise on evaluation teams.

### ***Pilot Testing Procedures***

**3.31** In order to identify solutions for novel schemes involving technologies not currently in use, a contracting authority must acquire the expertise to definitively determine its requirements. This can be achieved in a number of ways including

- using consultants with the requisite skills

- recruiting experts on a temporary or permanent basis and/or
- training existing staff in the technologies.

**3.32** The Garda Síochána, in the course of pilot testing, appear to have involved the supplier of that system in its testing. This involvement is evidenced from documents available to my audit team which show that, following an offer from a competitor of an alternative system for evaluation, SKS on the Garda Síochána's behalf, approached the competitor and requested relevant catalogues and asked that arrangements be made to send a unit for evaluation. In the event the competitor did not follow through with its offer of a unit for testing. This series of events might, however, give rise to suggestions that SKS was more than just the supplier of pilot testing equipment.<sup>11</sup>

**3.33** Fairness and transparency would dictate that

- all transactions between public bodies and private sector partners be clearly documented and, if material, be subject to contracts. In this case if SKS was assisting the Garda Síochána in the evaluation of equipment a separate contract for that service should have been concluded
- where a private sector partner has exclusive access to knowledge of public sector operations or that partner is itself relied upon as a source of technical advice, arrangements should be put in place to guarantee equality of treatment in subsequent tendering involving that partner
- Persons involved in the provision of consultancy advice for projects should, insofar as is practicable, be excluded from the subsequent procurement process. Where this is not possible, the process must be conducted in a way which demonstrably guarantees fairness and transparency.

### ***Transparent Evaluation***

**3.34** It is the prerogative of the purchasing authority to identify its requirements and to determine the means of evaluating the bids received in response to an RFT. An evaluation marking scheme should, however, be established, in advance of the issue of the RFT, covering all elements of each evaluation criterion decided upon. The evaluation weightings chosen should

- be stated unambiguously to ensure the evaluation team can make an informed choice as to the most economically advantageous offer
- be transparently disclosed, in the order of importance, in the tender documentation
- not inadvertently, or otherwise, favour a particular offering.

**3.35** While the evaluation criteria were clearly stated and set out in order of importance, the transparency of the process would be improved by

- the public disclosure of the weightings attached to each evaluation criterion
- the noting of the relative advantages attaching to the bid for each evaluation criterion.
- For instance, where the use of supplier references has been selected as an evaluation criterion each bidder should be treated fairly and impartially.

<sup>11</sup> SKS has also supplied CCTV systems to the Garda Síochána. The sum expended in this regard from end December 1994 to the end of July 2002 is in the order of €2.5 million.

**3.36** The supplier evaluation criterion process carried out by the evaluation team was outlined in Chapter 2. In the course of that evaluation AV Niche was assessed, as a supplier, on the basis of references obtained from a selection of police authorities in the United Kingdom for whom they had carried out similar work. SKS, on the other hand, was assessed on the basis of prior work carried out for the Garda Síochána. The evaluation team admitted as an external referee for SKS a police force to whom the NEAL equipment was supplied, but by another vendor. This in effect could be regarded as an assessment of the equipment rather than of the potential supplier. The equipment itself had already been evaluated under the technical merit heading. Under this heading AV Niche scored 3 marks while SKS scored 9. The markings of the evaluation team do not indicate the basis for such a divergence in the markings under this heading.

**3.37** When account is taken of the relationship between the Garda Síochána and SKS, it is clearly imperative to have the utmost transparency, clarity and objectivity in judging criteria of this type. Again, the presence of an independent evaluator on the team would have added to the perception of fairness in the process.

**3.38** The Department points out that there is no legal obligation nor is it a common practice for Government Departments/State Agencies to publish details of the weightings derived from the evaluation criteria in the tender documents.

