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# **PUBLIC PROCUREMENT GUIDANCE FOR PRACTITIONERS**

on avoiding the most common errors  
in projects funded by the European  
Structural and Investment Funds



## **DISCLAIMER**

This document contains guidance on how to avoid errors frequently seen in public procurement for projects co-financed by the European Structural and Investment Funds. It is intended to facilitate the implementation of operational programmes and to encourage good practice. It is not legally binding but aims to provide general recommendations and to reflect best practice.

The concepts, ideas and solutions proposed in the guidance are without prejudice to national legislation and should be read and may be adapted taking into account the national legal framework.

This guidance is without prejudice to the interpretation that the Commission may in the future give to any provision of the applicable legislation. This guidance does not commit the European Commission. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.

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# Glossary of acronyms

Acronym	Definition
<b>CA</b>	Contracting authority
<b>CAN</b>	Contract award notice
<b>CEO</b>	Chief Executive Officer, highest-ranking executive in an organisation
<b>CN</b>	Contract notice
<b>DG EMPL</b>	Directorate-General for Employment, Social Affairs and Inclusion of the European Commission
<b>DG GROW</b>	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission
<b>DG REGIO</b>	Directorate-General for Regional and Urban Policy of the European Commission
<b>EC</b>	European Commission
<b>ECA</b>	European Court of Auditors
<b>e-CERTIS</b>	Cross-border certificate repository
<b>EEA</b>	European Economic Area
<b>EFTA</b>	European Free Trade Association
<b>EMAS</b>	Eco-Management and Audit Scheme
<b>ESI Funds</b>	European Structural and Investment Funds
<b>ESPD</b>	European Single Procurement Document
<b>EU</b>	European Union
<b>FIDIC</b>	International Federation of Consulting Engineers
<b>GDP</b>	Gross Domestic Product
<b>GPP</b>	Green Public Procurement
<b>GPA</b>	Government Procurement Agreement of the World Trade Organization

<b>Acronym</b>	<b>Definition</b>
<b>IAASB</b>	International Auditing and Assurance Standards Board
<b>IATA</b>	International Air Transport Association
<b>ICAO</b>	International Civil Aviation Organisation
<b>IPR</b>	Intellectual Property Rights
<b>ISA</b>	International Standards on Auditing
<b>ISO</b>	International Organisation for Standardisation
<b>LCC</b>	Life-cycle cost
<b>MEAT</b>	'Most economically advantageous tender' criterion
<b>OJEU</b>	Official Journal of the European Union
<b>OLAF</b>	European Anti-Fraud Office
<b>PCP</b>	Pre-commercial procurement
<b>PIN</b>	Prior Information Notice
<b>PPI</b>	Public Procurement of Innovative solutions
<b>R&amp;D</b>	Research and Development
<b>SIMAP</b>	Information system for public procurement
<b>SME</b>	Small and medium-sized enterprise
<b>SRPP</b>	Socially Responsible Public Procurement
<b>TED</b>	Tenders Electronic Daily, the Supplement to the Official Journal of the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>ToR</b>	Terms of reference
<b>WTO</b>	World Trade Organization



# Foreword

Following on the great success of the first edition with more than 70,000 downloads, we are particularly happy to present you with the new and updated version of the Public Procurement - Guidance for practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds. This improved document takes into account the new and simplified EU rules on public procurement and the first direct experience from their implementation on the ground.

The aim is to support public procurement officials in Europe's Member States, regions and cities, taking them step-by-step through the process, highlighting areas where mistakes are typically made and showing how to avoid them.

Efficient, effective, transparent and professional public procurement is essential for strengthening the Single Market and stimulating investment in the European Union. It is also a key instrument to deliver the benefits of the Cohesion Policy to the European citizen and businesses.

This updated guidance was prepared by the Commission services involved in public procurement, as well as in consultation with the public procurement experts in the Member States. It is one of the building blocks of our ambitious Action Plan on Public Procurement and contributes to the objectives of the recently adopted EU public procurement package.

We are confident that this instrument, along with the other Commission's initiatives in this field, will continue to help Member States, regions and cities in applying public procurement and increase the impact of public investment for the benefit of the EU citizens and economy.

Corina Crețu,  
European Commissioner for Regional Policy

Elżbieta Bieńkowska,  
European Commissioner for Internal Market,  
Industry, Entrepreneurship and SMEs



# Introduction — How to use this guidance

## Who is this guidance for?

This guidance is aimed primarily at procurement practitioners within contracting authorities in the European Union who are responsible for planning and delivering the purchase of public works, supplies or services in a compliant, efficient and value-for-money way.

Managing authorities of European Structural and Investment (ESI) Funds programmes and other EU-funded programme authorities may also find the guidance useful when acting as public buyers or when conducting checks on public procurements carried out by beneficiaries of EU grants (see 6.4. Checklist for the control of public procurement).

## What is the purpose of this guidance?

This guidance aims to offer practical **assistance to procurement officers, helping them avoid some of the most common errors and financial corrections** observed in recent years by the Commission in the use of ESI Funds (see 6.1 Most common errors in public procurement).

This guidance aims to offer practical assistance to procurement officers, helping them avoid some of the most common errors and financial corrections observed in recent years by the Commission in the use of ESI Funds (see section 6.1. Most common errors in public procurement).

The status of this document is that of ‘guidance’. It is intended as a support to and not a substitute for internal rules and procedures.

**It is not an instruction manual on how to comply with the requirements set out in Directive 2014/24/EU.**

**It is certainly not a definitive legal interpretation of EU law.**

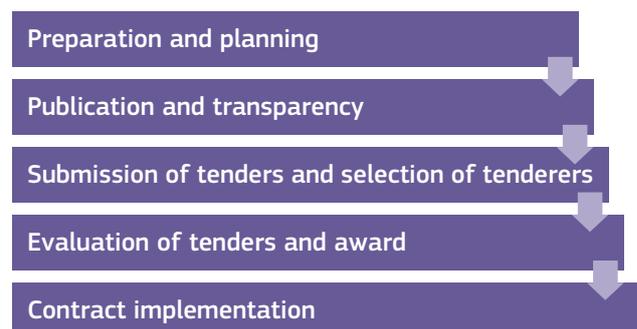
It is imperative that all those involved in the procurement process comply with national legislation, their own organisation’s internal rules, and EU rules.

In the absence of equivalent national or fund-specific guidance documents, managing authorities may voluntarily adopt this document as guidance for beneficiaries of EU grants.

## Structure of the guidance

This guidance is **structured around the main stages of a public procurement process** from planning to contract implementation. It highlights issues to look out for and potential mistakes to avoid, as well as specific methods or tools.

**Figure 1. Main stages of a public procurement process**



In addition, a **toolkit** provides some ready-to-use instruments and additional resources on specific topics.

## Explanation of symbols: warnings and help for public buyers

The guidance takes procurement officers step-by-step through the process, highlighting areas where mistakes are typically made and showing how to avoid them.

Throughout the guidance, the following symbols flag crucial areas:



### **RISK OF ERROR!**

This highlights the points where the most common and serious errors arise. Analysis and further guidance are provided to avoid these errors in the most effective way.



### **HELP!**

This is an area where specific advice is given to public procurement practitioners and/or where resources are provided through the toolkit or via links to other documents.

## Scope of the guidance

The guidance intends to support public procurement practitioners (also called public buyers or procurement officers) in dealing with EU-funded contracts for the procurement of works, supplies and services as set out in Directive 2014/24/EU<sup>1</sup> of the European

Parliament and of the Council of 26 February 2014 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (see Table 1. below).

**Table 1. Type of public contracts**

Works contracts	Supply contracts	Service contracts
Public contracts having as their objective either the execution, or both the design and execution, of works, for example building or civil engineering works such as a road or sewage plant.	Public contracts having as their object the purchase, lease, rental or hire purchase with or without option to buy, of products such as stationery, vehicles or computers.	Public contracts other than public works or supply contracts having as their object the provision of services such as consultancy, training or cleaning services.
Detailed list of works in Annex II to the Directive		Detailed list of services in Annex XIV to the Directive

Source: Directive 2014/24/EU

<sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Available at: <http://eur-lex.europa.eu/eli/dir/2014/24/oj>.

This guidance provides advice and recommendations to contracting authorities on the basis of the European legal framework, in particular Directive 2014/24/EU. This legislation applies above a set of EU thresholds, which means that it sets minimum requirements only for procurement procedures above a certain monetary value (i.e. contract value)<sup>2</sup>. If the contract value is below these EU thresholds, the procurement processes are regulated by nation-

al rules. However, they must still comply with the general principles of the Treaty on the Functioning of the EU<sup>3</sup>.

Even though this guidance does not deal with procurement below these thresholds, the general lessons and examples it provides can be useful for all kinds of procurement procedures, including smaller ones.



### More information on EU procurement rules

More information on the public procurement directives, applicable thresholds and interpretative communications on specific topics (such as 'Framework Contracts and Procurement below the thresholds') is provided by:

The European Commission, DG GROW:

[https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en)

The SIGMA initiative: Key procurement publications and policy briefs:

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

<sup>2</sup> The current EU thresholds are presented in detail in the following chapter on the Key changes introduced by the public procurement Directive 2014/24/EU.

<sup>3</sup> Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

# Key changes introduced by the public procurement Directive 2014/24/EU

A European legal framework was originally developed for public procurement to ensure that businesses across the European single market could compete for public contracts and to design bidding contests above certain thresholds. The legal framework aimed to ensure equal treatment and transparency, reduce fraud and corruption and remove legal and administrative barriers to participation in cross-border tenders. More recently, public procurement has started to cover additional policy goals such as environmental sustainability, social inclusion and the promotion of innovation (see Section 2.2.2 Strategic use of green, social and innovation criteria in public procurement).

The European legal framework for public procurement<sup>4</sup> is composed of:

- » The principles deriving from the Treaty on the Functioning of the European Union (TFEU) such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency; and
- » The three public procurement Directives: Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU on the award of concession contracts.

While the tenets of public procurement regulation are mostly unchanged, the 2014 Directives have introduced a number of changes. These may be applicable starting on 18 April 2016 even if the transition process in all Member States has not been finalised.

To achieve EU strategic policy goals while ensuring the most efficient use of public funds, the 2014 public procurement reform pursued several objectives:

- » make public spending more efficient;
- » clarify basic notions and concepts to ensure legal certainty;
- » make it easier for SMEs to participate in public contracts;
- » promote integrity and equal treatment;
- » enable contracting authorities to make better use of procurement in support of innovation and common societal and environment goals; and
- » incorporate relevant case-law of the Court of Justice of the European Union.

This section presents the key changes<sup>5</sup> brought about by the reform that procurement practitioners should pay attention to, especially if they are accustomed to referring to the former Directives.

## New definitions, new thresholds, and a new category of contracting authority

Directive 2014/24/EU provides new definitions to clarify the different **notions used in procurement procedures**, such as procurement document and economic operator (including candidate and tenderer). The Directive also presents new concepts that are essential now in public contracts, such as electronic means, life cycle, innovation or label.

<sup>4</sup> European Commission, DG GROW, Public procurement — Legal rules and implementation. Available at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/>.

<sup>5</sup> European Commission, DG GROW, EU public procurement reform: Less bureaucracy, higher efficiency. An overview of the new EU procurement and concession rules introduced on 18 April 2016. Available at: [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8562](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8562).

**Two categories of contracting authorities** are introduced to differentiate between central government authorities (national public bodies) and sub-central contracting authorities operating at regional and local level. These two categories mainly have an impact on the thresholds for applying the Directives (see below). The threshold is higher for sub-central contracting authorities in the cases of supply contracts and most service contracts.

The **thresholds** above which European legislation for public procurement applies have changed and are now different for central and sub-central authorities (see Table 2 below). The thresholds change on a regular basis, generally every 2 years, and can be regularly checked on the Commission's website<sup>6</sup>.

**Table 2. EU thresholds for public contracts from 1 January 2018 to 31 December 2019**

	Works	Supplies	Services		
			Social and specific services	Subsidised services	All other services
<b>Central government authorities</b>	€5 548 000	€144 000 <sup>7</sup>	€750 000	€221 000	€144 000
<b>Sub-central contracting authorities</b>	€5 548 000	€221 000	€750 000	€221 000	

Source: Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts.

## Making SME participation in public contracts easier

Contracting authorities are encouraged to **divide contracts into lots** to make it easier for SMEs to participate in public procurement procedures. They are free not to divide but then need to explain why not.

Contracting authorities cannot set **turnover requirements for economic operators** at more than two times the contract value except where there is a specific justification.

Economic operators can use the online tool '**e-CERTIS**'<sup>8</sup> to find out the administrative documents they may be asked to provide in any EU country. This should help them to participate in cross-border procurement if they are unfamiliar with the requirements of other countries.

The **European Single Procurement Document (ESPD)**<sup>9</sup> enables economic operators to electronically self-declare that they fulfil the required conditions to participate in a public procurement procedure. Only the successful tenderer needs to provide full documentary evidence. In the future, even this

<sup>6</sup> DG GROW publishes the updated values of the EU procurement thresholds at: [http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds/index_en.htm).

<sup>7</sup> For procurements under Directive 2009/81/EC on defence and sensitive security procurement, the applicable thresholds are €5,548,000 for works contracts and €443,000 for supplies and services contracts.

<sup>8</sup> e-CERTIS. Available at: <http://ec.europa.eu/markt/ecertis/login.do?selectedLanguage=en>.

<sup>9</sup> Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document. Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL\\_2016\\_003\\_R\\_0004](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2016_003_R_0004).

obligation could be lifted once evidence can be linked electronically to national databases.

Beginning on 18 October 2018 at the latest, an economic operator may no longer have to provide administrative supporting documents if the contracting authority already has these documents.

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## More provisions on grounds for exclusion and award criteria

**New provisions on grounds for exclusion** allow contracting authorities to reject economic operators who have shown poor performance or significant shortcomings in a previous public contract. The new provisions also allow the authorities to reject them if they distort competition by practising collusive tendering with other economic operators.

For award criteria, contracting authorities are encouraged to move from the 'price-only' criteria to the **'MEAT' criteria** (most economically advantageous tender). The MEAT criteria can be based on cost and can also include other aspects within a 'best price-quality ratio' (e.g. quality of tender, organisation, qualification and experience of staff, delivery conditions like processes and time frame). Award criteria must be clearly defined and weighted in the contract notice or procurement documents. In addition, every public procurement award must be documented in a specific evaluation report that must be sent to the Commission upon request.

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## Improved safeguards against corruption

The **definition and rules for conflict of interest** have been clarified. Contracting authorities are required to do more to put in place appropriate measures against conflicts of interest. The rules do not establish which safeguards should be used. However,

some common practices could be developed. For instance, all procurement officers could be asked to sign a declaration for each procurement procedure to confirm they have no interests with any participating tenderer.

Economic operators excluded from public procurement for bad practices can be included again if they clearly demonstrate that they have acted appropriately **to prevent misconduct and wrongdoings**.

Where the period of exclusion was not set in a final judgment, the period of exclusion cannot exceed **5 years** from the date of the conviction in cases of mandatory exclusion grounds or **3 years** from the date of the relevant event in cases of optional exclusion grounds.

New provisions regulate the **modification of contracts** in order to avoid abuse and ensure fair competition for potential new tasks.

Member States have to ensure that the application of public procurement rules is monitored and that monitoring authorities or structures **report violations of public procurement rules** to national authorities and make the results of their monitoring available to the public. They also have to submit a report to the Commission every 3 years on the most frequent sources of misapplication or legal uncertainty, on prevention measures as well as on the detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.

The use of **e-procurement makes the process more transparent**, reduces unfair interaction between procurement practitioners and economic operators and makes it easier to detect irregularities and corruption thanks to transparent audit trails<sup>10</sup>.

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<sup>10</sup> OECD, Preventing Corruption in Public Procurement, 2016.

Available at: <http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf>.

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## Including environmental, social and innovation policy goals in procurement procedures

The new Directives confirm the strategic role of public procurement in not only ensuring that public funds are spent in an economically efficient way and guaranteeing the best value for money for the public buyer. They also confirm its strategic role in achieving policy goals, notably in innovation, the environment and social inclusion. This is done in various ways:

- » Tender documents must explicitly require economic operators to comply with **social and labour law obligations** including international conventions.
- » Contracting authorities are encouraged to make the best strategic **use of public procurement to spur innovation**. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.
- » Contracting authorities are allowed to reserve the award of certain services contracts to **mutual companies and social enterprises** for a limited period of time.
- » Contracting authorities can request **labels, certifications** or other equivalent forms of confirmation of social and/or environmental characteristics.
- » Contracting authorities are allowed to take into account environmental or social factors in **award criteria** or **contract performance conditions**.
- » Contracting authorities are allowed to take the **full life-cycle cost** into account when awarding contracts. This may encourage more sustainable and better value offers which might save money in the long term despite initially appearing to be more costly.

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## Electronic procurement

Contracting authorities have until 18 October 2018 to implement **exclusive electronic public procurement** via dedicated e-procurement platforms<sup>11</sup>. This means that the entire procurement procedure, from publishing notices to submitting tenders, must be performed electronically by that time.

Starting on 18 April 2018, the **European Single Procurement Document** (ESPD) can only be provided in electronic form. Until then, ESPD can be printed, filled in manually, scanned and sent electronically. The Commission has actually developed a tool<sup>12</sup> that allows contracting authorities to create their ESPD and attach it to tender documents.

Within the Internal Market Information System (IMI), the Commission has established the online service **e-CERTIS** to identify the **administrative documents** frequently requested in procurement procedures across the 28 Member States, one candidate country (Turkey) and three EEA/EFTA countries (Iceland, Liechtenstein and Norway).

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## Changes in procedures

The open and restricted procedures remain the **main types of procedures** available for all types of public procurement.

The **minimum time limits** for economic operators to present their offers and other tender documents have been reduced by about a third (see Section 2.4 Set the time limits). This will help to speed up procedures but still permits longer timeframes in specific cases.

The use of the **competitive procedure with negotiation is more flexible** (formerly the negotiated procedure with publication of a contract notice) and can be used under certain conditions, including when the contract is complex or cannot be procured

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<sup>11</sup> European Commission, Communication: Electronic public procurement will reduce administrative burden and stop unfair bidding, January 2017. Available at: [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8716&lang=en&title=Electronic-public-procurement-will-reduce-administrative-burden-and-stop-unfair-bidding-](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8716&lang=en&title=Electronic-public-procurement-will-reduce-administrative-burden-and-stop-unfair-bidding-)

<sup>12</sup> European Commission, DG GROW, European Single Procurement Document — Service to fill out and reuse the ESPD. Available at: <https://ec.europa.eu/tools/espd>.

off-the-shelf. Contracting authorities have more freedom to negotiate with a reduced number of economic operators. First, a selection is made from the candidates who have responded to the advertisement and have submitted an initial offer. Second, the contracting authority may open negotiations with the selected tenderers to seek improved offers.

A new **light-touch regime** has been introduced for social and health services and some other services. This regime implies a higher threshold (EUR 750 000) but also some obligations, including an advertising requirement in the Official Journal of the European Union (OJEU). This regime replaces the former system in Annex II B of Directive 2004/18/EC.

The Directives now explicitly refer to **pre-commercial procurement** and have encouraged a wider use of this type of procurement by clarifying the exemption for R&D services.

A new procedure, the **innovation partnership**, was also introduced. It combines the purchase of R&D services and the purchase of the developed innovative solutions in one procedure. This is done through a partnership between the economic operator and the contracting authority.

With **mixed contracts**, it is possible to combine several types of procurement (works, services or supplies) in one procurement procedure. The rules applying in that case are those applicable to the type of procurement corresponding to the main subject matter of the contract.

Contracting authorities are expressly recommended to carry out **market consultation** to better prepare their procurement procedures and inform economic operators of their needs, provided that they do not distort competition.

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## Changes in the scope of Directive 2014/24/EU

Directive 2014/24/EU extends the scope of the procurement rules beyond the award and conclusion of a contract and includes **provisions to regulate the modification and termination of contracts**.

Works concessions contracts are excluded from Directive 2014/24/EU on public contracts. The new **Directive 2014/23/EU<sup>13</sup> covers all concessions contracts** for both works and services.

Forms of public-public cooperation that do not result in a distortion of competition in relation to private economic operators fall outside the scope of public procurement legislation:

- » **Contracts between entities within the public sector may be concluded directly** provided three conditions are cumulatively met: first, the contracting authority must exercise a control over the contractor which is similar to that which it exercises over its own departments; second, more than 80% of the activities of the contractor must come from the controlling contracting authority; and finally, there must be no direct private capital participation of the contracting authority in the contractor. The nature and extent of this control is described in full in Directive 2014/24/EU and should be carefully checked on a case-by-case basis before contracting 'in house'<sup>14</sup>.
- » Where **inter-administrative cooperation** leads two or more contracting authorities to conclude a contract to achieve common objectives of public interest, the contract falls outside the scope of Directive 2014/24/EU. In this case, the contracting authorities must perform on the open market less than 20% of the activities concerned by the cooperation.

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<sup>13</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL\\_2014\\_094\\_R\\_0001\\_01](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_094_R_0001_01).

<sup>14</sup> More details on the nature and extent of this control are provided in Article 12. Public contracts between entities within the public sector of Directive 2014/14/EU.

# 1. Preparation and planning

*The preparatory phase of a procurement procedure aims to design a robust process for delivering the required works, services or supplies. It is by far the most crucial stage of the process because the decisions made during this phase will shape the success of the whole procedure.*

As detailed in the figure below, a public procurement procedure is composed of multiple, closely interconnected steps and phases that go from planning to implementation and closure.

**Figure 2. Typical public procurement procedure stages**

1. Preparation and planning	2. Publication and transparency	3. Submission of tenders, opening and selection	4. Evaluation and award	5. Contract implementation
<ul style="list-style-type: none"> <li>» Detect future need</li> <li>» Engage stakeholders</li> <li>» Analyse market</li> <li>» Define the subject matter</li> <li>» Choose the procedure</li> </ul>	<ul style="list-style-type: none"> <li>» Draft specifications including criteria</li> <li>» Prepare procurement documents</li> <li>» Advertise the contract</li> <li>» Provide clarifications</li> </ul>	<ul style="list-style-type: none"> <li>» Receipt and opening</li> <li>» Apply exclusion grounds</li> <li>» Select suitable tenderers</li> </ul>	<ul style="list-style-type: none"> <li>» Evaluate tenders</li> <li>» Award and sign the contract</li> <li>» Notify tenders and publish the award</li> </ul>	<ul style="list-style-type: none"> <li>» Manage and monitor the execution</li> <li>» Issue payments</li> <li>» If needed, deal with modification or termination of contract</li> <li>» Close the contract</li> </ul>

If the preparatory phase of the procurement procedure is done correctly then the rest is more likely to flow without difficulty. However, often the contracting authority either underestimates the planning stage of the process or does not carry it out at all.



## Preparation requires time and expertise

Preparation may sometimes take a long time, but it is always a crucial phase.

Depending upon the size and complexity of the contract, preparation might take days or even months before the contract notice is due to be published. However, good planning should minimise the risk of needing to modify or vary a contract during implementation, and can help help avoid errors.

Indeed, in the context of funding from the ESI Funds, there have been many ‘how did it go wrong?’

reviews concluding that poor planning, particularly at the start of the procurement process, was to blame for the biggest errors.

As a result, contracting authorities increasingly employ **dedicated procurement officers**, particularly when conducting complex, risky and high-value public procurements. This increasing professionalisation of the procurement function is considered best practice.

This section will take practitioners through the different ‘must-dos’ in preparing a procurement procedure.

Indeed, the need comes from a gap in the ability of the public sector to perform one of its tasks. Public authorities cannot fulfil them with their internal resources and that is why they need to purchase external support.

## 1.1 Assess future needs

The first thing a contracting authority should do before launching a procurement procedure is to think of the need the whole process is supposed to satisfy.

Any contracting authority should therefore be able to duly justify a procurement procedure because it should meet a specific need or be required to carry out an activity of public interest.



### Start with why

Often, the subject matter of a contract is decided too quickly without properly defining why the contract is needed and what it is for. As a result, the works, supplies or services provided end up being partially — or totally — disconnected from the need that was supposed to be fulfilled.

This results in inefficient use of public funds and poor value for money.

It should be clarified that **the need is not the product or the service we want to obtain. The need is the function which is missing to achieve an objective or carry out an activity.**

For example, procurers should not start their reasoning with ‘We need to buy a printer’ but rather with ‘We need to print’. In that case, the printing function may be achieved through options other than purchasing, for example by sharing a printer with other departments, or renting or leasing one from an external company. All these alternatives must be taken into account before launching the procurement procedure.

In a nutshell, the **key process** procurers should have in mind is:

- » Identify the need with relevant stakeholders.
- » Choose the procedure.
- » Write the technical specifications (often called Terms of Reference) if purchasing services (see section 2.1 Draft procurement documents).

Working plans for EU-funded projects or programmes are normally defined for several years, meaning it should be easier for contracting authorities to anticipate which works, supplies or services they will need to purchase.

Once needs have been identified, contracting authorities have to carefully assess them before engaging in procurement. To do so, it is preferable to gather a small team and to get internal and external stakeholders on board (see section 1.2. Engage stakeholders).



### **Possible questions to help assess the need**

The following questions can help steer discussions on analysing the need:

- » What is my need? Which missing function do I need to achieve my objectives?
- » Do we have human and/or technical resources available internally?
- » Can we satisfy the need without launching a procurement procedure? They are often ignored, but alternatives to public procurement should be carefully considered and properly compared.
- » Have we analysed different ways of meeting the identified needs? Could we buy, lease, rent the item or service or set a public-private partnership to obtain whatever it is we intend to procure?
- » What final results do we want to obtain?
- » Do we need to purchase works, supplies or services, or a combination?
- » Which features are essential and which are optional?
- » Is the number/scope necessary or would fewer/less also be sufficient?
- » What is critical to satisfy the need?
- » Would it be appropriate to purchase ready-made solutions or would only a tailored satisfy our needs?
- » Would it be relevant to engage in dialogue with the business community?
- » What could the environmental impacts of this purchase be?
- » What could the social impacts of this purchase be?
- » Does this purchase need an innovative approach to obtain a tailor-made solution which does not already exist on the market?

Apart from analysing the need and determining the scope of the future procurement procedure, assessing the need in this way makes it possible to be open about alternative means of fulfilling a need, which are not necessarily linked to specific works, products

or services. Furthermore, it enables contracting authorities to take into account other considerations such as potential environmental and social impacts when defining the procurement need.



### Examples of lack of need assessment spotted by auditors

The two case studies below show how properly assessing needs can help ensure efficient use of public funds.

#### 1. Needless purchase of IT equipment

A department purchased 250 computers to replace existing equipment that had not yet been amortised. This purchase was said to be necessary because new software was being implemented that, apparently, required a higher hardware capacity than the existing computers offered. The auditors scrutinised this motivation and discovered that the new software could have been used without restriction on the available computers. The procurement was therefore unjustified.

#### 2. Unnecessary supply of new machinery

The maintenance of public roads was carried out by regional offices, which provided staff and equipment. The department purchased new machinery for one of those offices, including a roller for EUR 50 000. Looking for alternatives to this purchase, the auditor checked to find out how many rollers were already being operated and charged to capacity. It transpired that several rollers in other offices were only operated for a few hours. The auditor inferred from the data available that one of those rollers could have been relocated instead of buying a new one.

Source: SIGMA Public procurement policy briefs, Brief 28: Audit of Public Procurement, September 2016.

## 1.2. Engage stakeholders

As previously mentioned, a critical assessment of the fundamental rationale for the purchase is often best done at an interactive group session involving all key stakeholders. The same goes later when drawing up the technical specifications and monitoring the contract performance.

In short, this stage is about appointing and setting up a project team to carry out the procurement procedure. The team should be composed of:

- » A **core team in charge of managing the contract**. 1 to 3 people may be needed, depending on the complexity of the subject, for example one procurement officer and one technical project manager. All contracts will require, as a minimum, a project manager with both procurement and technical skills to be in charge of the contract.
- » A **larger working group** composed of the core team and of internal experts specialised in the subject (e.g. civil engineers, architects, IT specialists or lawyers), members of the administration

that will benefit from the product or service purchased, or other members who have dealt with similar purchase and can bring their experience to the group. External specialist advisors may also be needed depending on the planned number and complexity of the contracts.

Roles and responsibilities during the procurement process should be clearly defined in the operational manuals of the contracting authority, in particular to engage internal and external customers or users.

### 1.2.1. Internal key stakeholders

Recognition of internal stakeholders is a vital to the success of the future contract. Stakeholders may be customers/users or other internal parties that have an interest in the contract. It may also be relevant to involve elected representatives at this early stage of the procedure.

The core team has to make sure it involves these internal groups as soon as possible so that they can **bring their expertise** to the preparation phase and in order to **develop their ownership** of the project.

Designing competent technical specifications is vital for implementing the contract and achieving the desired result, so technically qualified stakeholders should be involved from the beginning. As the contract progresses and its focus changes, different stakeholders may need to be involved, and their needs may also change.

### 1.2.2. External key stakeholders

It can be very useful to involve external stakeholders if the required expertise is not available within the contracting authority. They may be specialised experts (e.g. architects, engineers, lawyers, economists) or even business organisations, other public authorities or businesses.



### **Not involving the right people early on can cost you at a later stage**

Failing to recognise the need to involve both internal and external stakeholders is a common criticism of many contracts. It often has a negative impact on the contract's success, sometimes resulting in additional costs to rectify omissions or errors. Inadequate specifications lead to complex adjustments and higher workload covering unforeseen questions and corrections. In addition, when tender documents are unclear the tenderers tend to cover their risks by higher prices.

Best practice shows that it is worth the contracting authority investing in outside technical expertise when preparing the procurement to ensure it makes the most of the money spent and avoids modifications or the costs of relaunching the procedure at a later stage.

However, working closely with and consulting external experts should not jeopardise the independence of the contracting authorities' decision-making process and/or create situations of potential conflict of interest which would breach the principles of equal treatment and transparency. It is therefore recommended to apply the same principles of confidentiality and integrity as for the market consultation (see section 1.3.2. Preliminary market consultation).

### 1.2.3. Integrity and conflict of interest

In a public procurement procedure, a conflict of interest arises where a person's ability to perform their role in an impartial and objective way is compromised. This applies to the people and the authorising officer in charge of the procedure, and to anyone involved in the opening and evaluation phases.

More specifically, a conflict of interest covers any situation where staff members of the contracting authority (or others) involved in the procurement procedure and who may influence its outcome have,

directly or indirectly, a financial, economic or other personal interest which might be perceived as compromising their impartiality and independence.



### **Undeclared conflicts of interest lead to financial corrections**

In the context of ESI Funds, the discovery by a control body of an undeclared conflict of interest may put the impartiality of the procurement process in doubt and may lead to financial corrections.

Contracting authorities should recall that the definition of conflict of interest provided in Directive 2014/24/EU is quite broad and covers a large number of cases, such as:

1. The spouse of a contracting authority's desk officer in charge of monitoring a procurement procedure works for one of the bidders.
2. A person owns shares in a company. This company takes part in a tendering procedure in which this person is appointed as a member of the evaluation committee.
3. The head of a contracting authority has spent a week's holiday with an executive director of a firm which bids in a tendering procedure launched by the contracting authority.
4. An officer in a contracting authority and a CEO of one of the tendering firms have responsibilities in the same political party.

Source: European Commission, OLAF, Identifying conflicts of interests in public procurement procedures for structural actions, November 2013.

From this basis, contracting authorities have to determine whether there are any possible conflicts of interest and must take appropriate measures in order to prevent and detect conflicts of interest, and to remedy them. They can consult the practical guide<sup>15</sup> issued by OLAF in 2013 for help.

In particular, an easy way to prevent conflicts of interest is to require anyone taking part in the selection, evaluation or award of the contract to sign a declaration of absence of conflict of interest once the contracting authority has decided to launch the procurement procedure (see chapter 3. Submission of tenders and selection of tenderers).

This declaration must include at least:

- » The full definition of conflict of interest according to Article 24 of Directive 2014/24/EU. Any stakeholder should be aware of the exact definition and of its particularly large extent, covering for example 'financial, economic or other personal interest';
- » A statement confirming that the person has no conflict of interest with the operators who have submitted a tender for this procurement, and that there are no facts or circumstances, past, present, or that could arise in the foreseeable future, which might call into question the person's independence;

<sup>15</sup> European Commission, OLAF, Identifying conflicts of interests in public procurement procedures for structural actions, November 2013. Available at: [https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/2013\\_11\\_12-Final-guide-on-conflict-of-interests-EN.pdf](https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/2013_11_12-Final-guide-on-conflict-of-interests-EN.pdf).

- » A statement that the person will report any conflict of interest as soon as it is detected to their superior within the contracting authority, and will withdraw from further participation in the procurement process.

Additional provisions can be added concerning whistleblowing or confidentiality of information. A template declaration of absence of conflict of interest and of confidentiality is proposed in the appendix.

Public buyers should also take appropriate measures to effectively prevent, identify and remedy conflicts of interest in procurement procedures so as to avoid any distortion of competition and to ensure equal treatment for all. In particular, Directive 2014/24/EU considers conflict of interest as grounds for excluding an economic operator.

More advice can be drawn from the best practices listed below.



### Best practices to avoid conflicts of interest in public procurement

A **code of conduct** covering public procurement activities should be set up and publicised widely in all public organisations. Since civil servants' tasks normally involve public money or areas where it is essential to treat everyone fairly, the code should require minimum standards of behaviour expected from all civil servants, and in particular from staff dealing with procurement.

**Systems, checks and training** should be in place to make sure that all key stakeholders capable of influencing decisions about the scope or award of a contract are aware of their responsibility to act impartially and with integrity.

Anyone involved in the evaluation committee or the project team in charge of the contract should sign a **declaration of absence of conflict of interest**. Anyone with a potential conflict of interest should not play any role in the procurement.

The evaluation committee should be asked to **declare any (potential) conflict of interest at the start of the procurement process**. Those declarations should be recorded and kept in the contract file.

**Tenderers should be asked to declare any conflict of interest** when submitting their tenders. This declaration could be a minimum requirement set in the procurement documents.

Detailed information on integrity in public procurement has been developed by the OECD<sup>16</sup>.

<sup>16</sup> OECD, Principles for Integrity in Public Procurement, 2009. Available at: <http://www.oecd.org/gov/ethics/48994520.pdf>.

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### 1.3. Analyse the market

When determining what to buy, estimating costs, and before developing selection and award criteria in a procurement procedure, it is helpful for public buyers to know and understand the market. Therefore, an important stage of the preparation phase is to conduct a preliminary market analysis of the needs identified. For smaller contracts the scope of this analysis can be limited, but is still useful in better defining the subject matter and scope of the contract.

Analysing the market allows the contracting authority to:

- » gain prior knowledge and understanding of the potential solutions available to satisfy the needs;
- » further focus and define the subject matter and the budget of the contract;

- » apply the principle of sound financial management and achieve the best value for money.

It is strongly recommended that contracting authorities conduct a preliminary market analysis when planning a negotiated procedure without prior publication for a contract that can be awarded only to one particular economic operator.

A preliminary market analysis is also needed for pre-commercial procurements and innovation partnerships, because these types of procurement are used only when the desired product does not exist on the market.

Innovation partnerships also require a preliminary market analysis to establish the number of potentially interested suppliers on the market. This helps avoid crowding out other R&D investments and excluding some competitors from supplying the innovative solutions.



#### **Not all procurements are achievable**

A common mistake is for the contracting authority to assume that the market can deliver a contract without consulting the market on its proposals. Yet not all procurements are achievable.

Procurement procedures can fail because no economic operators have submitted a tender or no tenders were acceptable. Sometimes the market is simply not able to deliver the requested works, supplies or services.

Problems may relate to technological maturity, over-saturated demand or unacceptable levels of risk transfer. The contracting authority might be seeking something that is beyond the market's current capabilities or might set unrealistic timescales and budget.

If this happens, contracting authorities must restart the procurement process and reconsider the objectives, scope and technical and economic conditions of the contract. These additional tasks increase the workload, time and resources dedicated to the procurement process, and could have been avoided by analysing the market in advance.

As a general rule and regardless of the method chosen, all initiatives linked to the preliminary market analysis have to be properly documented and

reported in writing for each procurement procedure. This ensures transparency and auditability.



### Standardised template for market analysis

The OECD has developed a comprehensive methodology<sup>17</sup> for market analysis, including a standard template for a market analysis report. This is useful to:

- » guide practitioners in their market analysis;
- » document the actions carried to ensure full transparency of this stage of the process. This can be used to build in-house knowledge and for audit purposes.

Detailed recommendations on the approach to be followed can be found [here](#).

**Box: Generic template for a market study report**

**Overview**

When was market study conducted? .....

Were files from previous similar tenders accessed?

Yes, please outline tender number.....

No, please outline reasons.....

Was information collected using

Desk-based research

Solicitation from private market participants

If desk-based research was conducted, what sources were accessed? .....

If there was a direct solicitation from private market participants, how were these identified? How many were contacted? How many responded? .....

If external consultant(s) were used to estimate prices or costs, did they sign a confidentiality agreement? .....

**Survey results**

Market analysis (number of suppliers): .....

Supplier analysis (capability): .....

Supplier analysis (price): .....

Aside from value-for-money, were any particular criteria given as part of the market study?

Environmental

Social

Innovation

Other .....

<sup>17</sup> OECD/SIGMA, Public Procurement Brief 32, Market Analysis, Preliminary Market Consultations, and Prior Involvement of Candidates/Tenderers, September 2016. Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-32-200117.pdf>.



## Market analysis toolkit

Procurement Journey Scotland has developed a **comprehensive toolkit on market analysis**. It is publicly available online.

It provides advice and tools such as this market analysis summary template which can be useful for contracting authorities in other countries.

Factor	Findings from research	
Market definition	What does the market constitute How is it described in industry	Overview of commodities/ products/services covered by segments
Market Overview	Size Total turnover in the market per year Total volume (quantity) of sales Financial Ratios e.g. Profitability/ROI	Overview of market by segments e.g., geographic area; customer base; sector
Trade Associations		
Key Suppliers	Please state if the commodity/service market is global, European, or UK, and identify the appropriate top 5 suppliers	
Market growth	Trends in the past 2-4 years Expected forecast 2-4 years Growth values in terms of%, value or volume	Overview of market by segments e.g., geographic area; customer base; sector Influences affecting growth
Trends and developments	Trends in the market place (demand, technology, other developments, approaches etc) Key areas of technology supporting the market Current technologies – maturity and capability Technology development trends – next big thing & when?	Rate of change Impact on the business Restrictions on technology access
Supply market trends	Major players in the market Supplier trends	Overview of key suppliers Developments in pricing Discounting policies – volume / loyalty / risk:reward “Cost plus “ pricing “Market pricing”

Available at: <https://www.procurementjourney.scot/route-3/route-3-develop-strategy-profiling-commodity-supply-market-analysis>

In terms of planning, good practice shows that market research carried out well in advance of publication of the contract notice can be extremely useful. Moreover, advertising in the OJEU for open pre-tender dialogue by publishing a prior information notice is positively accepted by the market, results in more qualitative procurement documents and submitted tenders and reduces the risk of complaints at a later stage.

Two ways to analyse the market are:

1. market research;
2. preliminary market consultation involving candidates or tenderers.

The scope and depth of the market analysis will vary depending on the nature and size of the procurement. Using desk-based research to clarify the market structure, identify active economic operators and understand prices may be an appropriate approach for standard procurement procedures.

### 1.3.1. Market research

The most commonly used method of market analysis before preparing a procurement procedure is the desk research that can be carried out using the contracting authority's internal resources. It consists of

gathering information, mainly from the internet and mail or phone contacts.

Desk-based market research can provide information on the availability of products or services which meet the contracting authority's needs. The authority can then determine the most appropriate procurement approach without much time or resources.

Frequently-used **sources of information** are:

- » internal departments dealing with the subject matter;
- » catalogues of producers, distributors, dealers;
- » press publications (specialised journals, magazines, newsletters, etc.);
- » trade associations, business organisations or chambers of commerce;
- » existing market studies.

Public buyers should analyse these different sources of information using the following criteria.

**Table 3. Indicative market analysis criteria**

Analysis categories	Data and information
Maturity of the market	Established market, market in development phase, existence of sufficient suppliers to ensure effective competition.
Market capacity to deliver	Within the required timeframe, on the required scale, within the available budget.
Standards and conditions	Conditions usually applied to similar contracts, potential market constraints, capacity of economic operators to meet certain standards.
Contract value	Recent market prices, price structure, breakdown of costs for similar contracts, fixed and variable costs within a similar budget.
Selection and award criteria	Minimum requirements in similar contracts, relevant qualitative considerations, takeaways from similar experiences.
Contract performance	Potential risks, key milestones, time management, lessons learnt from similar experiences.

For complex contracts, a series of pre-determined benchmarks should be established to show what would be considered an acceptable tender. An optimum theoretical tender could even be prepared beforehand by the contracting authority.

Where relevant or necessary, other more active market prospecting activities can be carried out, such as participation in conferences, fairs, seminars, or market consultations with prior involvement of candidates.

### 1.3.2. Preliminary market consultation

A preliminary market consultation involves interviewing market stakeholders or contacting knowledgeable people in the relevant field, for example independent experts, specialised bodies, business organisations or economic operators.

The purpose of market consultation is to:

1. better prepare the procurement procedure;
2. inform businesses in the relevant market about the planned procurement.