### ***Implications for National Guidance***

**3.39** Guidelines on the award of public sector contracts were first codified in 1986 in the booklet ‘An Outline of Government Contract Procedures’. This was updated and extended in 1994 by the booklet ‘Public Procurement’. This guidance is in place to ‘*avoid abuses, or allegations of abuse and to ensure value for money*’.

**3.40** In the light of the foregoing comments, it is clear that elaborating on a number of important aspects of the procurement process can further the objectives of the guidance, and their contribution to open and fair procedures.

**3.41** These could include

- detailed specification of requirements and how to handle outside assistance in determining requirements
- the conduct of pilot testing
- construction of RFTs
- protocols for tender evaluation
- providing a checklist to guide procurement actions to ensure laws and norms are respected.

**3.42** I understand that the 1994 procurement guidelines are being reviewed by the Department of Finance with a view to amending them to take account of developments in procurement practice since that time. This work will not be finalised until revisions to the EU Directive, currently under consideration, come into effect. This is not expected to happen until 2003.



## **4 Observations of the Department of Justice, Equality and Law Reform**

**4.1** The Accounting Officer of the Department of Justice, Equality and Law Reform has provided me with observations and information on the following matters

- the basis of the evaluation of suppliers' capacity by the Garda Síochána
- compliance with public procurement procedures in the acquisition of certain pilot stage equipment
- the circumstances surrounding the offer by AV Niche of equipment, for evaluation, during the pilot testing stage
- the views of the Chairman of the Steering Committee on its recommendation in regard to the type of equipment to be specified for the nationwide procurement round.

### **Views of the Garda Síochána on suppliers' capacity**

**4.2** The Garda Síochána stated that the assessment of AV Niche took into account not only the supplier's references but also the views formed during the evaluation process. These included the performance of AV Niche technical personnel during their visits to Garda Telecommunications Section to rectify faults which appeared on the sample under evaluation e.g. chipset failure.

**4.3** They pointed out that AV Niche actually asked Garda Telecommunications Section to rectify faults on the unit under evaluation and posted replacement integrated circuits for the purpose of expecting Garda Telecommunications members to install them in the faulty unit. Garda Telecommunications personnel did not accede to the request as the unit was not the property of the Garda Síochána and that such action could lead to later allegations of them causing the fault to arise.

**4.4** The evaluation team formed the view that AV Niche were poorly equipped or staffed to perform such a basic task as a result of the poor performance of AV Niche technical ability and the delay (6 days) in arranging the clearance of the fault.

**4.5** It was also considered that the performance of AV Niche at the evaluation process, when it would normally be expected to make its best effort to ensure full operability of its equipment, was not satisfactory. It did not indicate that confidence could be placed in the ability of the company to speedily rectify faults in the event that they received an order.

**4.6** Unfavourable views of AV Niche's technical capacity were also formed at this time because of the fact that the power supply of the unit under evaluation was underrated and constituted a fire hazard if left permanently switched on in a Garda station. AV Niche claimed to be a manufacturer and the ability of their designer/s is questionable due to this glaring shortcoming in the equipment under evaluation.

**4.7** When this was demonstrated to AV Niche, the company subsequently offered to increase the capacity of the power supply unit if they received an order for equipment. This offer was considered to be unsatisfactory and pose a considerable risk.

**4.8** These views and taking into consideration the unsatisfactory references, resulted in a much lower mark for AV Niche than that of SKS under the criterion “Supplier background/experience”.

## **Compliance with Procurement Procedures**

### ***1993 Pilot Purchases***

**4.9** On its adherence to Procurement Guidelines and Department of Finance and GCC approval mechanisms in the context of the 1993 purchase of equipment, the Department state that it appeared from its files that these purchases were made with a view to establishing the type of equipment that was available, and, in effect, to carry out a “proof of concept” prior to the commencement of the pilot programme.