A dialogue with the market before the procurement process begins can help identify innovative solutions and new products or services which the public authority may not have been aware of. It can also help the market meet the criteria which will be applied in the procurement process by explaining what the public authority's requirements are likely to be.

Even though there are no specific rules regulating the market consultation process, it must always follow the fundamental principles of non-discrimination, equal treatment and transparency. This is particularly important if the contracting authority seeks or accepts advice from external parties or individual economic operators.

The market must be approached in a way that ensures compliance with the principles of transparency and equal treatment and avoids disclosing privileged information and/or privileged market positions.



### Consult market without distorting competition

Particular care must be taken not to distort competition by providing some economic operators with early knowledge of a planned procurement procedure and/or its parameters. Competition could be also distorted if the technical specifications could be perceived as influenced or 'mirroring' the specifications of a particular product or service on the market.

When preparing calls for tenders, contracting authorities may conduct market consultations but must ensure that involving a previously consulted company does not distort competition within the tender procedure. They must also ensure that any information shared with a company as a result of its prior involvement is also made available to the other participating companies.

The following measures should help contracting authorities to ensure fair competition and avoid excluding a more advantaged tenderer:

- » Openly announcing the preliminary market consultation (e.g. by publishing a prior information notice in national procurement portals and TED);
- » Sharing with other candidates and tenderers all relevant information that results from involving one candidate or tenderer in the preparation of the procurement procedure;
- » Fixing adequate time limits for the receipt of tenders in order to give all candidates sufficient time to analyse the information.

The contracting authority should pay attention when excluding a potential candidate because of its prior involvement in the procedure preparation. Exclusion should indeed be considered if there is no other way to ensure equal treatment, but economic operators should be given the right to prove that their involvement did not distort competition.

The analysis made by the contracting authority in this regard should not be formal and should also compare the tender with others received from tenderers not involved in the procedure preparation.

Pre-commercial procurement<sup>18</sup> and specific procedures such as competitive dialogues or innovation partnerships enable public authorities to engage in market dialogue.

## 1.4. Define the subject matter

Contracting authorities tend to consider that defining the subject matter of the contract (i.e. its subject, duration and value) is the first step of a procurement procedure. However, this should be done only once the need has been assessed, the relevant stakeholders identified and mobilised and the market analysed.

As well as defining the subject matter, during this phase the contracting authority has to determine the contract's type, duration and timetable, value and structure.

### 1.4.1. Subject matter

It is essential that public buyers clearly identify the subject matter so that they select the correct procurement procedure to be followed and the right type of contract. The reference codes provided by the common procurement vocabulary<sup>19</sup> gives a detailed description of the various types of subject matter and can help define the task.

The subject matter of the contract should be based on a clear business case.

The business case is the justification for a proposed project or contract on the basis of its expected benefits. The contracting authority should arrange for the business case to be prepared within the department initiating the procurement request and have it approved by the corresponding hierarchy.

#### Business case

Sometimes a need is assessed and a procurement process launched without documenting the reasons behind particular choices and showing that appropriate approvals were given. However, it is essential that any decision to initiate a public contract be based on a systematic assessment of the issues involved and options available. Procurement procedures based only on a cursory assessment and untested assumptions might fail to deliver their objectives.

Before initiating a procurement procedure, contracting authorities should prepare a business case clearly setting out the reasons why the procurement should go ahead and demonstrating that key planning aspects have been considered.

The resources and time dedicated to preparing the business case should always be proportional to the size and complexity of the project: not every aspect is necessary for smaller projects.

<sup>18</sup> Commission Communication on 'Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe' (COM(2007) 799, 14/12/2007).

<sup>19</sup> European Commission, DG GROW, Common procurement vocabulary. Available at: [http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/common-vocabulary\\_en](http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/common-vocabulary_en).

The **purpose of the business case** is to establish a clear rationale for the proposed course of action by demonstrating that the project/contract will:

- » meet the organisation’s need;
- » choose the most appropriate tender procedure;
- » be achievable;
- » be affordable;
- » be a sound commercial arrangement; and
- » be sustainable.

A business case should be approved at the appropriate level within the contracting authority to secure the required budget as part of the procurement planning stage. It should always be approved before launching the actual procurement procedure.

The business case can follow a basic structure for usual procurement procedures or a more complex one for bigger procedures.

The **basic structure** below can be used as a model for drafting the business case, detailing all items that should be covered:

- » context and description of the need;
- » benefits to be obtained/problems that the contract will solve;
- » estimated costs and budget availability;
- » outline of the timescale;
- » involvement of internal resources, stakeholders or users; and
- » potential risks (see section 5.2.2. Risk management).

For more complex or bigger procurement procedures, a well-prepared business case will be a key tool for the contracting authority when preparing and implementing the contract. It can be used if the contract is challenged and to help the authority face possible difficulties and unforeseen circumstances.

The business case should therefore provide more detailed information that can be organised as follows:

**Table 4. Detailed structure of business case for complex procurements**

Section	Suggested content
<b>STRATEGIC FIT</b>	Context and description of the need; Alignment with internal plans and strategies; External strategies taken into account (when applicable); Contract objectives; Benefits to be realised; Key stakeholders; Success factors and how they will be measured; Potential risks.
<b>MARKET RESEARCH</b>	Market overview; Suppliers analysis; Market prices; Outcome of consultations (where applicable); Trends and developments.

Section	Suggested content
<b>OPTIONS APPRAISAL</b>	List of options available; High-level cost/benefit analysis including non-financial 'soft' benefits; Preferred option and rationale for choice; Is the preferred option available through an existing contract?
<b>AFFORDABILITY</b>	Available funding and sources; Cost estimate; Life-cycle cost (where applicable).
<b>ACHIEVABILITY</b>	High-level plan of tasks; Timetable to deliver the contract.
<b>CONCLUSION</b>	Key take-aways; Next steps; Main points of attention; Recommendation for approval.

### Type of contract

The contracting authority must also **determine whether the subject matter of the contract constitutes a works, supply or service** contract (see Table 1. Type of public contracts). This will especially determine which thresholds to consider in applying EU legislation.

This analysis can also conclude that a concession contract is appropriate.

It is also possible in very specific cases to combine works, supplies and services in mixed contracts.



### Mixed contract combining works, supplies and/or services

For **mixed contracts** which combine works, supplies and/or services in a single contract, the main subject must be determined by the element with the higher value or by the part of the contract that is the most essential to meet the need.

Specifically, the criteria to be applied by public buyers in determining the type of contract are:

Situations	Criteria to determine the type of contract
Works + Supplies	Main subject of contract
Works + Services	Main subject of contract
Services + Supplies	Highest value
Services + Services under the light regime	Highest value

In specific cases, the subject matter of the contract may also refer to more than one EU public procurement directive.



### Mixed contract falling under several EU directives

For mixed contracts to procure subjects covered by Directive 2014/24/EU and for procurement not covered by that Directive, the applicable legal regime depends on whether the different parts of the contract are objectively separable or not.

1. If the different parts are separable, the contracting authority may choose to

- (a) award separate contracts for the separate parts; or
- (b) award a single contract.

Where the contracting authority chooses to award separate contracts for separate parts, the decision on which legislation applies to each separate contract must be taken on the basis of the characteristics of the separate part.

If the contracting authority decides to award a single contract, Directive 2014/24/EU applies.

2. If the different parts are not separable, the applicable legislation must be determined on the basis of the main subject matter of that contract.

#### 1.4.2. Single contract or lots

Once the above steps have been taken, public buyers can decide whether to have just one contract or to divide it into lots. Contracting authorities are encouraged to divide contracts into lots since this is one way to help small and medium-sized businesses participate in public procurement.

Contracts covering a set of supplies or services serving a similar purpose, whose combined value is such that few operators would be able to provide them all in their entirety, should be split into lots. This will enable any operator who is interested to tender for one or more lots.

**Dividing a contract into lots increases competition** because contracting authorities are more likely to get more and a wider range of tenderers by going to the market with more and smaller contracts. So, although division into lots should not be

made mandatory for all contracts, it should be considered when developing the business case.

Splitting into lots is also appropriate when a contract for a single purchase is made up of a variety of products or services offered by companies operating in different sectors of the economy (for example, information and communication activities often include managing a website, producing videos or publishing written material). In such cases, a company which is highly efficient within its own sector but is not able to provide all the products or services would be unfairly prevented from competing.

**Dividing a contract into lots also makes it easier for SMEs to tender.** For instance, in very high-value contracts competition can only be achieved by splitting the contract, since only a small number of economic operators would be able to offer all the products or services requested, making the contracting authority dependent on them.



### **Divide in lots, or explain**

Unless the Member State requires the contract to be divided into lots, contracting authorities must provide in writing the main reasons for their decision not to subdivide into lots. This explanation must be included in the procurement documents or in the final report on the contract award.

For example, contracting authorities tend not to divide a contract into lots because having just one contract is easier to organise and can lead to economies of scale. Indeed, more contracts and more stakeholders to deal with is more difficult to manage.

If the contracting authority does decide to award a contract in the form of separate lots, no explanation is needed, and it may go on to determine the size and subject matter of each lot.

The contracting authority should indicate, in either the contract notice or the invitation to confirm interest, whether tenders may be submitted for all of the lots, for certain lots or for only one lot. Even if tenders may be submitted for several or all lots, the contracting authority may limit the number of lots that may be awarded to one tenderer. However, they need to state this maximum number of lots per tenderer in the contract notice.

The contracting authority must develop objective and non-discriminatory criteria or rules to apply where the applying the award criteria would result in one tenderer being awarded more lots than the maximum number. When determining which lots will be awarded, the evaluation committee (see 4.1. Set up the evaluation committee) must apply the criteria or rules indicated in the procurement documents.

The contracting authority may award contracts by combining several or all lots. In that case, the contracting authority needs to specify in the contract notice that it reserves the right to do so, and must indicate the lots or groups of lots that may be combined. Since Directive 2014/24/EU offers this as an option, practitioners need to check in the national law.

### **1.4.3. Duration of the contract**

The contracting authority must establish the required duration of the contract, meaning the period from the signature of the contract until the acceptance of the final products or deliverables.

It is recommended that this duration includes both the execution of tasks and the approval of interim deliverables if any (e.g. partial services, products or stages), since the approval of an interim deliverable usually determines whether or not the contractor should continue to execute the tasks. In addition, the time taken by the contracting authority to approve a deliverable should not reduce the time given to the contractor to perform the contract.

Normally, the contract ends when both parties have fulfilled their obligations: the contractor has delivered according to the terms of the contract and the contracting authority has made the final payment. However, some conditions linked to confidentiality and access for auditors may remain in force long after the end of the contract.



### Set up a realistic timetable

A realistic timetable for the entire procurement process, including potential remedy procedures, through to the contract award and implementation stage needs to be drawn up during the planning stage. Over-optimistic timetables are common and lead to errors in the subsequent implementation phases. For example, they could result in failure of the procurement process or severe implementation problems caused by unrealistic tender preparation periods limiting the number of tenders and affecting their quality.

The public procurement of works, supplies or services involving EU funds is often part a larger EU-funded project that may be delivered through several public contracts. Delays in one contract can affect implementation of the other contracts. The timing of grant approvals and payments is an additional constraint when launching procurement procedures. Contracting authorities need to take this into account at an early stage.

#### 1.4.4. Contract value

Another important element to be defined at this stage and which should eventually be published in the contract notice is the value of the contract, i.e. the maximum budget available for economic operators.

Defining a realistic budget for a contract to achieve the desired results, while achieving value for money, is critical and should be based on a clear scope of requirements and up-to-date market price information.

The contracting authority must carry out an estimation of the contract value and document it so that the justification and reasoning behind the value of a purchase is available in the future, either to other staff from the contracting authority or to potential auditors. The contracting authority will have to demonstrate not only the sources and method used for the estimation but also that the purchase offered value for money.

#### Definition — What is the contract value?

The estimated value is based on the total volume of the services, supplies or works to be purchased for the full duration of the contract, including all options, phases or possible renewals. It comprises the total estimated remuneration of the contractor, including all types of expenses such as human resources, materials and transport, but also covers additional costs such as maintenance, bespoke licences, operational costs or travel and subsistence expenses.



### Artificially splitting the contract value is illegal

The contracting authority must not artificially split larger works/supplies/services into smaller units to avoid the EU thresholds for advertising in the OJEU, national thresholds or to avoid applying certain competitive procedures.

For works, there must be an amalgamation of all separate contracts where there is a functional and timing relationship between them. In general, if the contracts together relate to the same subject matter, the values must be aggregated together. If the amalgamated values are above the thresholds, the contracts must be advertised in the OJEU. Collaborative multi-partner projects must consider public procurement requirements at the level of the project, i.e. not at individual partner level.

For example, if a contracting authority needs to paint a building with 10 rooms, it cannot split the contract into 10 contracts or fewer (for instance 6) and award the contracts without tendering. All those services/supplies or works must be ‘pooled’ together to create a functional whole. Consequently, in this example the contract value must be the total value of the 10 contracts. The overall value determines whether or not a tender is required to follow Directive 2014/24/EU.

### Examples of artificial splitting or ‘salami-slicing’

1. The review of the project procurement plan for a public building project revealed a pattern of multiple lots with amounts just below the Directive threshold, without clear technical justification. All these lots had been tendered locally, without taking into consideration the total amount of the lots which was well above the threshold.
2. The project works were artificially split into one contract to be tendered, whose amount was 1 % below the Directive threshold, and one ‘own works’ contract executed directly by the contracting authority.
3. A proposed purchase of a certain total quantity of vehicles is artificially subdivided into several contracts with the intention of ensuring that the value of each contract falls below the thresholds, i.e. deliberately avoiding publishing the contract for the whole set of supplies in the OJEU.

### Timing — When should the contract value be defined?

Procurement rules require that the value be valid when the call for tenders is issued or the procedure without publication is launched. However, it is recommended that public buyers estimate the contract value at the beginning of the process when defining the subject matter. In any case, when Directive 2014/24/EU applies, the estimated price with legal value is the one published with the contract notice.

### Method — How do we estimate the contract value?

Procurement practitioners should estimate the value of a purchase on the basis of previous experience, previous similar contracts and/or on the basis of preliminary market research or consultation.

It must be calculated without VAT.

If the contract is split into lots, the value of the purchase is the combined value of all lots.

Life-cycle costs can be taken into consideration at this point, since they are one method for assessing the budget needed (see section 2.3 Define the criteria).

In the case of works contracts, account must be taken not only of the value of the works but also of the estimated total value of the supplies needed to carry out the works and made available to the contractor by the contracting authority.

### 1.4.5. Joint procurement

Joint procurement involves combining the procurement procedures of two or more contracting authorities. In concrete terms, only one procurement procedure is launched on behalf of all participating contracting authorities to purchase common services, goods or works.

This can be done either between several contracting authorities from the same Member State, or between contracting authorities from different Member States through cross-border procurement.

### Occasional joint procurement

Occasionally, two or more contracting authorities may agree to conduct a single joint procurement procedure. If a procurement procedure is carried out jointly in the name and on behalf of all the contracting authorities concerned, they must be **jointly responsible** for fulfilling their legal obligations.

However, where a joint procurement procedure is conducted by several contracting authorities but the contract is not shared in its entirety (i.e. only some tasks of the contract are jointly procured), the contracting authorities are jointly responsible only for those parts carried out jointly.

### **Cross-border procurement**

**Contracting authorities from different Member States** can conduct joint procurement. This can involve public institutions from different Member States or use centralised purchasing bodies located in another Member State.

If centralised purchasing activities are provided by a central purchasing body located in another Member State, the activities must be conducted in accordance with the national law of the Member State in which the central purchasing body is located.

The allocation of responsibilities between contracting authorities from different Member States, including management of the procedure, distribution of the works, supplies or service to be procured, conclusion of contracts and the applicable national law must be clearly specified in the procurement documents.

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## **1.5. Choose the procedure**

The decision concerning which procedure to use is a critical and strategic one affecting the whole procurement process. The decision should be taken and justified at the planning stage.

Directive 2014/24/EU provides for five main procedures as well as specific criteria for particular situations which are presented in this section. An additional procedure called 'pre-commercial procurement' can be used when purchasing R&D services and does not fall under Directive 2014/24/EU.

In choosing which procedure to use, contracting authorities need to weigh a range of factors, including:

- » the specific requirements and purpose of each procedure;
- » the benefits of full open competition;
- » the advantages of restricting competition;
- » the administrative burden entailed by each procedure;
- » the likely risk of complaints and remedies often linked to corruption and collusion risks; and
- » the incentive for innovative or tailored solutions to a specific need.

The decision matrix below aims to provide practitioners with an overview of the possibilities offered by the different procurement procedures, as well as their advantages and disadvantages.

**Table 5. Decision matrix to support the choice of the procurement procedure**

Procedures	Specific requirements for using the procedure	Stages	Minimum number of candidates	Level of competition	Workload for contracting authorities	Risk of complaints, remedies or irregularities	Incentive for innovative or tailored ideas/products
<b>Open</b>	None. It can be used for all purchases.	1. Selection and evaluation	None. All interested candidates can submit a tender.	HIGH Unlimited number of tenders.	HIGH All compliant tenders must be examined by the CA and this can delay the award. Resource intensive for both the CA and the candidates who have to prepare a complete tender.	LOW Decision made with a straightforward focus on the award. Limited transparency risks as an open, transparent, competitive procedure	LOW
<b>Restricted</b>	None. It can be used for all purchases.	1. Prequalification 2. Selection and evaluation	All interested candidates can submit an expression of interest. At least 5 pre-selected candidates can submit a tender.	MEDIUM Limited number of candidates allowed to submit a tender. Possibility to restrict participation only to market operators with high level of specialisation.	MEDIUM Limited number of tenders to evaluate and therefore less resource intensive for the evaluation committee/ CA. Two-stage procedures might be longer in order to respect the required time limits.	MEDIUM Greater potential for collusion/corruption due to the increased exercise of discretion by the CA.	LOW

<b>Competitive procedure with negotiation</b>	<p>Fulfil one or more of the following criteria:</p> <p>An open or restricted procedure has attracted only irregular or unacceptable tenders.</p> <p>The needs of the CA cannot be met without the adaptation of available solutions.</p> <p>The subject matter includes design or innovative solutions.</p>	<ol style="list-style-type: none"> <li>1. Prequalification</li> <li>2. Negotiation and evaluation</li> </ol>	<p>All interested candidates may request participation in response to a contract notice.</p>	<p>MEDIUM</p> <p>Limited number of candidates allowed to submit a tender.</p> <p>Possibility to restrict participation only to market operators with high level of specialisation.</p>	<p>HIGH</p> <p>The burden of proof for the circumstances allowing for the use of the procedure rests with the CA.</p> <p>The CA is highly involved in the negotiation/dialogue with tenderers.</p> <p>Limited number of tenders to evaluate and therefore less resource intensive for the evaluation committee/ CA.</p> <p>Two-stage or three-stage procedures might be longer in order to respect the required time limits.</p>	<p>MEDIUM</p> <p>Greater potential for collusion/corruption due to the increased exercise of discretion by the CA.</p>	<p>MEDIUM</p>
<b>Competitive dialogue</b>	<p>The technical specifications cannot be established with sufficient precision by the CA with reference to defined standards or technical requirements.</p> <p>The contract cannot be awarded without prior negotiations due to specific risks or circumstances related to the nature, complexity, or legal and financial matters.</p>	<ol style="list-style-type: none"> <li>1. Prequalification</li> <li>2. Dialogue</li> <li>3. Selection and evaluation</li> </ol>	<p>At least 3 pre-selected candidates can submit a tender</p>			<p>HIGH</p> <p>Greater potential for collusion/corruption due to the increased exercise of discretion by the CA.</p> <p>Transparency requirements are particularly challenging during the dialogue.</p>	<p>HIGH</p>

Procedures	Specific requirements for using the procedure	Stages	Minimum number of candidates	Level of competition	Workload for contracting authorities	Risk of complaints, remedies or irregularities	Incentive for innovative or tailored ideas/products
<b>Innovation partnership</b>	The CA procures both the development and purchase of innovative products, services or works which are not already available on the market.	<ol style="list-style-type: none"> <li>1. Prequalification</li> <li>2. Negotiation</li> <li>3. Delivery</li> </ol>	<p>All interested candidates may request participation in response to a contract notice.</p> <p>At least 3 pre-selected candidates can submit a tender</p>	<p>MEDIUM</p> <p>Limited number of candidates allowed to submit a tender.</p> <p>Possibility to restrict participation only to market operators with high level of specialisation.</p>	<p>HIGH</p> <p>The burden of proof for the circumstances allowing for the use of the procedure rests with the CA.</p> <p>The CA is highly involved in the contract execution since it procures and monitors both the research and development and the delivery/deployment of a non-existing new product or service.</p> <p>Potentially, limited number of tenders to evaluate and therefore less resource intensive for the evaluation committee/CA.</p> <p>Three-stage procedures might be longer in order to respect the required time limits.</p>	<p>HIGH</p> <p>Greater potential for collusion/corruption due to the increased exercise of discretion by the CA.</p> <p>Transparency requirements are particularly challenging during the negotiation and the contract implementation.</p> <p>Risk of crowding out of other R&amp;D investments and foreclosing of competition for the delivery/deployment stage (2014 R&amp;D&amp;I State aid rules consider there is no risk of State aid only when the procedure is limited to the purchase of unique/specialised products or services for which there are no other potential suppliers on the market).</p>	HIGH