**4.10** The Garda Authorities state that in 1993, electronic recording of this nature was in its infancy. The Technical Advisor to the Steering Committee, accompanied by a Superintendent from Garda Telecommunications visited the Police Scientific Development Branch (PSDB) of the British Home Office. In a report of the visit, Professor Lacy states that the PSDB indicated that there was one serious manufacturer of recording equipment and one major contractor. It would appear that, although there was only one British manufacturer, two suppliers of equipment were identified at that meeting and it was decided to seek quotations from both, each of which were subsequently asked to supply equipment. An open tender process was not conducted, in view of the need to examine the equipment from both suppliers. The Department wrote to the Department of Finance informing them of the proposed approach and indicated that the purchase of this equipment would not prejudice any equipment to be purchased for the pilot.

### ***Purchases in 1998 and 2000***

**4.11** The Department considered that the equipment purchased in 1998 and 2000 was to extend the scheme in order to gather more information and to investigate the training of trainers in interviewing with the equipment. Deviation from equipment already purchased for the pilot was not considered appropriate in these circumstances.

## **SKS offer of Pilot Equipment**

**4.12** As regards the circumstances surrounding the passing to SKS of details of AV Niche’s interest in being considered as a supplier of video recording equipment to the Garda Síochána and the perception that a special relationship existed between the parties, the Garda Síochána view was that it considered AV Niche to be a manufacturer of equipment seeking an Irish agent and as SKS was the supplier of the pilot equipment they further concluded that it was favourable for AV Niche to contact SKS with a view to providing SKS with an alternative manufacturer.

**4.13** The Garda Síochána indicate that they passed on this information a year prior to the tender competition with the intention to be helpful to AV Niche while at the same time maintaining confidentiality concerning the plan to extend the scheme. The Department requested confidentiality on this issue as Government approval to extend the scheme on a nationwide basis had yet to be obtained at that time. The Garda Authorities state that the existence of AV Niche was the only information passed to SKS.

**4.14** With regard to the letter from AV Niche to the Gardaí in July 1999, the Garda Authorities have requested that the content of this letter be put in context of the events at that time. They point out that the tests were ongoing for some years rather than months and were carried out under the auspices of the Steering Committee. As such, the trials had concluded before March 1999 as referred to in the Committee's Interim Report published in March 1999. Regarding the request for an "opportunity of quoting for any existing requirements", the Garda Síochána state that such opportunity did not exist at that time as the tests under the Steering Committee had concluded and the next opportunity afforded to AV Niche was when the contract notice was published in the EU Journal in August 2000.

**4.15** The Garda Authorities have provided two items of correspondence between SKS and AV Niche. It would appear from this correspondence (a fax dated 20 September 2000), that AV Niche were prepared to offer equipment to SKS and to hold out the offer of some type of business arrangement with SKS should their (SKS) future negotiations with NEAL prove to be inconclusive or commercially unsatisfactory. A facsimile of these documents is reproduced at Appendix C. It might be noted that the fax of 20 September 2000 was over one month after the tender notice was published in the EU Journal. The Garda Authorities indicate that they were not aware that these discussions were taking place at the time and state that the documents only recently came into their possession.

**4.16** While the papers available to the Department, including those now supplied by the Garda Authorities indicate some degree of communication and discussion between AV Niche and SKS during 1999 and 2000, it is difficult to determine the precise extent and nature of these.

**4.17** The Garda Authorities consider that there was no consultancy relationship with SKS (notwithstanding the impression to the contrary in the SKS faxed letter of 5 August 1999) and they suggest that the SKS request for equipment for evaluation may not be all that unusual in the context of a possible future commercial relationship between manufacturer and agent.

**4.18** The Garda Authorities consider that they did not involve the supplier of the system in its testing. The assistance of the supplier was used during adjustment and alignment tests of equipment in order to obtain appropriate views of the room and its occupants. They state that SKS had no mandate to provide evaluation services for equipment supplied during the pilot scheme.