<b>Design contest</b>	The jury must be composed exclusively of natural persons independent of participants in the contest.	1. Selection and evaluation	All interested candidates may request participation in response to a contract notice.  Possibility to restrict the number of participants based on clear and non-discriminatory selection criteria.	MEDIUM  Limited number of candidates allowed to submit a tender.	HIGH  Resource intensive for both the CA/jury and the candidates who have to prepare a complete tender.	LOW  Decisions are related to a one-stage procedure.  Decision coming from an independent jury often including external stakeholders,	HIGH

Procedures	Specific requirements for using the procedure	Stages	Minimum number of candidates	Level of competition	Workload for contracting authorities	Risk of complaints, remedies or irregularities	Incentive for innovative or tailored ideas/products
<p><b>Negotiated procedure without prior publication</b></p>	<p>This procedure is a derogation from general rules and can be used only under one or more of the following exceptional instances:</p> <p><b>For works, supplies or services:</b> An open or restricted procedure has not attracted any tenders or any suitable tenders;</p> <p>Extreme urgency justified by unforeseeable circumstances;</p> <p>Contract can be performed only by a particular economic operator in case of unique work of art or artistic performance, absence of competition for technical reasons or protection of exclusive rights.</p> <p><b>For works or services:</b> New works or services that repeat similar works or services provided that they are in conformity with a basic project for which the original contract was awarded.</p> <p><b>For supplies or services:</b> For technical or artistic reasons or due to the existence of special or exclusive rights, only one possible supplier or service provider exists.</p> <p>Purchase of supplies or services on particularly advantageous terms;</p>	<p>1. Selection and evaluation</p>	<p>Possibility to restrict the number of participants down to 1.</p>	<p>LOW</p> <p>The CA chooses the economic operators for the negotiation.</p>	<p>LOW</p> <p>Reduced workload for the CA due to the small number of tenders to be assessed.</p> <p>Negotiation skills are required to conduct the procedure properly.</p>	<p>HIGH</p> <p>The use of the procedure has to be exceptional and be easily challenged by prejudiced economic operators.</p> <p>Greater potential for collusion/corruption due to the increased exercise of discretion by the CA.</p>	<p>LOW</p>

	<p><b>For supplies only:</b> Supplies quoted and purchased on a commodity market.</p> <p>Products manufactured purely for the purpose of research, study, experimentation or development;</p> <p>Additional deliveries for the partial replacement or the extension of existing supplies/installations to avoid incompatibility or technical difficulties.</p> <p><b>For services only:</b> Contract to be awarded to the winner of a design contest.</p>						
<p><b>Pre-commercial procurement</b></p> <p>Note: This procedure does not fall under Directive 2014/24/EU.</p>	<p>The CA procures R&amp;D services to research and/or develop and test innovative products, services or works which are not already available in the market.</p>	<p>1. Selection and evaluation</p>	<p>All interested candidates can submit a tender.</p> <p>Pre-commercial procurement awards contracts to several contractors in parallel and is budgeted to end with minimum 2 contractors up to the final R&amp;D step.</p>	<p>HIGH</p> <p>Unlimited number of tenderers allowed to submit a tender.</p>	<p>MEDIUM</p> <p>The burden of proof for the circumstances allowing for the use of the procedure rests with the CA. However, the burden of proof is lower compared to innovation partnerships (no crowding out of R&amp;D investments or foreclosing of competition for final delivery of solutions).</p>	<p>LOW</p> <p>Decision made with a straightforward focus on the award. Limited transparency risks as an open, transparent, competitive procedure.</p>	<p>HIGH</p>

### 1.5.1. Open procedure

The open and restricted procedures are the usual methods of procurement for routine works, services or supplies.

The open procedure is mostly used when competition is limited to few candidates and the specification might be rather complicated and technical expertise might be required.

All economic operators interested in the contract can submit tenders. **All tenders must be considered** without any prior selection process. The selection and evaluation is carried out after the tenders have been submitted.

Since tendering is open to all interested candidates, including ones from other countries, the open procedure promotes competition, resulting in better value for money for the contracting authorities. The share of open procedures is actually considered as a key indicator of the level of competition of a public procurement system.

Although open procedures are preferred for the degree of competition they promote, they are not suitable for all types of contracts and can entail greater administrative burden. Complex or highly specialised contracts may be better allocated via a more selective process<sup>20</sup>.

### 1.5.2. Restricted procedure

The restricted procedure is a two-stage process where **only pre-selected tenderers may submit tenders**.

The restricted procedure is generally used where there is a high degree of competition (several potential tenderers) in the marketplace, such as for cleaning, IT equipment or furniture, and the contracting authority wishes to draw up a shortlist.

### Prequalification

As a first step, the contracting authority's requirements are set out in a contract notice (published in the OJEU if above the relevant thresholds) inviting potential tenderers to present expressions of interest. The contract notice may indicate the relevant information to be submitted via a detailed European single procurement document (see section 2.1.1. Set up the ESPD).

The procurement documents must be made available as of the publication of the contract notice, or as of the confirmation of interest if using a prior information notice as a means of calling for competition.

### Selection and evaluation

The second step involves issuing the invitation to tender to at least five pre-selected tenderers having the requisite level of professional, technical and financial expertise and capacity.

### 1.5.3. Competitive procedure with negotiation

The competitive procedure with negotiation, like the competitive dialogue, is a process that can be used in exceptional circumstances. It involves **shortlisting at least three candidates who are invited to submit an initial tender and then negotiate**.

In all cases, the contracting authority must duly justify their use of the competitive procedure with negotiation since it is only allowed in a limited number of circumstances:

- » in response to a previous open or a restricted procedure, only irregular and unacceptable tenders were received;
- » the needs of the contracting authority cannot be met without adapting solutions already available;
- » the contract includes design or innovative solutions;

<sup>20</sup> European Commission, DG REGIO, Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds, January 2016. Available at: [http://ec.europa.eu/regional\\_policy/en/policy/how/improving-investment/public-procurement/study/](http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/study/).

- » the technical specifications cannot be established with sufficient precision with reference to defined standards or technical references.
- » the contract cannot be awarded without prior negotiations due to specific risks or circumstances related to its nature, complexity, or legal and financial matters.

## Negotiation and evaluation

The contracting authority may then choose at least three candidates and invite them to submit an initial tender as basis for subsequent negotiation.

A negotiation phase is then organised on the basis of the initial tenders, while the evaluation will consider the final version of the tenders on the basis of the most economically advantageous tender criteria.

## Prequalification

In a competitive procedure with negotiation, the contracting authority publishes a contract notice and all interested economic operators may ask to participate in the procedure. To do so, they must demonstrate that they are qualified to perform the contract.



## Examples of competitive procedure with negotiation

### 1. Supply contract in the health sector

A contracting authority in the health sector launches a restricted procurement process for a contract to supply an X-ray machine. Four tenders are submitted and evaluated, but all four tenders include minor variations of the technical specifications, none of which are permitted. The contracting authority decides to initiate a competitive procedure with negotiation, inviting the four economic operators that had submitted the original tenders to participate in the negotiations. The contracting authority negotiates with all of the tenderers using the tenders that they initially submitted. The aim of the negotiations is to adapt the submitted tenders to the requirements that the contracting authority has set out in the contract notice, specifications and additional documents in order to obtain regular and acceptable tenders.

### 2. Works contract for a local authority

A municipality wishes to award a contract for the construction of a new office building in the centre of a town, where it is known that archaeological remains are likely to be found, which will need to be protected during the construction process. The local authority does not know how much risk economic operators are prepared to take in relation to the impact of protecting the archaeological remains on the cost and timing of construction. This issue will require negotiation with the economic operators.

Source: OECD/SIGMA, Public Procurement Brief 10, Public procurement procedures, September 2016.  
Available at: <http://www.sigmapweb.org/publications/Public-Procurement-Policy-Brief-10-200117.pdf>

### 1.5.4. Competitive dialogue

Contracting authorities which carry out complex projects might be unable to define how to meet their needs or assess what the market can offer in terms of technical, financial or legal solutions. This can arise with major integrated transport infrastructure, large computer networks or projects involving complex and structured financing (e.g. public-private partnership), for which the financial and legal set-up cannot be determined in advance.

The competitive dialogue procedure aims to provide a certain amount of flexibility for particularly complex purchases. As with the competitive procedure with negotiation, the contracting authority **may use the competitive dialogue only in a limited number of circumstances and must always justify its decision.** (see section 1.5.3. Competitive procedure with negotiation).

### Prequalification

First, at least three economic operators are shortlisted based on their capacity to perform the contract (as with the competitive procedure with negotiation).

### Dialogue

The contracting authority then issues the invitation to participate only to the shortlisted economic operators, and enters into a competitive dialogue phase with them.

During the competitive dialogue phase, **all aspects of the project can be discussed with the economic operators.** This ensures transparency among them.

### Selection and evaluation

Once the contracting authority is confident that it will receive satisfactory proposals, it invites the economic operators to submit their tenders which will be evaluated on the basis of the most economically advantageous tender criteria.



### Competitive dialogue is very demanding for contracting authorities

Contracting authorities should be aware that the competitive dialogue **requires both intense use of internal staff and high levels of expertise** as it deals with a complex subject matter and it is time-consuming.

A high level of technical expertise on the subject matter is necessary in-house for the contracting authority to carry out the procedure with the best chances of success and to be able to hold the dialogue with the selected candidates.

### 1.5.5. Innovation partnership

An innovation partnership is implemented through a three-stage procurement process (prequalification, negotiation, delivery). The contracting authority buys both R&D services to **develop an innovative solution and the resulting innovative products, services or works.**

The underlying logic of an innovation partnership is that tenders for both the R&D and the delivery of

the resulting solutions are submitted at the start of the competitive procurement procedure and that the solutions are actually further developed during the implementation of the contract.

This constitutes a major difference compared to the competitive dialogue procedure where dialogue continues until the contracting authority identifies the solution that best meets its needs.

## Prequalification

As with the competitive procedure with negotiation and the competitive dialogue, all providers interested in the contract may ask to participate in response to a contract notice. The contracting authority selects a minimum of three candidates for their R&D capacity and their performance of innovative solutions.

The partner that presents the best R&D capacity and can best ensure the real scale implementation of the innovative solutions must be selected. The selection criteria can include the partner's past performance, references, team composition, facilities and quality insurance systems. It may be difficult for start-ups and SMEs to win contracts in innovation partnership procedures as candidates have to demonstrate from the start of this procedure not only their capacity to perform R&D but also to supply results.

Consequently, the selected candidates will be invited to submit an **initial tender in the form of a research and innovation project proposal**. The subject matter, the minimum requirements and the award criteria for this must be set out in the procurement documents.

## Negotiation and contract implementation

Once the tenders have been submitted, the contracting authority negotiates initial and all subsequent tenders with the candidates, unless it decides to award the contract based on one of the initial tenders.

All aspects may be negotiated, except the subject matter, the award criteria and the minimum requirements set out in the procurement documents. However, the distribution of rights and obligations (including intellectual property rights) must be specified up front in the tender documents. In addition, the contracting authority cannot make substantial modifications to the subject matter (the minimum solution requirements) even if the R&D stage shows that this was not optimally formulated at the start of the procedure. The contracting authority can carry out negotiations in a number of successive stages to limit the number of tenders which require negotiation and thus potentially eliminate some tenderers from the process.

After awarding the contract to one of several tenderers, the contracting authority agrees the terms of the innovative contract and initiates the innovation process. Apart from research and development activities, this includes completing works, manufacturing and delivering products or services.

The contracting authority must pay the participating partners in suitable instalments. Contracting authorities must ensure to the greatest possible extent that the degree of innovation of the planned solution and the order of the research and innovation activities required to develop an innovative solution are taken into account in the structure and term of the partnership and the value of the various stages. The estimated value of the planned purchase of supplies, services or works must be in proportion to the investment required for those supplies, services or works.

## Delivery

As the innovation partnership is a contract for both the development and delivery of innovative solutions, the contracting authority can terminate the contract before proceeding to the delivery of the solutions only if the targets that the contracting authority set at the start of the procedure for the newly created innovative works, services or products were not reached during the R&D. The burden of proof that newly created solutions do not meet the initial targets and minimum requirements rests with the contracting authority. The procedure does not give the contracting authority the right to stop the procedure for other reasons if the targets and minimum requirements are met (e.g. not even if better solutions have emerged in the meantime on the market).

### 1.5.6. Design contest

A design contest is a competitive procedure which enables contracting authorities to **purchase a plan or a design mainly in the fields of spatial planning, architecture, civil engineering or data processing**.

The plan or design is selected by a jury and the subsequent winner is then invited to negotiate before signing the contract. The negotiated procedure without prior publication of a contract notice can be used for that purpose (see section 1.5.7. Negotiated procedure without prior publication).

In addition to the design contract, the outcome of the procedure may also include the award of prizes.

There are no detailed requirements relating to the number of stages to be used, or to the process to be followed.

### 1.5.7. Negotiated procedure without prior publication

When using the negotiated procedure without prior publication, contracting authorities negotiate, without advertising, the terms of the contract directly with one or more economic operators.

This is a significant derogation from the core principles of openness, transparency and competition and is a **very exceptional procedure**. The burden of proof for the circumstances allowing for the use of the negotiated procedure rests with the contracting authority.

The negotiated procedure without prior publication can be used only in exceptional circumstances which must be duly justified. These possibilities are clearly defined by Article 32 of Directive 2014/24/EU and are listed in the table below.

**Table 6. Overview of the instances where the negotiated procedure without prior publication can be used**

Works	Services	Supplies
<p><b>An open or restricted procedure has not attracted any tenders or any suitable tenders</b>, provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially. <b>No suitable tenders</b> mean that tenders are unusable, irrelevant to the contract, being manifestly incapable of meeting the contracting authority’s needs and requirements as specified in the procurement documents.</p> <p>Cases of <b>extreme urgency justified by unforeseeable circumstances</b>. These are situations a CA could not have predicted from the beginning of the procurement procedure and not attributable to actions of the CA (e.g. natural disasters, floods, security attacks). This applies also to additional works/ services/supplies requiring immediate action and arriving even if the CA has prepared the project and/ or the technical specifications in a diligent way.</p> <p>The <b>contract can be performed only by a particular economic operator</b> for one of the following reasons: creation or acquisition of a unique work of art or artistic performance, absence of competition for technical reasons (provided that the technical requirements are not artificially narrowed), protection of exclusive rights including intellectual property rights.</p>		

Works	Services	Supplies
<p><b>New works or services in case of repetition of similar works or services</b> provided that they are in conformity with a basic project for which the original contract was awarded. The basic project must indicate the extent of possible additional works or services and the possible use of this procedure for the award.</p>		<p><b>Supplies quoted and purchased on a commodity market.</b></p> <p><b>Purchase of supplies on advantageous terms</b>, from a supplier definitively winding up a business, the receiver or liquidator of a bankruptcy, from an arrangement with creditors or a similar procedure.</p> <p>The <b>products are manufactured purely for the purpose of research</b>, experimentation, study or development.</p> <p><b>Additional deliveries either for the partial replacement or the extension of existing supplies/ installations</b> only if the change of supplier would oblige the CA to acquire supplies having incompatible technical characteristics or resulting in disproportionate technical difficulties in operation and maintenance.</p>
	<p>The <b>contract follows a design contest</b> and is to be awarded, under the rules of the design contest, to the winner or one of the winners of the design contest.</p>	
<p>For technical or artistic reasons or due to the existence of special or exclusive rights, <b>only one possible supplier or service provider exists.</b></p>		

Source: Article 32 of Directive 2014/24/EU.

Before deciding to use this procedure, contracting authorities should ensure that the precise circumstances justifying negotiation do exist. If in doubt, it is advisable to get legal advice with a written record to that effect.



### Cases not justifying use of the negotiated procedure without prior publication

A contracting authority awards a public contract by negotiated procedure but cannot prove that this procedure was justified (it can only be used exceptionally in very specific circumstances).

Before using the procedure, carefully check the list of key requirements and obtain advice from national public procurement authorities if in any doubt.

### 1.5.8. Pre-commercial procurement

Pre-commercial procurement<sup>21</sup> uses the existing **open procurement procedure to procure R&D services** in a way that uses competitive development in phases, and shares intellectual property rights and related risks and benefits between the contracting authority and participating tenderers.

#### Exemption of public procurement rules for the purchase of R&D services

It should be highlighted that **pre-commercial procurement is not covered by the EU public procurement directives and the WTO Government Procurement Agreement rules**. However, Directive 2014/24/EU does refer to it, and puts in practice an exemption for R&D services.

R&D service contracts are used where existing solutions on the market are not able to provide a convenient solution to a contracting authority's needs.

<sup>21</sup> European Commission, COM(2007) 799 final, Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0799:FIN:EN:PDF>

By using this exemption, a contracting authority can procure R&D services outside of the EU and WTO rules, provided that it still complies with the EU Treaty principles and selects the economic operators in a transparent and non-discriminatory manner.

### Sharing of intellectual property and benefits

In pre-commercial procurement the contracting authority does not reserve all the intellectual property and the benefits of the R&D exclusively to itself, but shares them with the economic operators under market conditions, thus ensuring that there is no state aid.

Benefit sharing means that the contracting authority leaves the intellectual property ownership rights with the participating economic operators, while keeping licence-free rights to use the R&D results and the right to (require the economic operators to) give licences to third parties.

The interest of the contracting authority is primarily the right to use the solution and possibly to license it in any follow-up procurement. Furthermore, the contracting authority encourages competition between more economic operators by progressively selecting them based on their performance obtained for pre-defined milestones and their tenders for the next phase. Lastly, the contracting authority should have the possibility to terminate the project at any point if the results do not meet expected objectives.

The main advantage for economic operators is that it allows them to bring a solution to a need in public service that is not satisfactorily addressed by the current market. They also can test this solution and gather users' feedback throughout the R&D phase. If successful, this process enables them to test the solutions and sell them to other public procurers or in other markets.

In addition, pre-commercial procurement can be particularly interesting for SMEs because tenderers only need to fulfil the professional qualification and

financial capacity requirements for the research and development, not for deploying commercial volumes of solutions.

### Contracting

A pre-commercial procurement contract must be of limited duration and may include the development of prototypes or limited volumes of first products or services in the form of a test series.

However, the purchase of the newly created products or services must not be part of the scope of the same contract. Pre-commercial procurement differentiates the R&D contract from potential subsequent contracts for the purchase of commercial volumes of the innovative solution created.

### 1.5.9. Light regime for procurement of social and health services

For a number of categories of **services contracts in the health and social sectors**, contracting authorities can use a 'light' regime.

These services, often referred to as 'services to the person', are provided within a particular context which can differ between Member States. In addition, they usually have, by essence, a very limited cross-border dimension.

The threshold of EUR 750 000 applies to this light approach. This is much higher than the threshold that applies to services under the full regime.

This light approach can be taken when procuring health, social and other services that fall within the common procurement vocabulary codes listed in Annex XIV to Directive 2014/24/EU.

The list of those services includes:

- » health, social and related services;
- » administrative, social, educational, health care, and cultural services;

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European Commission, Commission staff working document — Example of a possible approach for procuring R&D services applying risk-benefit sharing at market conditions, i.e. pre-commercial procurement, 2007.  
Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1511547965552&uri=CELEX:520075C1668>.

- » compulsory social security services;
- » hotel and restaurant services;
- » legal services, to the extent that they are not excluded altogether from the Directives;
- » investigation and security services;
- » international services;
- » postal services.



### Practices from Directive 2004/18/EC might lead to error

The former public procurement Directive 2004/18/EC (Classical Directive) drew a distinction between services (Annex II A) and priority services (Annex II B).

Directive 2014/24 abolishes that distinction and introduces a 'light' procurement procedure that applies to the procurement of health, social and other services that fall within the common procurement vocabulary codes listed in Annex XIV.

**Contracting authorities should consult Annex XIV** carefully to determine whether a service requirement previously classified as 'Part B' falls inside or outside of the 'light' regime.

Although the list of services in Annex XIV is similar to the list in Annex II B under the 2004 Directive, **the lists are not identical**. Some service contracts that were formerly 'Part B' but are not listed in Annex XIV will be subject to the standard full procurement rules.

Directive 2014/24/EU includes very few provisions on the procurement of light regime services. Thus, Member States must put in place national rules complying with the principles of transparency and equal treatment of economic operators, taking into account the specific nature of the services.

Nevertheless, under the light regime, contracting authorities are required to advertise the contract opportunity in the OJEU, using a contract notice or prior information notice, and to publish a contract award notice in the OJEU.

#### 1.5.10. Framework agreements

Framework agreements are not a specific procedure or a type of contract, but rather a **tool that is recommended for established and repetitive needs** when the contracting authority does not know in advance either the contract amount or exactly when their need will occur. Framework agreements are one of the tools and techniques for aggregated procurement defined in EU legislation.

Framework agreements can be applied to works, supplies or services and are concluded within one contracting authority (or between several contracting authorities) with one or several economic operators.

The contracting authority advertises the framework agreement in the OJEU and uses one of the standard procurement procedures set out in the Directive to select and evaluate the tenders. Once it has received and evaluated the tenders, the contracting authority awards the framework agreement to one or more economic operators.

The successful tenderers (normally selected using an open or restricted procedure) benefit from the exclusivity of the framework agreement. The agreement governs the way in which contracts will be awarded to framework members and the terms applying to that award for a certain amount of time.

The rationale behind using a framework agreement for purchasing is that it helps make savings, both in the costs of the procurement thanks to economies of scale, and the time spent on the procurement process.

Framework agreements are frequently used by central purchasing bodies, acting either on their own behalf or on behalf of a number of contracting authorities. Framework agreements can also be easily combined with joint procurement, such as in the examples below.



### Examples of framework agreements

The most appropriate use of a framework agreement is where a contracting authority has a repeated requirement for works, services or supplies, but where the exact quantities that will be required are unknown, like in the following cases:

1. 'A central purchasing body, acting on behalf of 10 health bodies, enters into a framework agreement with four providers for the supply of emergency vehicles.'
2. 'Four neighbouring local authorities enter into a framework agreement with one economic operator for the maintenance of roads.'
3. 'A single government department enters into a framework agreement for stationery with three suppliers.'

Source: OECD/SIGMA, Public procurement Brief 19, Framework Agreements, September 2016.  
Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-19-200117.pdf>.



### More information on framework agreements

Link to comprehensive explanation and guidance on framework agreements:

European Commission, DG GROW, Explanatory note on framework agreements. Available at: [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en)

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## 1.6. Plan the procedure

At this stage, it is recommended to draw up a comprehensive plan for the whole procurement procedure in order to organise the future implementation

and management of the contract. This can be done on the basis of all the key elements that have already been defined: need to be satisfied, team and stakeholders, subject matter, duration and value of the contract as well as the procedure.



### Planning can be quick and saves time for the future

Planning is crucial and does not need to entail burdensome and long processes.

It is simply a matter of **defining what do to, when, and with which resources**. If the contracting authority gets this part of the process wrong, mistakes and problems will most likely follow.

For common procurement procedures, the core team can do this with just a few hours of work using a simple planning tool like the one presented in section 1.6.2 Simple planning tool.

The contracting authority should draw up a comprehensive timetable, standard tools or rules (e.g. for communication with tenderers) and devise a system for recording key decisions (i.e. register information known at that stage, available options and justification of the preferred option). The plan should include realistic and regular milestones to help track progress while implementing both complex and simpler contracts.

The contracting authority is also recommended to have rules concerning contract management, involvement from stakeholders, monitoring and control of the procurement procedures (see chapter 5. Contract implementation).

### 1.6.1. Planning complex contracts

For complex contracts, a Gantt chart can be established in order to take into account all the required tasks, distribute responsibilities and clearly identify the causal relationships between the steps of the process.

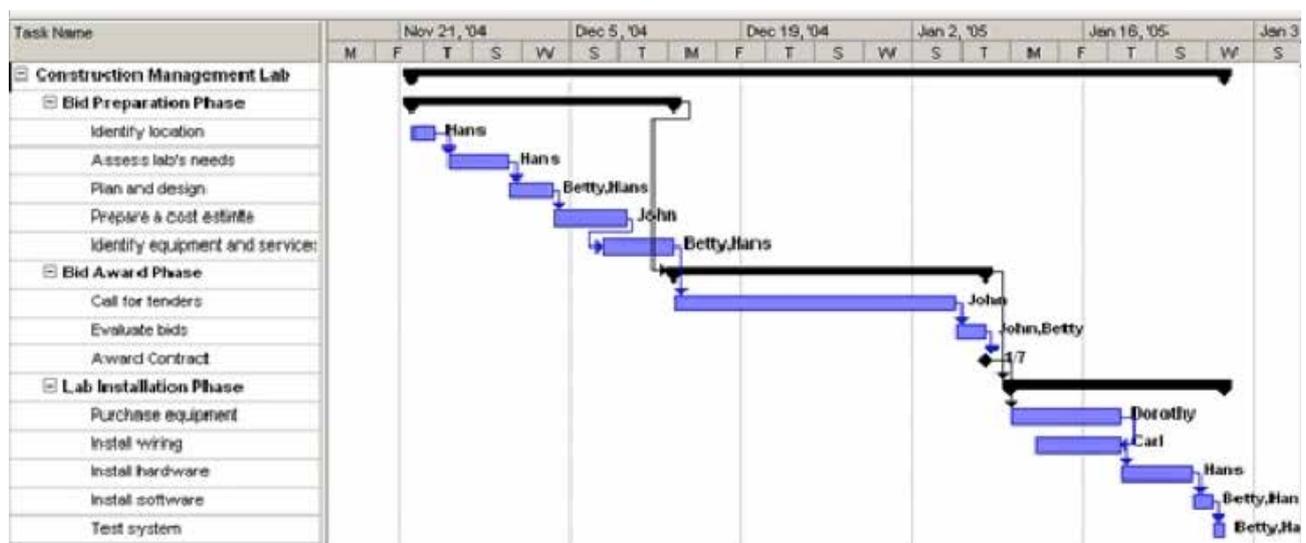
In order to proceed with scheduling in a Gantt chart you need the following inputs:

- » the sequence of tasks to be carried out;
- » the task duration estimates;
- » human resources requirements;
- » time constraints and main milestones;
- » deliverables or equivalent;
- » dependencies between tasks.

A Gantt chart focuses on the sequence of tasks necessary to complete a certain project. Each task is represented as a horizontal bar. The horizontal axis is the time scale over which the project will be implemented. Therefore, the length of each task bar

corresponds to the duration of the task or the time needed to complete it. Arrows connecting the tasks represent the causal relationship between some of the tasks (see example below)<sup>22</sup>.

**Figure 3. Example of Gantt chart for a public procurement procedure generated by MS Project**



The Gantt chart is an excellent tool for quickly assessing the status of a project. It is therefore suitable for status reports and for communicating information regarding the progress of a project to all stakeholders.

It can be developed using software like Microsoft Project or via a Microsoft Excel template which has less functionality but is easier and faster to use.

### 1.6.2. Simple planning tool

For more routine contracts, a comprehensive dashboard in the form of a simple table can be easily and quickly completed to plan and monitor the contract preparation and implementation.

The indicative table below allows to gather in one single sheet the necessary information for each of the main phases of the procurement process.

<sup>22</sup> Public Procurement Directorate (PPD) of the Treasury of the Republic of Cyprus, PUBLIC PROCUREMENT BEST PRACTICE GUIDE, 2008. Available at: [http://www.publicprocurementguides.treasury.gov.cy/OHS-EN/HTML/index.html?7\\_4\\_1\\_5\\_time\\_planning\\_of\\_activities.htm](http://www.publicprocurementguides.treasury.gov.cy/OHS-EN/HTML/index.html?7_4_1_5_time_planning_of_activities.htm).

**Table 7. Simple dashboard structure for procurement planning**

Tasks and key milestones	Person in charge	Stakeholders involved	Systems and tools	Record keeping	Timing/ Expected completion
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**1. Preparation and planning**

Detect future need					
Engage stakeholders (appoint working group)					
Analyse market					
Define the subject matter					
Choose the procedure					

**2. Publication and transparency**

Draft procurement documents					
Publish contract notice					
Provide clarifications to potential tenderers					

**3. Evaluation and award**

Open and evaluate tenders					
Award the contract					
Sign the contract					
Publish the contract award notice					

**4. Contract implementation**

Manage and monitor the execution					
Issue payments					
If relevant, modification of contract					
If relevant, termination of contract					

Ideally, this dashboard table should be prepared jointly and should be shared among the relevant internal stakeholders at the beginning of the process

to ensure a common agreement and understanding of the overall planning.

## 2. Publication and transparency

*The purpose of the publication and transparency phase is to attract competitive tenders that will deliver the contract in a satisfactory way, that is to say, with outcomes that meet the needs of the contracting authority.*

To do this, it is necessary to:

**Draft clear procurement documents** which clearly set out the need for and the subject matter of the contract in the technical specifications, the grounds for exclusion, and the selection and award criteria;

**Set sufficient time limits** in order for tenderers to appropriately prepare their proposals;

**Properly advertise** the contract or invite candidates to tender, and provide clarifications if needed.

### 2.1. Draft procurement documents

The drafting of the procurement documents is a crucial step in the procurement procedure. This is how the contracting authority will explain its needs and its related objectives and requirements to the market, namely to those interested in tendering.

The number and nature of the procurement documents depend on the type of procedure that has been selected. Nonetheless, in most cases, the procurement dossier will include the following items.

**Table 8. Main procurement documents**

Document	Description
<b>Invitation to tender, or invitation for pre-qualification</b>	The invitation is a <b>brief letter</b> inviting economic operators to submit to the contracting authority a tender, or a request to participate in the case of two-stage procedures (such as the restricted procedure or the competitive procedure with negotiation).
<b>Contract notice</b>	The contract notice is the document that <b>formally and publicly launches the procurement procedure</b> . Depending on the value of the contract and on national rules, the contract notice will be published in the Official Journal of the EU and/or in national, regional or local publications (see section 2.5.2 Notices to be advertised). It provides essential information about the contract, refers to the main relevant bodies and indicates where interested parties can access the full procurement documents.
<b>Technical specifications</b>	The technical specifications are the <b>key document</b> in the procurement dossier. They may include general background information about the contract, a description of the subject matter, the exclusion grounds, the selection and award criteria, and details of the specific scope of work required from the economic operator.

Document	Description
	<p>This document primarily aims to provide economic operators with the information needed to prepare their tenders or requests to participate. In addition, technical specifications might serve to protect the contracting authority at a later stage by setting out a single clear source of information for the tenderer(s). This thus prevents tenderers from claiming that they did not know about certain circumstances during the award or implementation phases.</p> <p>In the field of services, technical specifications are often referred to as Terms of Reference (ToR). In some cases, these include more documents in addition to the technical specifications.</p>
<p><b>Instructions to tenderers</b></p>	<p>The instructions consist of <b>guidelines and formal rules</b> regulating the procurement procedure.</p> <p>These rules aim to support economic operators in preparing and submitting their tenders or requests to participate. They usually provide practical indications on the way the proposals should be structured, the language in which they should be drawn up, the pricing schedule, the method for electronic submission or the formal presentation requirements (for example, financial and technical proposals are often required to be submitted in separate sealed envelopes).</p> <p>It is recommended to include a <b>formal compliance check-list</b> to help tenderers prepare the documentation and to facilitate the verification of documents by the contracting authority/evaluation committee.</p>
<p><b>European Single Procurement Document (ESPD)</b></p>	<p>The ESPD is a <b>self-declaration</b> of the economic operator's financial status, abilities and suitability for a public procurement procedure. It is available in all EU languages and used as preliminary evidence that the tenderer meets the conditions required in public procurement procedures. Thanks to the ESPD, <b>tenderers no longer have to provide full documentary evidence</b> and all the different forms previously used in EU procurement. This means access to cross-border tendering opportunities is now significantly simpler. As of October 2018, the ESPD must exclusively be provided in electronic form.</p>
<p><b>Draft contract</b></p>	<p>A draft contract may be included in the procurement documents to provide clear information to economic operators on the required contractual arrangements. A draft contract is a <b>detailed legal document</b>, which generally indicates the contract value, subject matter, duration and timeframe, payment conditions, and other legal provisions including protection of parties, representations, warranties, indemnifications, terms and all applicable laws and regulations.</p>

The key elements concerning the administrative part of tenders are further described below, while specific sections deal in more depth with the technical part of tenders (see sections 2.2. Define specifications and standards and 2.3. Define the criteria).

### 2.1.1. Set up the ESPD

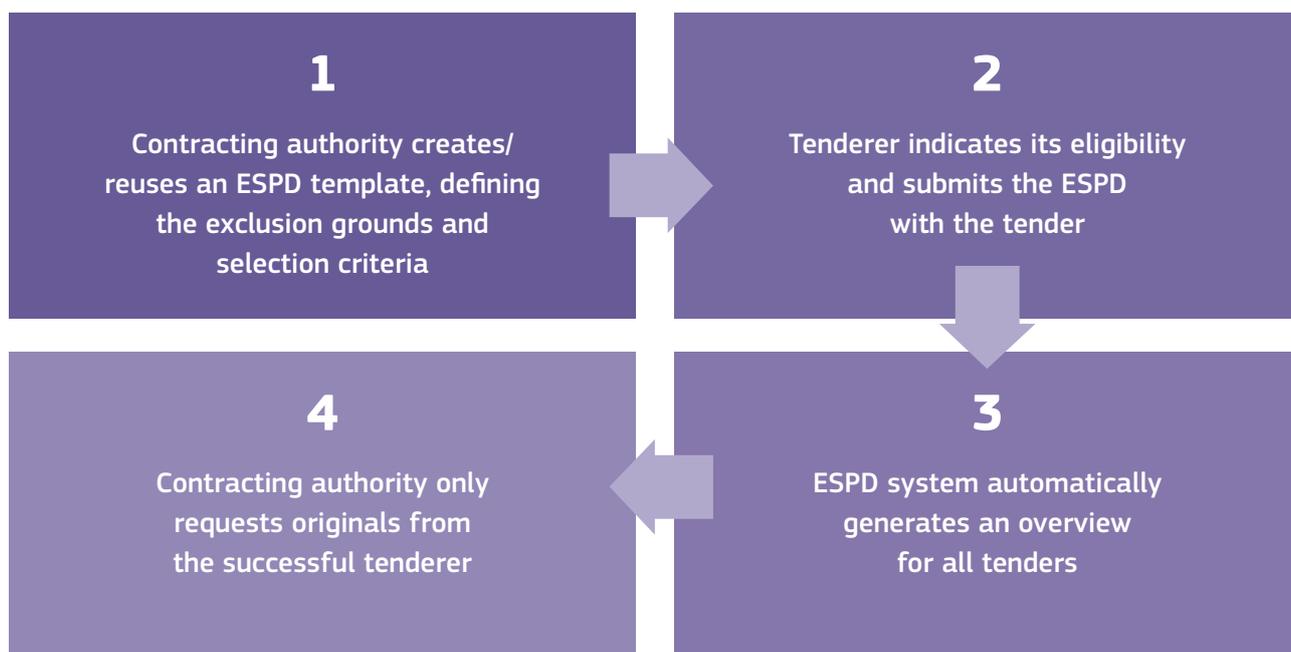
The European Single Procurement Document (ESPD) aims to reduce the administrative burden on economic operators, and in particular SMEs, that arises from the need to produce a substantial number of certificates and administrative documents relating to the exclusion grounds and selection criteria.

The ESPD enables economic operators to declare electronically that they meet the required conditions to participate in a public procurement procedure. In other words, the ESPD consists of a formal statement from economic operators confirming that they are not excluded under the grounds for exclusion and that they meet the selection criteria.

Only the successful tenderer will need to provide full documentary evidence supporting this declaration. In the future, even this obligation may be lifted once evidence can be linked electronically to national databases.

The figure below sets out the main steps relating to the ESPD.

**Figure 4. 4 steps to verify a tenderer’s eligibility**



Source: European Commission, DG GROW, 2016.

### How does the ESPD work?

As of 18 April 2018, EU Member States will put in place exclusively electronic public procurement. Until that date, the ESPD can be printed, filled in manually, scanned and sent electronically.

To create and use the ESPD, contracting authorities can either use a tool integrated into their own e-pro-

urement platforms, or use the ESPD tool developed by the Commission (see Figure 5. below).

The Commission has developed a tool that allows contracting authorities to create their ESPD and attach it to tender documents<sup>23</sup>. It is then possible for contracting authorities to tailor the ESPD to their needs and to export it in a machine-readable format.

<sup>23</sup> European Commission, DG GROW, European Single Procurement Document and e-Certis, 2017. Available at: <http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/espdl/>.

Figure 5. Online tool to create and use the ESPD

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## European Single Procurement Document (ESPD)

Service to fill out and reuse the ESPD

European Commission > Tools > European Single Procurement Document

Start Procedure Exclusion Selection Finish

### Welcome to the ESPD service

European Single Procurement Document (ESPD) is a self-declaration of the businesses' financial status, abilities and suitability for a public procurement procedure. It is available in all EU languages and used as a preliminary evidence of fulfilment of the conditions required in public procurement procedures across the EU. Thanks to the ESPD, the tenderers no longer have to provide full documentary evidence and different forms previously used in the EU procurement, which means a significant simplification of access to cross-border tendering opportunities. From October 2018 onwards the ESPD shall be provided exclusively in an electronic form.

The European Commission provides a free web service for the buyers, bidders and other parties interested in filling in the ESPD electronically. The online form can be filled in, printed and then sent to the buyer together with the rest of the bid. If the procedure is run electronically, the ESPD can be exported, stored and submitted electronically. The ESPD provided in a previous public procurement procedure can be reused as long as the information remains correct. Bidders may be excluded from the procedure or be subject to prosecution if the information in the ESPD is seriously misrepresented, withheld or cannot be complemented with supporting documents.

For more information on ESPD, please [click here](#)  
If you are interested in the answers to the most frequently asked questions about the ESPD, please have a look at the [FAQ leaflet](#)

### Who are you?

- I am a contracting authority
- I am a contracting entity
- I am an economic operator

### What would you like to do?

- Create a new ESPD
- Reuse an existing ESPD
- Review ESPD

### Where is your authority located?

Select country

Source: European Commission, 2017. Available at: <https://ec.europa.eu/tools/espd>

The ESPD must be included alongside the other procurement documents. In addition, the contract notice should indicate that candidates or tenderers are required to fill in and submit an ESPD as part of the application or tender.

Before awarding the contract, the contracting authority must require the tenderer to which it has decided to award the contract to submit up-to-date documents supporting the information declared in the ESPD. If the contracting authority already possesses or has full access to the relevant, up-to-date supporting documents or other documentary evidence via a national database, the successful tenderer is not required to submit the supporting documents again.

In addition, economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein remains correct.

### e-Certis, online database on administrative documentary evidence

e-Certis is a free source of information which is meant to help economic operators and contracting authorities to identify the different certificates and attestations frequently requested in procurement procedures across the EU.

The system is available online: <https://ec.europa.eu/growth/tools-databases/ecertis/>

It helps tenderers find out what evidence is requested by a contracting authority (e.g. in relation to exclusion grounds or selection criteria) and helps contracting authorities understand documents provided

by an economic operator. It is particularly useful in the framework of cross-border procurement procedure when the different parties come from several Member States.



### **e-Certis is a reference tool, not a legal advice service**

The reliability of the e-Certis system depends on the information provided by the different public procurement bodies in all Member States, and the regular update of this information.

As a result, e-Certis cannot guarantee that the information resulting from a query will be recognised as valid by a contracting authority. It is an information tool to help users identify and recognise the certificates and attestations that are most commonly requested in the context of procurement procedures of different Member States.

If there is any doubt, it is therefore recommended to contact directly the relevant party (contracting authority or national authorities) to obtain further clarification on the required documentary evidence.

### **2.1.2. Draft contract**

Contracting authorities should publish, within the procurement documents, a draft of the contract that is to be signed with the successful tenderer so that all economic operators are aware of the legal framework regulating the contract implementation (see section 5. Contract implementation).

A well-drafted contract should include provisions on applicable regulation, subject matter, price, delays, misconduct, liability, dispute resolution, revision clauses, intellectual property rights, confidentiality obligations and any other relevant aspects.

The contract should be fair and balanced in terms of risk sharing. In particular, contracting authorities should avoid clauses or contract terms shifting risks

to the contractor that are totally beyond its control, as these may limit the number of tenders, have a significant impact on the price or lead to contract disputes.

It is recommended that contracting authorities use standardised pro forma contract issued by their legal department or their national public procurement bodies. It might also be useful to divide contract templates into 'specific conditions' and 'general conditions', the latter being standardised, and the former being tailored to each specific procurement procedure. If there is any doubt, contracting authorities should always seek appropriate legal advice.

The full set of procurement documents and the full tender from the successful tenderer should be attached to the final contract signed by all parties.



## Contract changes might lead to errors

The possibility of contract modifications needs to be thoroughly considered during the planning stage. As a result, the draft contract should state clear, precise and unequivocal revision clauses including the scope and nature of possible modifications as well as the conditions under which they may be used.