## Specification of Equipment

**4.19** The Accounting Officer also furnished me with the views of Judge Esmond Smyth who had chaired the Steering Committee. On the matter of the recommendation of the Committee that the same equipment as had been tested in the pilot stage be used the Chairman emphasised that the terms of reference of the Committee had included, *inter alia*, the requirement to make recommendations to the Minister for Justice relating to the type of equipment to be used. However, it was never part of the terms of reference of the Committee to advise on, or have any role in, the procurement or tendering procedures to be followed in the purchase of any equipment. Such procurement or tendering procedures were always understood by the Steering Committee to be a matter for the appropriate Government Department and, where appropriate, for An Garda Síochána.

**4.20** Accordingly, any recommendations made by the Steering Committee in relation to equipment should be seen in the context of the specific term of reference which obliged the Steering Committee to make recommendations relating to the type of equipment to be used. In making its recommendation, the Committee adopted the specialist advice of an expert in conjunction with the members of An Garda Síochána, who formed an implementation group for that purpose. The scientific advice given to the Steering Committee was that “the specialist audio/visual recording and audio/visual playback equipment currently in use in the pilot scheme has proved satisfactory from an operational and technical view point.”

**4.21** The Chairman emphasised that the ultimate recommendation of the Steering Committee merely reflected its understanding of its obligations under the original terms of reference, which were to make recommendations, *inter alia*, relating to the type of equipment to be used. The Steering Committee had no input whatsoever into the subsequent procurement and/or tendering process for any of the purchased equipment.

## **Appendices**



## **Appendix A    Steering Committee and Terms of Reference**

### ***Membership of Steering Committee on appointment***

His Hon. Judge Esmond Smyth, President of the Circuit Court, (Chairman)

Mr. David Gormally, Office of the Director of Public Prosecutions

Ms. Helen Heffernan, Office of the Attorney General

Mr. Kevin Haugh, The General Council of the Bar of Ireland

Mr. Michael Staines, Incorporated Law Society

Deputy Commissioner Tom O'Reilly, Garda Síochána

Ms. Vera Kelly, Department of Justice, Equality and Law Reform

Ms. Linda Grealy, Department of Justice, Equality and Law Reform (Secretary to the Committee)

Professor James G. Lacy, B.E., C.Eng., F.I.E.E., F.I.E.I., Associate Professor of Electronic Engineering, U.C.D. was appointed as technical adviser to the Committee in relation to the type of technical equipment that may be used and on any alterations that may be required to interview rooms.

Detective Superintendent Tom Connolly was appointed as an advisor on Garda operational matters.

### ***Membership of Steering Committee at publication of Second Interim Report***

Mr. Justice Esmond Smyth (Chairperson), President of the Circuit Court

Mr. David Gormally, Office of the Director of Public Prosecutions

Mr. Roy Pearson, Office of the Chief State Solicitor

Mr. Patrick Gageby, S.C., The General Council of the Bar of Ireland

Mr. Michael Staines, Incorporated Law Society of Ireland

Assistant Commissioner Patrick Crummey, Garda Síochána

Detective Superintendent John McElligott, Garda Síochána Operational Advisor

Mr. John Cronin, Department of Justice, Equality and Law Reform

Professor James G. Lacy, B.E., C.Eng., F.I.E.E., F.I.E.I., Emeritus Professor of Electronic Engineering, University College Dublin