The underlying principle is that any modifications of the original procurement procedure that substantially change the contract in terms of subject matter, value, timetable or scope, to the extent that it might have changed the outcome of the original procedure, should be considered as a new contract for additional works or services.

More information is provided in chapter 5 Contract implementation.

## 2.2. Define specifications and standards

### 2.2.1. Specifications drafting

The **most important document in the procurement procedure** is the technical specifications document.

The purpose of the specifications is to set out to the market a clear, accurate and full description of the contracting authority's needs, and thus to enable economic operators to propose a solution to meet those needs.

Specifications form the basis for choosing the successful tenderer and they will be part of the final contract setting out what the successful tenderer has to deliver. The final review and validation of the specifications is therefore a key decision point in the procurement procedure, and it is important that those undertaking it have the knowledge, authority and experience necessary for the task.

Specifications usually describe the needs of the contracting authority, the subject matter of the contract explaining the service, supply or work to be provided, the inputs and the expected outputs and outcomes, the standards required and some background and context material. When drafting the specifications, drafters should bear in mind the fact that these have a direct impact on cost.

There are three main types of specifications, based on input, output or outcome:

- » The **input**-based specification is a series of instructions on how to execute a determined task. This type of specification is rarely used (except for basic procurements) because it is not flexible, often does not ensure value for money and may not allow the tenderer to bring added value or innovation. These are usually used with an award criterion based on the lowest price (see 2.3.3. Award criteria).
- » The **output**-based specification focuses on the desired outputs or deliverables in business terms, rather than on detailed technical specifications of how the outputs are to be provided. This allows tenderers to propose innovative solutions that might not have occurred to the contracting authority.
- » The **outcome**-based (or **result**-based) specification can be the easiest of all to draft, but the hardest to evaluate and monitor. It is a description of a need and a statement of expected benefits rather than a description of inputs and deliverables.

The latter two types of specifications can be combined, requiring tenderers to develop a methodological proposal which sets down how the requirements can be met. Since each tenderer could propose something different, the contracting authority needs to be able to evaluate these alternatives.

As a general rule, well-prepared technical specifications should:

- » be precise in the way requirements are described;
  - » be easily understood by economic operators and all other stakeholders;
  - » have clearly defined, achievable and measurable inputs, outputs and outcomes;
  - » provide sufficiently detailed information to allow economic operators to submit realistic and tailored tenders;
  - » take into account as much as possible the views of the contracting authority, potential users of or beneficiaries from the contract, and external stakeholders, as well as inputs from the market;
  - » be drafted by persons with sufficient expertise either from the contracting authority or using external expertise;
  - » not mention any brand names or requirements which limit competition;
- » be drawn up so as to take into account accessibility criteria for persons with disabilities or be designed for all users where the procurement is intended for use by natural persons, either the general public or staff of the contracting authority;
  - » be approved by the contracting authority's relevant management chain depending on the applicable internal rules.

Works technical specifications should cover, as a minimum: technical works description, technical report, design package (design drawings, design calculations, detailed drawings), assumptions and regulations including working conditions (traffic deviation, night works), bill of quantities (if applicable), works price list and a time schedule.

If relevant, technical specifications should provide explicit review clauses to allow for a certain degree of flexibility for possible modifications of the contract during implementation. Review clauses must specify the scope and nature of possible changes in a clear and precise way and must not be drafted in broad terms with a view to covering all possible modifications. They must also indicate the conditions under which they may be used (see section 5.3. Deal with contract modifications).



### **Solid technical specifications improve the overall quality of the procedure**

Weak drafting of the specifications is often a root cause of subsequent contract modifications, due to not properly reflecting the needs of the contracting authority and the results expected from the works, supplies or services.

This lack of clarity can lead to contract changes, either modifying or adding tasks, and thus altering both the scope and value of the contract from what was initially planned. Contracting authorities would have to then consult the contract modifications rules and, if necessary, run a new procurement procedure (see section 5.3. Deal with contract modifications).

In addition, clear, complete and precise technical specifications help economic operators produce high-quality tenders tailored to the needs of the contracting authority.

Using specific subject matter expertise (whether internal or external) contributes to the overall efficiency of the process by providing information which has been properly researched, analysed, assessed and written.

## Subject matter

The information included in the contract notice and/or the procurement documents must be sufficient for potential tenderers/candidates to identify the subject matter of the contract. For example, the technical specifications should not just describe 'furniture' or 'cars' without explaining what kind of furniture or cars are being purchased.

The person(s) in charge of the specifications drafting should be sufficiently skilled to describe the needs and expectations accurately and should get support from other stakeholders.

The specifications must **describe the subject matter in a clear and neutral form** without any kind of discriminatory references to certain brands or companies. If this cannot be avoided for objective reasons, contracting authorities should always add the words 'or equivalent'.



### Avoid discriminatory technical specifications

Contracting authorities cannot set technical specifications for supply of equipment by specifying a particular brand without allowing for an 'equivalent' or by using tailor-made specifications that either intentionally or unintentionally favour particular suppliers.

This sometimes happens where inexperienced staff are responsible for drafting the technical specifications for a piece of equipment and simply copy the specifications directly from a brochure of a particular manufacturer without realising that this may limit the number of companies that will be able to supply this equipment.

The words 'or equivalent' should be used in all cases where reference to a particular brand is unavoidable.

## Budget

It is considered a good practice to include the estimated budget (i.e. the estimated contract value) in the contract notice or in the technical specifications, to make the procurement documents as transparent as possible.

This implies that the indicated budget must be realistic for the works, services or supplies requested. The contract value does not only give an indication to tenderers for the setting up of their financial offers, it also provides key information on the results and quality levels expected from the contracting authority (see section 1.4.4. Contract value).

An open competition without a disclosed budget is always possible, but the procurement documents must state that the contracting authority reserves the right not to proceed if no reasonably priced tenders are received (or for any other objective reason). In these cases, an unpublished maximum acceptable price must be fixed by the contracting authority before launching the procurement procedure and the technical specifications need to be precisely drafted.

## Variants

As a general rule, economic operators should prepare their tenders on the basis of what is requested in the procurement documents. However, contracting authorities can decide to leave room for different approaches or alternative solutions. To do this, they can allow the proposal of variants.

The procurement documents including the contract notice must state clearly whether or not variant tenders will be allowed. If variant tenders are allowed, then contracting authorities should ensure the following:

- » The possibility of variant tenders should be addressed at **planning stage**. Market research should show whether there is a possibility that the draft specifications can be delivered by a contractor by methods other than those anticipated. If so, and if the contracting authorities is willing to make use of this possibility, then the specifications should be drafted accordingly.
- » Contracting authorities can invite variant tenders only in the case of **specifications based on output or outcome**, but not on input where the contracting authorities provide instructions to tenderers. The contracting authorities should set out the minimum requirements that the variants have to meet.
- » The **award criteria and evaluation method** must be designed in such a way that both ‘compliant’ and ‘variant’ tenders can be evaluated using the same criteria. In these cases, it is crucial that the award criteria are thoroughly tested at the procurement planning stage to ensure that they enable a fair, open and transparent evaluation. In extreme cases, if this is not the case, this can lead to the tender having to be cancelled and restarted.

Allowing for variants in technical specifications is a challenging task which will require appropriate technical expertise during the evaluation of tenders. Therefore, the acceptance of variants needs to be addressed and agreed as early as possible, before the procurement procedure is advertised.

## 2.2.2. Strategic use of green, social and innovation criteria in public procurement

Traditionally, the main goal of public procurement is to achieve the best value for money while purchasing works, supplies or services. However, in a context of financial scarcity and budgetary constraints, public authorities increasingly use public procurement, not only to satisfy a need and to purchase works, supplies or services, but also to serve strategic policy objectives.

Given the significant proportion of public-sector contracts in European economies (about 14% of GDP in the EU), public procurement seems a powerful tool to promote environmental, social and innovation goals and to stimulate SME access to public contracts.

There are three commonly used forms of strategic public procurement<sup>24</sup>:

- » **Green public procurement (GPP)** consists of procuring goods, services and works with a reduced environmental impact throughout their life cycle, when compared to goods, services and works with the same primary function that would otherwise be procured<sup>25</sup>;
- » **Socially responsible public procurement (SRPP)** allows contracting authorities to take into account different social considerations, such as social inclusion, labour standards, gender equality and ethical trade<sup>26</sup>;
- » **Public procurement for innovation (PPI)** allows contracting authorities to purchase innovative goods and services that are not yet commercially available on a large-scale basis. With the contracting authority acting as the launch

<sup>24</sup> European Commission, DG GROW, Study on Strategic use of public procurement in promoting green, social and innovation policies — Final Report, 2016. Available at: <http://ec.europa.eu/DocsRoom/documents/17261>.

<sup>25</sup> European Commission, Communication (COM(2008) 400) Public procurement for a better environment. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0400>.

<sup>26</sup> European Commission, DG EMPL, Buying social: a guide to taking account of social considerations in public procurement, 2011. Available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978>.

customer, this is a demand-side tool to encourage innovation while satisfying the needs of the contracting authority<sup>27</sup>.

The EU procurement legislative framework explicitly allows contracting authorities to use some **specific provisions to facilitate work towards strategic goals** in procurement procedures. They may:

- » include specific requirements (e.g. social or environmental) as award criteria when using the best price-quality ratio, provided that these requirements relate to the contract;
- » require certifications, labels or other equivalent evidence of the application of quality, environmental or social standards (see section 2.2.3. Use of standards or labels);
- » take into account the life-cycle cost when setting the award criteria in order to encourage more sustainable purchases. This practice might save money in the long term, despite appearing on initial examination to be more costly (see section 2.3.3. Award criteria);
- » use procedures designed to support innovation in public procurement such as the competitive dialogue and the innovation partnership (see sections 1.5.4. Competitive dialogue and 1.5.5. Innovation partnership);
- » lay down conditions related to the way the contract is carried out, including environmental or social considerations. These conditions must be non-discriminatory and compatible with EU law (e.g. clauses related to labour conditions must be drawn up in compliance with the EU rules on minimum standards applicable to all European workers);
- » reserve some service contracts for specific organisations, provided that they meet five conditions:
  - > they pursue a public service mission;
  - > they reinvest profits in the organisation's objective;
  - > they are managed on the basis of employee ownership or participatory principles;
  - > they must not have been awarded a contract within the past three years;
  - > contracts awarded using this option cannot have a duration of more than three years.
- » reserve some contracts for organisations where at least 30% of the workforce consists of people with disabilities or disadvantaged people.



### Reserved contracts to support social inclusion

Regardless of the type of contract (supply, works, service) and its subject matter, contracting authorities are allowed to either reserve participation in the tendering procedure for sheltered workshops and economic operators whose main goal is the integration into the workforce of people with disabilities or disadvantaged people, or to require that the contract is carried out by a sheltered workshop that has these as their main goals.

Tenders may legitimately only be considered if at least 30% of the staff employed in carrying out the contract are people with disabilities or disadvantaged people. If the contracting authority decides to make use of this option, it must clearly specify the reserved nature of the procurement in the contract notice.

<sup>27</sup> OECD, Public Procurement for Innovation — Good practices and strategies, 2017.  
Available at: <http://www.oecd.org/gov/public-procurement-for-innovation-9789264265820-en.htm>.



## Common green public procurement criteria at EU level

In order to facilitate the inclusion of environmental considerations in procurement procedures, the European Commission has developed practical sets of green public procurement criteria (technical specifications and award criteria) for different product groups which contracting authorities can directly use if they wish to procure environmentally friendly products and services<sup>28</sup>.

In addition, the Commission regularly publishes information and guidance to support contracting authorities in using GPP, including:

- » a list of European and international eco-labels<sup>29</sup>;
- » “Buying green! A handbook on green public procurement” available in all EU languages<sup>30</sup> which provides guidance on how environmental considerations can be included at each stage of the procurement process in the current EU legal framework;
- » a compilation of good practice cases<sup>31</sup>.

### 2.2.3. Use of standards or labels

The use of standards, labels or certifications in public procurement is widespread, as these are objective and measurable and represent a practical and reliable way for contracting authorities to verify the compliance of tenderers with certain minimum requirements. Contracting authorities may reference commonly known standards or labels in the procurement documents in order to ensure that the product or service is delivered in compliance with particular sectoral or quality standards.

Standards or labels used in procurement procedures usually refer to quality assurance, environmental certification, eco-labels, environmental management systems, and social requirements such as accessibility for people with disabilities or gender equality.

Contracting authorities should only refer to standards which are drawn up by independent bodies, preferably at European or international level such as the Eco-Management and Audit Scheme (EMAS) or certifications from the International Organisation for Standardisation (ISO).

If they chose to mention a national or regional certification, contracting authorities must accept equivalent certifications from other Member States or any other evidence proving that the requirement is met.

<sup>28</sup> European Commission, DG ENV, EU Green Public Procurement criteria (all EU languages). Available at: [http://ec.europa.eu/environment/gpp/eu\\_gpp\\_criteria\\_en.htm](http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm).

<sup>29</sup> European Commission, DG ENV, List of existing EU and international eco-labels. Available at: <http://ec.europa.eu/environment/gpp/pdf/ecolabels.pdf>.

<sup>30</sup> European Commission, DG ENV, Buying green! A handbook on green public procurement, 2016. Available at: [http://ec.europa.eu/environment/gpp/buying\\_handbook\\_en.htm](http://ec.europa.eu/environment/gpp/buying_handbook_en.htm).

<sup>31</sup> European Commission, DG ENV, GPP good practices. Available at: [http://ec.europa.eu/environment/gpp/case\\_group\\_en.htm](http://ec.europa.eu/environment/gpp/case_group_en.htm).



### When requiring a standard or a label, use the words ‘or equivalent’

As a general rule, any terms of the technical specifications which can be interpreted as discriminatory, particularly against tenderers from another country or requiring goods that only one supplier (or suppliers from one country) can deliver, are not acceptable.

If a contracting authority would like to mention a specific standard or a particular label, explaining clearly what the requirements are, the specifications should clearly indicate that equivalent standards or labels will also be accepted.

The use of the words ‘or equivalent’ is therefore necessary to avoid restricting competition.

## 2.3. Define the criteria

Contracting authorities have to define the criteria for choosing the best tender in the procurement documents. These criteria must be made publicly available in a clear and transparent way.

There are three types of criteria which are used to choose the winning tender:

- » **Exclusion grounds** are circumstances in which an economic operator must be excluded from the procurement procedure;
- » **Selection criteria** determine the suitability of tenderers to carry out the contract;
- » **Award criteria** determine which tenderer has developed the most economically advantageous proposal that delivers the expected results and should therefore be awarded the contract.

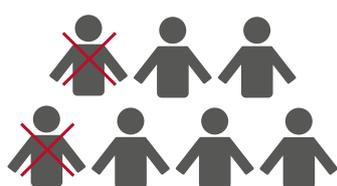


### Do not mix up the different criteria

It is important to clarify the differences between the types of criteria. Contracting authorities and economic operators should ensure they do not confuse these different types.

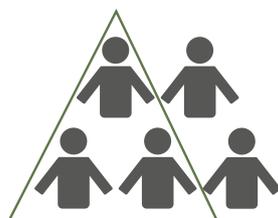
The three types of criteria correspond to three different steps in the selection of the winning tender. They pursue different objectives and are meant to answer three different questions.

**Exclusion grounds**



Who must be excluded from the procurement procedure?

**Selection criteria**



Who is capable of executing the contract?

**Award criteria**



Whose proposal will deliver the expected results in the best possible way?

When identifying the criteria, contracting authorities should have these questions in mind in order to avoid any confusion and the potential inclusion of inappropriate criteria.

### 2.3.1. Exclusion grounds

Contracting authorities must exclude from the procurement procedure all economic operators that infringe or have infringed the law or who have demonstrated highly reprehensible professional behaviour. The legislation defines a series of exclusion grounds which are either mandatory or left to the discretion of contracting authorities, depending on national transposition of the relevant EU Directives.

In cases of joint tendering where several economic operators form a consortium to submit a common tender, the exclusion grounds apply to all tenderers.

**Mandatory exclusion grounds** must be applied by all contracting authorities.

Economic operators who have been convicted of one of the following **legal offenses** must be excluded from any procurement procedure:

- » participation in a criminal organisation;
- » corruption;
- » fraud;
- » terrorism;
- » money laundering;
- » child labour or human trafficking.

In addition, economic operators who have not properly paid **taxes and social security contributions** in their Member State must also be excluded from any procurement procedure.

On an exceptional basis, contracting authorities can accept a **derogation** to this rule if only minor amounts of taxes or social security contributions are unpaid or if the economic operator was informed of its breach of obligations so late that it was not possible for them to issue the payment in time.

In addition to mandatory exclusion grounds, contracting authorities are also recommended (and

may be obliged, depending on the national transposition of the relevant EU Directives) to exclude from participation in a procurement procedure any economic operator in one of the following situations (i.e. **optional exclusion grounds depending on the Member State**):

- » non-compliance with environmental, social or labour law;
- » bankruptcy or being subject to insolvency proceedings;
- » serious professional misconduct affecting the economic operator's integrity;
- » distortion of competition, for example either through collusion with other tenderers or via the involvement of an economic operator in the preparation of the procurement procedure;
- » conflict of interest that cannot be resolved by 'softer' measures than exclusion;
- » significant deficiency in carrying out a previous public contract;
- » failure to provide information to verify absence of grounds for exclusion;
- » exerting undue influence on the on the decision-making process of the contracting authority, to obtain confidential information conferring undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

In order for contracting authorities to properly assess compliance with the exclusion grounds, it is crucial that they **access up-to-date information**, either via national databases from other administrations or via the documentation provided by the tenderers. This is particularly important in cases of financial difficulties affecting the suitability of an economic operator or because of an unsettled debt relating to taxes or social contributions.



### State the criteria and their weighting in the contract notice or in the technical specifications

The exclusion grounds, selection and award criteria, and their respective weighting, must be stated either in the contract notice, the technical specifications or other procurement documents.

The use of specific check-lists and standardised forms of contract notices or procurement documents help to avoid forgetting these key elements.

#### 2.3.2. Selection criteria

**Selection is about determining which economic operators are qualified to carry out the contract.** The selection criteria aim to identify the candidates or tenderers which are capable of delivering the contract and its expected results.

To be selected, economic operators have to demonstrate that they can carry out the contract thanks to their:

- » suitability to pursue the professional activity;
- » economic and financial capacities; and
- » technical and professional abilities.

#### Defining the selection criteria

The selection criteria are the minimum levels of ability which are required to participate, and they must be:

- » compliant with the EU Treaty principles, in particular the principles of transparency, equal treatment and non-discrimination;
- » related to and proportionate to the size and nature of the contract;

- » determined by taking into account the specific need of each contract;
- » relevant to the specific contract to be awarded and not set out in an abstract way;
- » formulated simply and clearly, so that they can be easily understood by all economic operators;
- » designed in such a way that economic operators, including small and medium-sized enterprises, that have the potential to be efficient providers would not be deterred from participating.

The selection criteria must always mention 'or equivalent' when specifying standards, brands or origins of any type.

Since the selection criteria depend upon the specific nature and scope of the procurement, best practice is to define them when drafting the specifications.

The table below summarises potential selection criteria provided for in Directive 2014/24/EU, which can be used by contracting authorities to select tenderers.

**Table 9. Examples of selection criteria**

<b>Objective</b>	<b>Requirement for economic operators</b>
<b>Assess suitability to pursue the professional activity</b>	Be enrolled in one of the official professional or trade registers kept in the relevant Member State
	Official authorisation to perform a certain type of service (e.g. civil engineers, architects)
	Valid professional insurance certificate (this can also be requested at the time of signing the contract)
<b>Assess economic and financial capacity</b>	Minimum yearly turnover, which must not exceed twice the estimated contract value (e.g. EUR 2 million where the contract value is EUR 1 million per year), including a particular minimum turnover in the area covered by the contract
	Information on annual accounts showing the ratio between assets and liabilities (e.g. a minimum solvency level of 25 % or more)
	Appropriate level of professional risk indemnity insurance
<b>Assess technical and professional ability</b>	Appropriate human resources (e.g. relevant qualifications for key staff) and technical resources (e.g. specific equipment) to carry out the contract to the required quality standard
	Experience of the contractor itself — not of individual staff members — to carry out the contract to an appropriate quality standard (e.g. references from previous contracts within the last three years, including at least two from similar contracts)
	The necessary skills, efficiency, experience and reliability to provide the service or to execute the installation or the work



### **Substantial changes to the selection criteria once set are not acceptable**

After publication of the procurement documents, only minor changes to the main selection criteria are acceptable, such as changes in the wording or the address to which applications should be submitted.

Changes in requirements such as financial details (yearly turnover or equity rate), the number of references, or the required insurance cover are considered significant changes. These require an extension of the application/submission deadline (see section 2.4 Set the time limits) or a cancellation of the procedure.