### **Terms of Reference**

The terms of reference of the Steering Committee were

- To make recommendations to the Minister for Justice, on the following matters, for the purpose of establishing field trials
  - Location of field trials
  - Essential modifications to be made to Garda interview rooms
  - The Garda training required
  - The type of equipment to be used (subject to the approval of the Departments of Justice, Equality and Law Reform and Finance and having regard to the appropriate technical advice)
  - Whether any amendments to the Judges' Rules may be necessary because of the change to electronic recording of Garda questioning
  - The special arrangements (adverted to by the Martin Committee) which will, on the basis of the advice of the Garda Commissioner, need to be applied in cases where questioning by the Gardaí relates to organised crime or terrorism, so as to ensure, in particular, that intelligence gathering by the Gardaí on such matters is not affected
  - A code of practice which would include the procedures to be followed in relation, for example, to the introduction of participants in the interview, the suspect's rights, admissions off camera (at the scene, on the way to the station) etc., interruption of the interview for any reason, technical breakdowns during the interview, opportunity for the suspect to clarify anything he may have said, signing off at the end of the interview, and the custody of the cassettes and play-back of the cassettes in Court.
- To make arrangements in relation to the following matters when the Minister has considered the foregoing recommendations and agreed the features of the pilot scheme
  - Stringent scientific monitoring of the pilot scheme and of four controlled Garda Districts
  - Assessment of the operation and cost of the pilot scheme, the likely effects of audio and audio/ video recording on the criminal justice system as a whole and the extent to which the pilot scheme shows that an effective and economic basis can be found for a national scheme
  - Submission for the Minister's consideration of a report on the outcome of such assessment.



## **Appendix B Rules Governing Procurement**

### ***Background***

Public Procurement, i.e. the purchase of works, supplies and services by public authorities, public bodies and entities with certain special or exclusive rights, is of major economic significance. In line with the aim of removing barriers to intra-Community trade, and in accordance with fundamental principles of EC law on the free movement of goods and services, EC directives have been in place since the early 1970s in order to tackle discriminatory practices in contract awards and promote cross-border competition for public contracts. The rules governing public procurement are aimed at

- improving access to information concerning public contracts
- promoting transparency and harmonisation of the procedures for the award of contracts including the banning of technical specifications liable to discriminate against potential foreign bidders
- preventing discrimination by ensuring selection criteria are fair and objective.
- These objectives are met through provisions in the Treaty and the Directive on Procurement.

### ***Treaty Provisions relating to Tendering***

The EC Treaty (the “Treaty”)<sup>12</sup> makes no specific mention of public procurement. However, a number of its provisions are generally applicable to the award of contracts (and concessions) by public authorities and entities with certain special and exclusive rights. Accordingly, in addition to rules prohibiting any discrimination on grounds of nationality certain rules and principles derive from the Treaty

- rules on the free movement of goods, freedom of establishment, freedom to provide services and the exceptions to these rules provided for in the Treaty
- Treaty principles of equality of treatment, transparency, proportionality and mutual recognition<sup>13</sup>.

### ***Free Movement of Goods, Freedom of Establishment and Freedom to Provide Services***

Free movement of goods is governed by Articles 28 to 31 of the Treaty. Article 28 provides that: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. Article 29 contains similar provisions relating to export, while Article 30 provides an exception for certain types of case in which a Member State is allowed to place restrictions on the free movement of goods. These exceptions relate to, inter alia, public morality, public policy, public security and the protection of health and life of humans. Article 30 can be breached where, for example, there has been discrimination in the way in which a Member State treats its own goods and those coming from another Member State.

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<sup>12</sup> The Treaty establishing the European Community was extensively modified and renamed the EC Treaty by the Treaty on European Union (Maastricht Treaty)

<sup>13</sup> The European Commission has stated that it is possible to derive from the case law of the European Court of Justice four fundamental principles underlying the EC Treaty

Freedom of establishment, set out in Articles 43 to 48 of the Treaty, requires the removal of restrictions on the right of individuals and companies to maintain a permanent or settled place of business in a Member State. Article 43 also prohibits discrimination on the basis that a person exercising the right of establishment must be treated in the same way as a national of a Member State.

Freedom to provide services, set out in Articles 49 to 55 of the Treaty, requires the removal of restrictions on the provision of services between Member States, where either the provider is supplying services in a State in which that person does not maintain an establishment, or the recipient is travelling to receive services in a Member State other than that in which the recipient is established. In order to obtain the benefit of Article 49, the person in question, natural or legal, must already have a place of establishment within the Community, i.e., a permanent economic base.

### ***Equality of Treatment/non-discrimination***

The general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is a specific enunciation pursuant to Article 12(1) of the Treaty is one of the fundamental principles of EC law. This principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified.

The principle of equality of treatment implies, in particular, that all potential contractors know the rules in advance and that they apply to everybody in the same way. The principle of equality of treatment requires not only that conditions of access to an economic activity be non-discriminatory, but also that public authorities take all available measures to ensure the exercise of such activity.<sup>14</sup> The European Commission (the “Commission”) considers that it follows from this case law that the principle of open competition must be adhered to. The European Court of Justice (“ECJ”) has considered the scope of the principle of equality of treatment in the context of services contracts. In particular, the ECJ found that this principle requires that all offers conform to the tender specifications to guarantee an objective comparison between offers. This principle is violated when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors.

### ***Transparency***

There is a clear connection between the principle of transparency and the principle of equality of treatment. In a procurement context, transparency can be ensured by advertising the contract in advance by way of publishing a tender notice in the daily press or specialist journals or by posting appropriate notices, depending on (and to allow account to be taken of), the particularities of the relevant sector. This type of advertising generally contains the information necessary to enable potential contractors to decide whether they are interested in participating (e.g., selection and award criteria etc.). The Commission considers that, under these circumstances, the obligation to ensure transparency is met<sup>15</sup>.

### ***Proportionality***

The principle of proportionality is one of the general principles of Community law<sup>16</sup> and is expressly recognised in Article 5 of the Treaty. It requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought. In choosing the measures to be taken, a Member State must adopt measures which cause the least possible disruption to the pursuit of an economic activity.<sup>17</sup> This principle, which allows contracting authorities to define the objective to be reached especially in terms of performance and technical specifications, nonetheless requires that any measure chosen be both necessary and

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<sup>14</sup> Case C/357-89 Raulin [1992] ECR I-1027, judgment of 26 February 1992.

<sup>15</sup> Ibid.

<sup>16</sup> Case 265/87, Schröder v. Hauptzollamt Gronau [1989] ECR 2237, judgment of 11 July 1989, paragraph 21.

<sup>17</sup> Case 15/83, Denkvit Netherlands, judgment of 17 May 1984.

appropriate in relation to the objective set. Thus, for example, when selecting candidates, a Member State may not impose technical, professional or financial conditions which are excessive and disproportionate to the subject of the contract.

The principle of proportionality also requires that competition and financial stability be reconciled; the duration of a contract must be set so that it does not limit competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital, while maintaining a risk inherent in exploitation by the contractor. It should not give rise to a significant foreclosure of competition unless this can be justified.

### ***Mutual Recognition***

According to this principle, a Member State must accept the products and services supplied by economic operators in other EC Member States if the products and services meet the legitimate objectives of the recipient Member State.

Applying this principle to the award of services contracts, a Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided. In fact, the procurement rules normally require that contracts should specify a common technical specification implementing a European standard or a European technical approval where possible.

### ***Directive on Procurement***

Council Directive 93/36/EEC as amended and implemented in Ireland <sup>18</sup>(the Directive) imposes on “contracting authorities”, i.e. the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law the obligation to procure supplies with a value which exceeds certain thresholds in accordance with the rules set out in the Directive. Other directives apply to the award of public works and public services contracts and to contracts awarded by utilities. The Directive does not apply to contracts with a value falling below certain value thresholds and there are exceptions available depending on the subject-matter of the contract or the activity carried on by the contracting authority.

In general, all contracting authorities must comply with the rules set out in the Directive where the estimated value of the contract before VAT is not less than €200,000. Certain bodies listed in Annex I to the Directive, known as GATT contracting authorities must comply with the Directive in respect of contracts the estimated value of which, before VAT, equals or exceeds SDR130,000<sup>19</sup> (currently €137,537). Where entities listed in Annex I operate in the defence field, they must observe the SDR130,000 threshold only in the case of contracts for products listed in Annex II to the Directive. Annex I lists the Department of Justice in Ireland as a contracting authority subject to the GATT Agreement. Annex II to the Directive provides a list of products which, when supplied to defence authorities listed in Annex II are subject to the GATT Agreement. Annex II, Chapter 37 lists “photographic and cinematographic goods”.