<sup>32</sup> The full list of professional or trade registers in EU Member States is provided in Annex XI of Directive 2014/24/EU.

## Assessing the selection criteria

The methodology to select tenderers depends on the nature and complexity of the procurement procedure. The methodology should enable the contracting authority to objectively and transparently determine which tenderers are capable of delivering.

The selection criteria can be assessed via:

- » a 'comply or fail' question;
- » a weighting system for the criteria;
- » an assessment methodology, for more complicated contracts.

A numerical scoring methodology can also be used to help contracting authorities rank and shortlist tenderers, if needed. In restricted procedures, after screening out those tenderers that do not meet the minimum selection criteria, a numerical rating should be allocated if the number of applicants needs to be reduced in order to make a shortlist. In these cases, contracting authorities must set out, in the contract notice or in the invitation to confirm interest:

- » the objective and non-discriminatory method they intend to apply;

- » the minimum number of candidates they intend to invite; and
- » where appropriate, the maximum number of candidates that will be invited.

When scoring applicants, the decision on points must always be followed by comments, in order to be able to explain the results in the future.

As with many procurement aspects, **the selection criteria and the methodology for selecting tenderers must be transparent and made available in the procurement documents.**

When defining the selection criteria, common errors made by contracting authorities are:

- » failing to check that all the selection criteria are relevant and proportionate to a particular procurement, and simply reusing the same criteria in new procedures;
- » adding questions without any thought as to the potential responses;
- » failing to publish the methodology for assessing and scoring compliance with the selection criteria.



### Unlawful and/or discriminatory selection criteria

The selection criteria must not be disproportionate or unfair and should not unnecessarily limit the number of tenderers. For example, contracting authorities must give a reasonable revenue requirement per year and may not distinguish between a public sector and a private sector reference. If in doubt, legal advice should be sought.

The examples of obligations set out below refer to cases where economic operators have been deterred from tendering because of unlawful selection criteria and have led to financial corrections for contracting authorities:

1. already having an office or representative in the country or region or experience in the country or region;
2. having an annual revenue of EUR 10 million even if the contract value is only EUR 1 million;

3. having at least 5 similar references from the public sector only, and not the private sector (e.g. for cleaning contracts), unless justified and non-discriminatory;
4. providing references for previous works that are significantly higher in value and scope than the contract being tendered, unless justified and non-discriminatory;
5. already having qualifications/professional certificates recognised in the country of the contracting authority at the time of submission of tenders, as this would be difficult for foreign tenderers to comply with in such a short timeframe;
6. complying with a particular professional standard without using the wording 'or equivalent' (e.g. standards set by the International Federation of Consulting Engineers (FIDIC), global standards from the International Federation of Social Workers, NSF Water Treatment Standards, norms from the International Civil Aviation Organisation or the International Air Transport Association, etc.).

### 2.3.3. Award criteria

Following the selection of tenderers who comply with both the exclusion grounds and the selection criteria, contracting authorities must choose the best tender on the basis of the award criteria. As with the selection criteria, the award criteria must be set in advance, published in the procurement documents and must not impair fair competition.

Contracting authorities must base the award of contract on the **most economically advantageous tender**. The application of this criterion can be done through three different approaches, all of which involve an economic element:

- » price only;
- » cost only, using a cost-effectiveness approach such as life-cycle costing;
- » best price-quality ratio.

Contracting authorities are free to choose one of these three methods, except in cases of the competitive dialogue and the innovation partnership, where the criterion of the best price-quality ratio must be used. The price criterion can also take the form of a fixed price on the basis of which economic operators will compete on quality criteria.

The approach chosen for the award criteria must be clearly stated in the contract notice. In addition, when using the best price-quality ratio, detailed award criteria and their weighting should be indicated either in the contract notice or in the procurement documents (e.g. technical specifications) through a scoring matrix or a clear evaluation methodology<sup>33</sup>.

#### Price only or lowest price

The price-only approach means that price is the only factor that is taken into account when choosing the best tender. The tender with the lowest price wins the contract. No cost analysis and no quality considerations are assessed in this choice.

The use of the price-only criterion can be useful in the following cases:

- » For works where the designs are provided by the contracting authority or for works with a pre-existing design, it is common to use the lowest price criterion.
- » For supplies which are simple and standardised off-the-shelf products (e.g. stationery), the price may be the only relevant factor on which the contract award decision is based.
- » For some standardised services (e.g. cleaning services for buildings or publishing services), a

<sup>33</sup> OECD/SIGMA, Public procurement Brief 8, Setting the Award Criteria, September 2016. Available at: <http://www.sigmaxweb.org/publications/Public-Procurement-Policy-Brief-8-200117.pdf>.

contracting authority may prefer to define in detail the exact specification requirements and then select the tender that meets the requirements and offers the lowest price.

It should be noted that, even though the application of the price-only criterion is still allowed and can be useful for simple purchases, contracting authorities may decide to limit the use of this criterion because it might not help reach the best value for money.

### **Cost-effectiveness, life cycle costing**

With the cost-effectiveness approach, the winning tender is the one with the lowest total cost, taking into account all costs of the goods, works or services throughout the duration of their life cycle. The life-cycle costs cover all costs incurred by the contracting authority, either one-off or recurrent costs, including<sup>34</sup>:

- » acquisition costs (e.g. purchase, installation, initial training);
- » operational costs (e.g. energy, consumable, maintenance);
- » end-of-life related costs (e.g. recycling, disposal);
- » environmental impacts (e.g. polluting emissions).

Contracting authorities must specify the method which will be used to assess life-cycle costs in the procurement documents and must indicate precisely which data will be needed from tenderers to do this.



### **Calculation tools and resources on life-cycle costing**

The National Agency for Public Procurement in Sweden has developed specific life-cycle costing calculation tools for the following product groups: outdoor and indoor lighting, vending machines, household and professional appliances.

Available at: <http://www.upphandlingsmyndigheten.se/en/subject-areas/lcc-tools/>.

The SMART SPP project developed and tested a tool in Excel format to help contracting authorities assess life-cycle costs and CO<sub>2</sub> emissions and compare tenders.

Available at: <http://www.smart-spp.eu/index.php?id=7633>.

The European Commission has developed a calculation tool for life-cycle costs which aims to facilitate the use of this approach by public procurers. It focuses on specific product categories, such as office IT equipment, lighting and indoor lighting, white goods, vending machines and medical electrical equipment.

Available at: <http://ec.europa.eu/environment/gpp/lcc.htm>.

<sup>34</sup> OECD/SIGMA, Public procurement Brief 34, Life-cycle Costing, September 2016.

Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-34-200117.pdf>.

## Best price-quality ratio

The purpose of the **best price-quality ratio** is to identify the tender that offers the best value for money. It must be assessed on the basis of criteria linked to the subject matter of the public contract in question. These criteria may include qualitative, environmental and/or social aspects.

The best price-quality ratio is considered appropriate in cases such as:

- » works designed by the tenderer;
- » supplies that involve significant and specialised product installation and/or maintenance and/or user training activities - for this type of contract, quality is normally of particular importance;
- » services linked to intellectual activity such as consultancy services where the quality is essen-

tial. Experience has shown that when procuring this type of service, using the best price-quality ratio delivers the best results in terms of value for money.

The award criteria based on price-quality ratio will generally be scored using a system that assigns weightings to the different criteria. The relative weighting of each criterion used to evaluate the tenders must be stated in percentages or in quantifiable scores, for example 'price 30%, quality 40%, service 30%'. Where this is not possible for objective reasons, the criteria should be listed in descending order of importance (see section 4.2. Apply the award criteria).

The table below sets out typical award criteria and sub-criteria that can be used when the contracting authority chooses the best price-quality ratio approach.

**Table 10. Examples of award criteria of the best price-quality ratio approach**

Criteria	Sub-criteria
<b>Price</b>	Fixed price Rates (e.g. daily fees, unit costs) Life-cycle cost
<b>Quality</b>	Technical merit Aesthetic and functional characteristics Accessibility and design for all users Social, environmental and innovative conditions
<b>Organisation</b>	Project management Risk analysis Quality control
<b>Staff assigned to carry out the contract</b>	Where the quality of the staff assigned has a significant impact on the way the contract will be carried out: » Qualification of staff; » Experience of staff.

Criteria	Sub-criteria
<b>Service</b>	Delivery conditions such as delivery date, delivery process and delivery period or period of completion  Maintenance  After-sale service  Technical assistance

The award criteria should be specific to each public contract. Contracting authorities should define them when preparing the procurement documents and must not modify them afterwards.



### **Never amend the award criteria during the procurement process**

The award criteria and their weightings are considered substantial elements of the procurement documents and thus must not be amended after the contract notice has been published.

As with the selection criteria, if the award criteria included in the procurement documents are not correct and need to be modified, an extension of the deadline for tenders is required (see section 2.5.2. Notices to be advertised).

In addition, clarifications to tenderers must not have the effect of changing the criteria that have been submitted or any other substantial information.

Setting the award criteria for a complex contract requires considerable technical skills and therefore contracting authorities may need to seek expert advice either internally or externally (see section 1.2. Engage stakeholders). Technical advisors can also be used as non-voting members of evaluation committees (see chapter 4. Evaluation of tenders), but it is important that they do not have any conflict of interest with regard to potential tenderers (see section 1.2.3. Integrity and conflict of interest).

Since award criteria must be specific to each procurement procedure and closely linked to the subject matter of the contract, one-size-fits-all award criteria cannot and should not be drawn up. Nevertheless, in order to provide further guidance to procurement practitioners, it is possible to point out common mistakes that should be avoided and to list some examples of do's and don'ts when designing award criteria.



## Bad practices when defining award criteria

The examples below are either bad practices or mistakes that have led to financial penalties because they were not compliant with procurement rules and have deterred economic operators from tendering:

1. award criteria not clearly linked to the subject matter of the contract.
2. award criteria too vague, e.g. quality is evaluated based on the product's durability and robustness, but there is no clear definition of durability or robustness in the procurement documents.
3. minimum requirements used to award the contract (e.g. warranty period of 5 years, blue colour, time of delivery of 7 days) when they should be used as selection criteria (i.e. yes/no response).
4. mathematical errors when adding up scores and ranking tenders.
5. mixing selection criteria and award criteria, where selection criteria are used as award criteria or criteria that were already used at selection stage are used again at award stage. For example, previous experience with a similar contract should not be used as an award criterion, as it relates to the capacity of the tenderer to carry out the contract. This should be assessed at the selection stage, not at the award stage. However, experience of the staff assigned to the contract, where the quality of the staff can have a significant impact on the delivery of the contract can be used as an award criterion.
6. use of average pricing, where tenders that are close to the average of all tenders receive more points than tenders further away from the average. Although the tender price is an objective criterion to use at award stage, the use of this methodology leads to unequal treatment of tenderers, particularly those with valid low tenders.
7. use of contract penalties as an award criterion, where the higher the contract penalty the tenderer is willing to pay for late delivery of the contract, the more points it is awarded. Such penalties, if envisaged, must only be included in the terms of the contract.
8. use of the duration of the contract as an award criterion – the duration of the contract should be set out in the procurement documents and should be the same for all potential contractors.
9. use of contract 'extras' as an award criterion, for example giving additional points to tenderers who offer free items in addition to those requested.
10. using the level of subcontracting as an award criterion in order to limit this, for example by awarding higher points to tenderers who propose not to use sub-contracting compared to those who propose sub-contracting.

The table below sets out some examples of good practices when designing criteria.



### Examples of do's and don'ts in defining award criteria

The following examples of award criteria highlight some important details that should be taken into account when designing award criteria.

Those details can make a difference between a useful criterion and an ineffective one.

Don'ts	Do's
<p>Tenderer's minimum opening hours from 08:00 to 16:00. Long opening hours will be evaluated positively.</p> <p>→ 'Long opening hours' are not defined by the contracting authority.</p>	<p>Minimum opening hours from 08.00 to 16.00. Longer opening hours up to 24/7 will be evaluated and weighted positive.</p> <p>→ The tenderers compete between opening hours from 8:00-16:00 to 24/7.</p>
<p>Days of delivery from ordering. Short delivery time will be evaluated positively.</p> <p>→ 'Short delivery time' is not defined by the contracting authority, e.g. maximum days and days in the offer that will be weighted positively.</p>	<p>Days of delivery from ordering within a maximum of 12 days. An offer of 4 days will be evaluated and weighted positively.</p> <p>→ The tenderers compete between 12 and 4 days. No extra points will be awarded for a delivery time faster than 4 days.</p> <p>The scoring model can be listed and published as follows:</p> <p>≤4 days: 5 points                      5-6 days: 4 points                      7-8 days: 3 points                      9-10 days: 2 points                      11 days: 1 point                      &gt;12 days 0 points</p>
<p>Extra cost for urgent orders.</p> <p>→ The contracting authority should provide an estimated number of 'urgent orders' per year to enable tenderers to calculate the related costs.</p>	<p>Extra cost for urgent orders. The estimated number of 'urgent orders' per year is 500.</p> <p>→ The tenderers can calculate a total cost per year for urgent order which is realistic and clear.</p>
<p>Product warranty of a minimum of 2 years from production date.</p> <p>→ No preferred warranty duration is defined by the contracting authority.</p>	<p>Product warranty of a minimum of 2 years from production date. A warranty of 5 years will be evaluated and weighted positively.</p> <p>→ The tenderers compete between 2 and 5 years in warranty duration. No extra points will be awarded for a warranty of more than 5 years.</p>

## Formula to rank tenders

Once the award criteria have been evaluated and scored, a specific formula should be used to rank tenders and to establish which tender should win the competition. This does not apply if the price-only criterion has been used, where the ranking of tenders can be easily done by comparing the financial offers.

To calculate which tender offers the best price-quality ratio, contracting authorities should take into account the quality score and the price, both expressed in the form of indices. The method used must be indicated in the procurement documents and must remain unchanged during the entire procedure.

There is no one required way to define the best price-quality ratio but two formulas are commonly used:

(a) a basic method with no particular weighting between price and quality:

$$\text{Score for tender X} = \frac{\text{cheapest price}}{\text{price of tender X}} \times \text{total quality score (out of 100) for tender X}$$

(b) a method applying a weighting for quality and price expressed as a percentage (e.g. 60%/40%):

$$\text{Score for tender X} = \frac{\text{cheapest price}}{\text{price of tender X}} \times 100 \times \text{price weighting (in \%)} + \text{total quality score}$$

(out of 100) for tender X x quality criteria weighting (in %)

The weighting determines how much extra money the contracting authority is prepared to spend in order to award the contract to an economic operator whose tender provides a higher technical value.

The example below shows the differences in calculating results and ranking for three valid tenders (A, B and C) using the two methods above.

Both formulae give a final mark out of 100 points. The tender with the highest mark must be awarded the contract.

The weighting formula (b) clearly emphasises the importance of quality compared to formula (a).

**Table 11. Example of calculations to rank tenders**

Tender	Price	Quality score	(a) No weighting formula		(b) Weighting formula 40% for price, 60% for quality	
			Calculation	Ranking	Calculation	Ranking
A	100	62	$\frac{100}{100} \times 62 = 62$ points	<b>1st</b>	$\frac{100}{100} \times 100 \times 0.4 + 62 \times 0.6 = 77.20$ points	2nd
B	140	84	$\frac{100}{100} \times 62 = 62$ points	2nd	$\frac{100}{140} \times 100 \times 0.4 + 84 \times 0.6 = 78.97$ points	<b>1st</b>
C	180	90	$\frac{100}{100} \times 62 = 62$ points	3rd	$\frac{100}{180} \times 100 \times 0.4 + 90 \times 0.6 = 76.22$ points	3rd

## 2.4. Set the time limits

At this stage of the process, the contracting authority must set the length of time between the publication of the procurement procedure and the deadline for the submission of tenders or requests to participate by economic operators.

Contracting authorities can choose to provide economic operators with more or less time to prepare their proposals, taking into account the size and complexity of the contract.

In practice, contracting authorities usually face significant time constraints and tight internal deadlines. Therefore, they tend to apply the minimum time limits allowed in the legislation. Also, in exceptional cases, contracting authorities can use accelerated procedures in order to speed up the procurement process.

### 2.4.1. Minimum time limits

As explained above (see section 1.5. Choose the procedure), the choice of procedure should be made and justified at the planning stage. For each type of procedure, contracting authorities must comply with the minimum timescales set out in Directive 2014/24/EU.

The table below summarises the required minimum time limits that must be respected for procedures above EU thresholds.

It should be noted that the publication of a prior information notice (PIN) combined with the possibility for economic operators to submit their tenders electronically substantially reduces the minimum time limits.

**Table 12. Minimum time limits above EU thresholds**

Procedure	Receipt of requests to participate		Receipt of tenders	
	Ordinary submission	E-submission	Ordinary submission	E-submission
<b>Open</b>	–	–	35 days <u>without</u> PIN 15 days <u>with</u> PIN	30 days <u>without</u> PIN 15 days <u>with</u> PIN
<b>Restricted</b>	30 days	30 days	30 days <u>without</u> PIN 10 days <u>with</u> PIN	25 days <u>without</u> PIN 10 days <u>with</u> PIN
<b>Competitive procedure with negotiation</b>	30 days	30 days	30 days <u>without</u> PIN 10 days <u>with</u> PIN	25 days <u>without</u> PIN 10 days <u>with</u> PIN
<b>Competitive dialogue</b>	30 days	30 days	No minimum	No minimum
<b>Innovation partnership</b>	30 days	30 days	No minimum	No minimum
<b>Negotiated procedure without prior publication</b>	–	–	No minimum	No minimum
<b>Design contest</b>	–	–	No minimum	No minimum

Source: Directive 2014/24/EU, Articles 27 to 31, in number of days from date of dispatch of the contract notice in the OJEU.

Further explanations are provided below for the most commonly used procurement procedures: the open procedure and the restricted procedure.

### Open procedure

Directive 2014/24/EU allows a **minimum of 35 days** from the date on which the contract notice (CN) is published on the OJEU to the receipt of tenders.

This period can be reduced by 5 days if the contract notice is transmitted electronically and the contracting authority offers full electronic access to the procurement documents.

The period can be reduced to 15 days from the date of the CN publication if a prior information notice (PIN) was published between 35 days and 12 months before the date of the CN publication. The PIN must include all the information required for the contract notice in Directive 2014/24/EU (Annex V, part B, section I), provided that this information was available at the time the PIN was published.

All responses to questions from tenderers must be anonymised and sent out to all interested parties at the latest 6 days before the tender submission deadline.

Clarifications provided to tenderers should not have the effect of changing important aspects of the initial specifications (including the initial selection and award criteria). To ensure full transparency, all clarifications should be published prior to the deadline for submission of tenders on the website of the contracting authority, so that they are available to all potential tenderers.

A contract award notice must be published within 30 days of the conclusion of the contract (signature of all parties).

### Restricted procedure

Directive 2014/24/EU requires a **minimum of 30 days** from the date on which the contract notice (CN) is published on the OJEU to the receipt of request to participate.

If the CA wishes to limit the number of tenderers under this procedure, the limit must be a minimum of five. The CA is however not obliged to specify a limit if it does not intend to apply one.

On the basis of the requests to participate, the contracting authority then selects a minimum of five candidates who will be invited to tender.

Written invitations to tender must then be issued to those selected, allowing a minimum of 30 days from despatch of the invitations to the receipt of tenders. This period can be reduced by 5 days if the contracting authority accepts tenders submitted electronically.

If a prior information notice (PIN) was published electronically between 35 days and 12 months before the date of publication of the CN, the time-frame for submission of tenders can be reduced to 10 days. As with the open procedure, the PIN must include all the information required for the contract notice in Directive 2014/24/EU (Annex V, part B, section I), provided that this information was available at the time the PIN was published.

All responses to questions from tenderers must be anonymised and sent out to all interested parties at the latest 6 days before the tender submission deadline.

A contract award notice must be published within 30 days of the conclusion of the contract (signature of all parties).



### **Non-compliance with minimum time limits leads to financial corrections**

Contracting authorities need to consider the time limits set out in articles 27 to 31 of Directive 2014/24/EU before publishing the notice and set realistic timetables at the planning stage (see Table 12. Minimum time limits above EU thresholds).

If the time limits for receipt of tenders (or receipt of requests to participate) are shorter than the time limits set out in Directive 2014/24/EU, the contracting authority will fail to give economic operators sufficient time to participate.

If time limits are reduced as a result of publication of a prior information notice (PIN), contracting authorities must ensure that the PIN contains all of the information needed for the contract notice.

#### **2.4.2. Extension of time limits initially set out**

These time limits can be extended so that economic operators are aware of all relevant information regarding the procurement documents if:

- » there have been significant modifications to the procurement documents;
- » answers to requests for clarification have been provided to potential tenderers fewer than 6 days before the deadline for receipt of tenders,

or fewer 4 days in an accelerated procedure (see section 2.4.3. Reduction of time limits: the accelerated procedure);

- » on-the-spot access to information is necessary for economic operators to prepare their tenders – for example, information that can only be accessed via on-site visits, data that doesn't exist in machine-readable format or particularly large documents.