<sup>18</sup> Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 and the Act of Accession of Austria, Sweden and Finland adopted by Council Decision 95/1/EC, Euratom, ECSC. Council Directive 93/36/EEC as amended has been implemented in Ireland by the European Communities (Award of Public Supply Contracts) (Amendment) Regulations, 1994 (S.I. No. 292 of 1994), European Communities (Award of Public Supply Contracts) (Amendment) Regulations, 1998 (S.I. No. 379 of 1998) and European Communities (Award of Public Supply Contracts) (Amendment) Regulations, 2001 (S.I. No. 611 of 2001).

<sup>19</sup> The SDR value as expressed in Euro is revised every two years. The most recent revision was 1 January 2002.

### ***Contracts to which the Directive applies***

The Directive sets out special mechanisms for the way in which the value of a contract is calculated. In general, when deciding the value of a contract one must consider its value taking into account its entire duration including all options under it. There is a prohibition on the splitting of a procurement requirement with the intention of circumventing the rules.

### ***Award Procedure***

The Directive sets out three types of procedure for awarding public supply contracts:

- the open procedure
- the restricted procedure
- the negotiated procedure.

An open procedure is one where all interested parties may submit tenders in response to a published contract notice. A restricted procedure is one where, of the suppliers who have expressed an interest following publication of the contract notice, only those so invited by the contracting authority may submit tenders. A negotiated procedure is one where the contracting authority consults the suppliers of its choice and negotiates with them the terms of the contract. The negotiated procedure may be used only in exceptional circumstances listed exhaustively in the Directive.

### ***Common rules governing tendering and award of contracts***

The Directive sets out certain common rules which are applicable to all contracts to which the Directive applies. These are

- Common advertising rules
- Common rules in the technical field
- Common rules on participation

### **Common Advertising Rules**

The rules set down in the Directive concerning advertising are aimed at ensuring transparency at all stages of the award procedures so as to foster competition between economic operators and genuinely open up public procurement in the European Union. Three types of notices are specifically referred to in the Directive, as follows

- *Indicative Notices (PIN)* – Contracting authorities must, as soon as possible after the beginning of each budgetary year, make known by means of an indicative notice the total procurement by product area which they envisage awarding during the subsequent twelve months and which has a value which equals or exceeds €750,000
- *Contract notices* – The Directive obliges contracting authorities to publish a contract notice when an award procedure is about to be launched in respect of the procurement of a supply contract with a value exceeding the thresholds. Publication of the notice enables economic operators in all Member States to be informed of contracts put out for tender throughout the European Union and provides them with information they need in order to assess the contracts which may be of interest to them
- *Contract award notices* – Contracting authorities which have awarded a contract must, irrespective of the procedure used, publish a notice setting out the most important points in respect of the contract awarded including the identity of the successful supplier (there are some exceptions to this principle). Contract award notices are

intended not only to ensure greater transparency in award procedures but also to generate more interest among suppliers.

Contracting authorities are required to draw up notices in accordance with the models given in Annex IV to the Directive, supplying the information specified in the relevant model and sending it to the Office for Official Publications of the European Communities.

### **Common Rules in the Technical Field**

Contracting authorities must indicate, in the general or contractual documents relating to each contract, the technical specifications with which the goods must comply (Article 8 of the Directive). The Directive provides at Article 8(2) that *‘Without prejudice to the legally binding national technical rules, in so far as they are compatible with Community law, the technical specifications [...] shall be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications’*.

Article 8(6) expressly prohibits the introduction into a contract of technical specifications which mention goods of a *“specific make or source or of a particular process and which therefore favour or eliminate certain suppliers or products”* unless such specifications are justified by the subject of the contract. Article 8(6) expressly prohibits the *“indication of trademarks, patents, types or of a specific origin or production”*. This is only permitted where such indication is accompanied by the words *“or equivalent”* where the contracting authorities are unable to give a description of the subject of a contract using the specifications which are sufficiently precise and fully intelligible to all parties concerned.

### **Common Rules on Participation**

Examination of the suitability of suppliers and award of a contract are two different steps in the procurement procedure. The Directive does not prohibit the possibility of an examination of the supplier’s suitability and the award of the contract taking place simultaneously but the two procedures are governed by different rules.

The suitability of suppliers may be examined only on the basis of the qualitative criteria established in the Directive. The Directive makes the following provisions for the examination of suitability

- it gives an exhaustive list of the grounds on which a candidate can be excluded from a procedure
- it sets out rules in respect of the general professional capacity of the supplier
- it sets out rules in regard to proof of a supplier’s financial or economic standing
- it gives an exhaustive list of the evidence which contracting authorities may require as regards a supplier’s technical capacity
- it provides that the extent of the information required by contracting authorities *“must be confined to the subject of the contract”*, i.e., the information specified must be strictly necessary for assessing whether the supplier’s technical capacity is appropriate to the desire to supply.

### ***Criteria for the Award of Contracts***

The criterion on which contracting authorities base the award of contracts must be either the lowest price or the most economically advantageous tender. The criterion of the lowest price

is not difficult to apply since only the price requested by tenderers must be taken into consideration and the contract must be awarded to the tenderer asking the lowest price. The question of what constitutes the “most economically advantageous tender” is more complex. Article 26(1)(b) of the Directive states that the contracting authorities may base the award of contract on “various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.” This list is not exhaustive.

The most economically advantageous tender can only be decided on objective grounds, equally applicable to all tenders and strictly related to the subject of the contract. Where contracting authorities intend to use the most economically advantageous tender criteria to determine the contract award, they must list these criteria either in the contract notice or in the contract documents and in descending order of importance where possible.

## Appendix C Offer by AV Niche to supply equipment to SKS for the purposes of this tender competition



AV NICHE (RECORDING SYSTEMS) LIMITED  
AVNICHE HOUSE  
136A SWAN LANE  
WICKFORD  
ESSEX SS11 7DH  
TEL: (01268) 474608 MOBILE: (0-911) 679907 FAX: (01268) 763503

### FACSIMILE MESSAGE

TO: Mr Harry Smith	FAX REFERENCE: 20092000-02
COMPANY: SKS Communications Limited	DATE: 20 September 2000
FROM: Mr. Neil Holmes	PAGE: 1 OF 1
FAX NOS. 00 353 1 450 5519	SUBJECT: Garda Tender Video Interview Recording

Further to our telephone conversation regarding the supply installation and commissioning of Video Interview Recording equipment throughout EIRE for the Garda Siochana, I am pleased to confirm that AV NICHE (Recording Systems) Limited will be pleased to supply SKS Communications Video Interview Recorders for supply installation and commissioning. Please be advised that the Video Interview Recorder will be supplied together with 2 off microphones. All necessary cameras, lenses, camera brackets, and cabling etc will be provided by SKS Communications.

It is understood that SKS Communications have a meeting with NEAL Recording Systems during the early part of next week at which point it will be decided on the way forward with regard to representation etc. Please be advised that the proposed offer above will give SKS Communications an alternative should the future negotiations with NEAL prove to be inconclusive or commercially unsatisfactory from the point of view of SKS Communications.

I trust that the above meets with your approval and should you require any additional information or further assistance, please do not hesitate to contact myself. In the meantime I look forward to hearing you decisions in the early part of next week.

Kind regards,

N.A Holmes

Company Registration No. 3121438  
V.A.T. Registration No. 667822933



Director: N.A. Holmes  
S.A. Jack

Engineers Office: Tower House, 177 Belfry Road, Drogheda, Co. Dublin, D15 2E2

TOTAL P.01