### **Lack of publication of extended time limits in the OJEU for either receipt of tenders or requests to participate**

Details of extensions to the time limits for receipt of tenders (or receipt of requests to participate) **must be published** in accordance with the relevant rules.

All time limit extensions need to be published in the OJEU, for contracts where publication of a contract notice in the OJEU was required in accordance with Articles 18, 47 and 27-31 of Directive 2014/24/EU.

### 2.4.3. Reduction of time limits: the accelerated procedure

The accelerated provisions provided for in Directive 2014/24/EU allow contracting authorities to speed up a particularly urgent public procurement procedure when the normal time limits would be impractical. Although this is not a separate procurement procedure (see 1.5. Choose the procedure), this practice is referred to as an ‘accelerated procedure’.

The time limits can be shortened under the following conditions:

- » the urgency of the procedure renders the standard time limits unrealistic;

- » the use of the accelerated procedure must be appropriately justified in the contract notice with a clear and objective explanation;
- » these accelerated provisions apply only to three types of procedure: the open procedure, the restricted procedure and the competitive procedure with negotiation.

The table below sums up the reduction of time limits possible as a result of the accelerated procedure.

**Table 13. Accelerated time limits**

Procedure	Standard time limit for the receipt of requests to participate	Accelerated time limit	Standard time limit for the receipt of tenders	Accelerated time limit
<b>Open</b>	–	–	35 days	15 days
<b>Restricted</b>	30 days	15 days	30 days	10 days

Source: Directive 2014/24/EU, Articles 27 and 28, in number of days from date of dispatch of the contract notice in the OJEU.

The accelerated procedure is often mis-used, and contracting authorities must be able to justify its use with clear and objective facts.



#### **The ‘accelerated procedure’ is not a procedure as such**

The possibility offered by Directive 2014/24/EU to ‘accelerate’ an open or a restricted procurement procedure does not constitute an additional type of procedure.

This process should not be confused with the negotiated procedure without publication, based on extreme urgency resulting from unforeseeable circumstances, which does not require the publication of a contract notice (see section 1.5.7. Negotiated procedure without prior publication).

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## 2.5. Advertise the contract

Advertising the contract consists of making the procurement procedure public so that all interested economic operators have the option to participate and submit a proposal (either a request for participate or a tender).

Publication is one of the most important elements of public procurement to ensure transparency, equal treatment and competition between economic operators within the Single Market.

Advertising helps to improve transparency and fight corruption because it ensures that economic operators and civil society, including the media, as well as the general public, are aware of available public contracts opportunities and also of past awarded contracts. Advertising also allows contracting authorities to inform as many potential economic operators as possible about business opportunities in the public sector and therefore enables these operators to compete, which leads to the best value-for-money outcomes for contracting authorities<sup>35</sup>.

### 2.5.1. Above the thresholds, advertising in the OJEU is mandatory

If the value of a contract is above the EU thresholds (see section New definitions, new thresholds, and a new category of contracting authority), then Directive 2014/24/EU must be followed and, in consequence, the contract must be advertised in the Supplement to the Official Journal of the European Union (OJEU). Notices are published by the Publications Office of the European Union free of charge.

Public contracts which are required to be advertised in the OJEU may also be published in other international, national or local official journals or newspapers. Contracting authorities must keep in mind that this additional advertising must not be published before the contract notice has been published in the OJEU and must not contain any information that is not included in the OJEU contract notice.

In addition, contracts whose value is below EU thresholds but which may have potential cross-border interest should also be advertised in the OJEU. As a general rule, publication in the OJEU is open to any type of procurement below EU thresholds, even those which do not have a particular cross-border interest.



### **If any doubt, advertise in the Official Journal of the EU (OJEU)**

Failure to advertise appropriately is one of the most serious errors.

Where contracts below the EU thresholds have potential cross-border interest, the safest course of action to avoid any risk of irregularity and possible financial corrections is to advertise the contract in the OJEU and in a national public procurement web-site or a well-known public procurement web-site.

If in any doubt for instance about thresholds or about the potential for cross-border interest in a contract, advertising in the OJEU is recommended as a way of ensuring EU-wide competition.

Many Member States electronic procurement platform are now connected to the electronic supplement of the OJEU (TED) and the publication on the OJEU can be done in parallel to national advertising. However, to avoid any errors, contracting authorities should always carry out a quick double-check on the TED platform to ensure that the notice is properly published.

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<sup>35</sup> OECD/SIGMA, Public procurement Brief 6, Advertising, September 2016.

Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-6-200117.pdf>.

## 2.5.2. Notices to be advertised

A fundamental tenet of EU public procurement law is that all contracts above EU thresholds should be published in notices following a standard format at EU level in the OJEU, so that economic operators in all Member States are able to tender for contracts for which they consider they meet the requirements.

Contracting authorities can prepare the notices either via their usual e-procurement platform if it can generate notices which are compliant with the EU standard forms, or via [eNotices](#), the online application to prepare and publish public procurement notices<sup>36</sup>.

All notices submitted to the OJEU must use a standard vocabulary. The **Common Procurement Vocabulary (CPV)** is an 8-digits (with a 9th for verification) classification system which aims to standardise the references used by contracting authorities to describe the subjects of procurement contracts. The CPV codes may be accessed online, via the SIMAP website<sup>37</sup>.

Public procurement practitioners can also refer to the specific guidance developed by the European Commission to complete the standard forms to be used above EU thresholds<sup>38</sup>.

The essential documents that must be advertised in the OJEU above EU thresholds are the three notices described below.

**Table 14. Main notices that have to be published for contracts above EU thresholds**

Notice acronym	Standard forms <sup>39</sup>	Purpose	Mandatory?	Timeframe
<b>PIN</b>	<a href="#">Prior information notice</a>	Alerts the market to future contracts	No	Between 35 days and 12 months prior to the publication of the CN or invitation to candidates
<b>CN</b>	<a href="#">Contract notice</a>	Launches a procurement procedure	Yes	–
<b>CAN</b>	<a href="#">Contract award notice</a>	Informs the market of the outcome of a procurement procedure	Yes	Within 30 days of the conclusion of the contract

<sup>36</sup> European Commission, SIMAP, eNotices. Available at: <http://simap.europa.eu/enotices/>.

<sup>37</sup> European Commission, SIMAP, Common Procurement Vocabulary (CPV). Available at: <http://simap.ted.europa.eu/web/simap/cpv>.

<sup>38</sup> European Commission, DG GROW, Public procurement standard forms guidance, version 1.05, 2015-09-19. Available at: <http://ec.europa.eu/DocsRoom/documents/14683/attachments/1/translations/en/renditions/pdf>.

<sup>39</sup> European Commission, SIMAP, Standard forms for public procurement. Available at: <http://simap.ted.europa.eu/en/web/simap/standard-forms-for-public-procurement>.

## Prior Information Notice (PIN)

The publication of a PIN is not mandatory.

Nonetheless, by publishing a PIN at the beginning of the year, it is possible to take advantage of reduced time limits for the submission of tenders (see section 2.4. Set the time limits).

The PIN was introduced so that contracting authorities could inform the market of all its upcoming contracts for example in the next six months or in the next year. The PIN can also be used to announce upcoming preliminary market consultations, even if these consultations can also be launched without the publication of the PIN. This goes alongside a regular forecast of procurement procedures (most of the time on an annual basis) that contracting authorities should develop to encourage the high quality of public procurement in general<sup>40</sup>.

More recently, contracting authorities have been using the PIN on a contract-specific basis. The PIN must be published between 35 days and 12 months before the publication of the specific contract via the contract notice.

## Contract Notice (CN)

If the procurement is above the EU threshold (and therefore falls within the scope of Directive 2014/24/EU) **it is mandatory to publish a CN**.

The CN provides information on the contracting authority, the subject matter of the contract (including the CPV codes), the contract value, the conditions for participation (legal, economic, financial and technical information), the type of contract, the procedure used, the time limit and instructions for the submission of tenders, as well as the relevant review bodies.

Once the notice has been published, substantial changes to the main content of the procurement documents (such as the technical requirements, volume, time schedule, selection and awarding criteria and contract terms), cannot be made unless an extension of time limits is provided for (see section 2.4.2. Extension of time limits initially set out).

If any minor changes in the procurement document occur before the deadline for submission of tenders, contracting authorities must publish the changes in the OJEU and are always recommended to extend the deadline for submission of the tender.



### **Lack of publication of the contract notice might lead to serious financial corrections**

Other than in very specific cases, the lack of publication of a contract notice for a contract with a value above the EU thresholds will be considered a breach of EU procurement rules and may lead to a financial correction that could go from 25 % to 100 % of the related expenditure<sup>41</sup>.

The advertisement requirements of Directive 2014/24/EU are met when the contract notice is published and all information required by the standard form is provided in a clear and precise manner.

<sup>40</sup> European Commission, DG REGIO, Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds, January 2016. Available at: [http://ec.europa.eu/regional\\_policy/en/policy/how/improving-investment/public-procurement/study/](http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/study/).

<sup>41</sup> European Commission, Commission Decision of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement, COCOF(2013)9527 final. Available at: [http://ec.europa.eu/regional\\_policy/sources/docoffic/cocof/2013/cocof\\_13\\_9527\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2013/cocof_13_9527_en.pdf).

## Contract Award Notice (CAN)

The CAN sets out the decision resulting from the procurement procedure (see section 4.6. Award the contract). Apart from information on the award, including the successful tenderer and the final contract value, most of the content related to the procurement procedure can be automatically filled in thanks to the information in the contract notice. However, the contracting authority needs to make the conscious decision to publish the CAN within the required timeframe.

If a contract is not awarded, it is recommended (but not mandatory) that the contracting authority publishes a CAN stating the reason why the contract was not awarded. Most of the time, this is due to the fact that no tenders or requests to participate were received or all of them were rejected. Other reasons leading to the cancellation of the procedure must be indicated<sup>42</sup>.

Where the contract is awarded, the CAN provides information about the tenders received (numbers of tenders and main characteristics of the tenderers), the name and details of the successful tenderer (i.e. the contractor) and the total final value of the contract.

## Additional notices

Contracting authorities must always inform the market (i.e. potential tenderers) if any changes are made to the procurement documents and the notices (e.g. date for receipt of tenders) via the publication of a further notice and additionally by informing all those that have expressed an interest in the contract.

It is possible to send a corrigendum of the published information using the form [F14 Corrigendum - Notice for changes or additional information](#), which has been created by the EU's Publications Office. Additional instructions on using a corrigendum are published on the SIMAP website<sup>43</sup>.

## 2.5.3. Access to tender documents

Contracting authorities must give unrestricted and full direct access to the procurement documents, free of charge, from the date of publication of the contract notice (CN). To do this, the contract notice must specify to interested parties the website where these procurement documents are available.

If this full and free direct access to procurement documents cannot be offered, contracting authorities must indicate in the contract notice or in the invitation to confirm interest that the procurement documents concerned will be provided by other means. The potential tenderers or candidates may then access the procurement documents and submit their proposals via an electronic platform or using email.

Similarly, contracting authorities must supply additional information related to the contract notice and the procurement documents to all interested tenderers. Therefore, contracting authorities must carefully keep track of all economic operators who have downloaded the procurement documents or who have expressed an interest or asked for a clarification on the procurement procedure.

<sup>42</sup> OECD/SIGMA, Public Procurement Training Manual, Update 2015. Module E, Conducting the procurement process, 2.11.1 Advertising the award of the contract. Available at: <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>.

<sup>43</sup> European Commission, SIMAP, F14 Corrigendum — Notice for changes or additional information. Available at: [http://simap.ted.europa.eu/documents/10184/99173/EN\\_F14.pdf](http://simap.ted.europa.eu/documents/10184/99173/EN_F14.pdf). European Commission, SIMAP, Instructions for the use of the standard form 14 'Corrigendum'. Available at: [http://simap.ted.europa.eu/documents/10184/166101/Instructions+for+the+use+of+F14\\_EN.pdf/909e4b38-1871-49a1-a206-7a5976a2d262](http://simap.ted.europa.eu/documents/10184/166101/Instructions+for+the+use+of+F14_EN.pdf/909e4b38-1871-49a1-a206-7a5976a2d262).



## 3. Submission of tenders and selection of tenderers

*The purpose of the submission and selection phase is to ensure that compliant tenders are received and selected according to the rules and criteria established in the procurement documents (see section 2.1. Draft procurement documents).*



### Ensure transparency before the submission of tenders

Before the submission of tenders, potential tenderers may be allowed to contact the contracting authority to ask for some clarifications, provided that this is foreseen in the tender documents, that communication channels are available to all potential tenderers and that clear timeframes and cut-off dates are set.

In such cases, communication is recommended to be exclusively in writing and all additional information provided by the contracting authority must be made public to all potential tenderers, and not only to the tenderer requesting clarifications.

Communication with the tenderers after the deadline for submission of tenders is limited to clarification of the tender only in open and restricted procedures. Any dialogue relating to the substance of an offer is not acceptable and would be interpreted as negotiation.

### 3.1. Ensure a delivery of tenders according to instructions

Contracting authorities should provide clear technical and administrative instructions in the procurement documents to support economic operators in the preparation and submission of their tenders or requests to participate.

It is also recommended to include a **formal compliance check-list** to help tenderers prepare the required documentation and also facilitate the verification of documents by the contracting authority (see section 2.1. Draft procurement documents).

If a hard copy proposal is required, it is essential to precisely explain the delivery instructions — where the tender should be sent (name, address, room or office number), the number of copies required and any packaging instructions. Contracting authorities may also specify that the tenders have to be presented in an envelope containing no company identification such as company stamps or logo. In case of electronic procurement, in particular in the case of e-submission, the relevant websites and e-procurement platforms must be made available to all potential tenderers.

The time limit for receipt of tenders or requests to participate must be included in the contract notice. It is the tenderer's responsibility to ensure delivery in time.



### Be clear about the date and time of delivery

Stating a clear deadline in the contract notice and procurement documents is extremely important to avoid that a potential tenderer missing it will simply be disqualified from the process.

In order to avoid any misunderstanding, contracting authorities should indicate:

- » The complete date (day, month, year); and
- » The exact time (hour, minutes).

If a hard copy in paper is required from the tenderers and can be send by post, it should be indicated if the date of the postal stamp is considered valid or if the hard copy has to be delivered to the contracting authority's venue before the deadline.

If the decision is to extend the tender submission date (2.4.2. Extension of time limits initially set out) then all tenderers should be immediately informed in writing and a notice sent to the OJEU or other e-procurement platform used. This aims to make all potential tenderers aware of the new deadline in case they may be interested in submitting a tender given the extended timeframe. This includes any tenderers who have already submitted their tenders and can then submit a replacement tender by the new deadline.

### 3.2. Acknowledge receipt and open tenders

Whether tenders are submitted in paper or via electronic means, contracting authorities are advised to establish a **list of the incoming tenders**, with the name of tenderers as well as the dates and times of receipt.

In addition, tenderers should receive an official written confirmation of receipt with the date and time of delivery recorded, whether their tenders have been submitted by post, courier, in person or electronically.

In the case of e-submission of tenders, e-procurement portals should provide a reliable delivery

structure for the submission and generate automatic confirmation for receipt to tenderers.

The submission of tenders should be kept confidential and in safe custody.

The following task of the contracting authority is to check all tenders to ensure that they are formally compliant with the instructions to tenderers (e.g. number of copies, packaging, structure of the tender). If they are not, and there is no possibility to ask for clarifications (either because the non-compliance goes beyond what is allowed by rules on clarifications, or clarifications themselves are simply not allowed in national law), they should immediately be rejected as non-compliant and an explanation given to the tenderer as to why it has been rejected. The rejection and the reason(s) must be recorded.

It is considered as good practice that contracting authorities organise a formal **opening ceremony** of the tenders that are compliant with formal requirements. At least two persons from the Evaluation Committee should be present to record the tender details (4.1. Set up the evaluation committee). The place, time and date of the opening ceremony may be included in the contract notice so that all tenderers or other interested stakeholders can attend.

It should be noted that this practice varies among European countries and that, in case of doubt concerning the organisation of such event, contracting authorities should consult their national procurement authorities.

### 3.3. Assess and select tenders

The selection of tenders consists in assessing the tenders on the basis of the exclusion grounds and the selection criteria set out in the procurement documents (see section 2.3. Define the criteria). The evaluation of tenders will be done after this phase on the basis of the award criteria (see chapter 4. Evaluation of tenders).

The assessment of exclusion grounds and selection criteria could be conducted thanks to a matrix gathering the criteria disclosed in the procurement documents and the different tenders (see below Table 15. Matrix for the assessment of exclusion grounds and selection criteria). Exclusion grounds and selection criteria must not be modified during the assessment.

Even if exclusion grounds and selection are transparent and objective criteria, it is recommended that at least two persons from the contracting authority and/or the Evaluation Committee (see section 4.1. Set up the evaluation committee) perform this assessment, one analysing each criterion, and one reviewing the assessment.

**Table 15. Matrix for the assessment of exclusion grounds and selection criteria**

Assessment	Assessor's name:	Date of assessment:	
Review	Reviewer's name:	Date of review:	
Tenders	Tender A	Tender B	Tender ...
<b>Exclusion ground 1</b>	Compliant: Yes/No Source: ... (ESPD, other)	Compliant: Yes/No Source: ... (ESPD, other)	...
<b>Exclusion ground 2</b>	Compliant: Yes/No Source: ... (ESPD, other)	Compliant: Yes/No Source: ... (ESPD, other)	...
<b>Exclusion ground 3</b>	Compliant: Yes/No Source: ... (ESPD, other)	Compliant: Yes/No Source: ... (ESPD, other)	...
<b>Exclusion ground ...</b>	...	...	...
<b>Requirements are met to be selected as tenderer</b>	<input type="checkbox"/> <b>Yes</b> <input type="checkbox"/> <b>No, the tenderer is excluded from the procurement process.</b>	<input type="checkbox"/> <b>Yes</b> <input type="checkbox"/> <b>No, the tenderer is excluded from the procurement process.</b>	...
<b>Selection criteria 1</b>	Compliant: Yes/No or Score: ... Source: ... (ESPD, other) Comment:	Compliant: Yes/No or Score: ... Source: ... (ESPD, other) Comment:	...

Tenders	Tender A	Tender B	Tender ...
<b>Selection criteria 2</b>	Compliant: Yes/No or Score: ... Source: ... (ESPD, other) Comment:	Compliant: Yes/No or Score: ... Source: ... (ESPD, other) Comment:	...
<b>Selection criteria ...</b>	...	...	...
<b>Tenderer selected: tender may be evaluated</b>	<input type="checkbox"/> Yes <input type="checkbox"/> <b>No, the tenderer is excluded from the procurement process.</b>	<input type="checkbox"/> Yes <input type="checkbox"/> <b>No, the tenderer is excluded from the procurement process.</b>	...

First, the contracting authority will establish whether there are grounds for excluding economic operators from participating and if any derogation has been established (see section 2.3.1. Exclusion grounds). The contracting authority will then consider whether the economic operators that have not been excluded meet the relevant requirements to be selected as tenderers. The economic operators that have been selected will then be invited to submit tenders, ne-

gotiate or participate in dialogue. In the case of the open procedure, the tenders that they have already submitted will be evaluated<sup>44</sup>.

If a tenderer fails to comply with an exclusion ground or a selection criterion, the tender should be treated as ineligible, and the rest of the tender should not be evaluated.



### Joint tendering to comply with the selection criteria

It is common practice that several economic operators decide to cooperate and join forces to prove that, as a group or a consortium, they comply with the economic and financial standing, technical or professional ability required in the selection criteria. For example, it would be sufficient for the economic and financial standing requirements to be satisfied by the group as a whole and not by each individual member.

In addition, an economic operator, may, where appropriate, and with regard to a specific contract, rely on the capacities of other entities, regardless of the legal nature of the links that it may have with them. In this case it must prove that it will have at its disposal the necessary resources, for example by producing an undertaking by those entities to that effect.

This possibility helps to foster the participation of SMEs in procurement procedures.

<sup>44</sup> OECD/SIGMA, Public procurement Brief 7, Selecting Economic Operators, September 2016.  
Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf>.



### **Acceptance of tenderers who should have been eliminated**

Cases have been noted of tenderers that should have been eliminated for failing to meet a particular selection criterion, nonetheless being accepted for evaluation by the Evaluation Committee. In some cases, such tenderers have gone on to win the contract. This is a clear case of unequal treatment and must be avoided.

Contracting authorities are advised to make sure that the four-eyes principle is implemented within the Evaluation Committee to ensure that there is a review, at least of the successful tenderer, to ensure that the tenderers qualified for evaluation have met all selection criteria.

#### **3.3.1. Use of scoring**

When a scoring mechanism is foreseen to assess the compliance with selection criteria, contracting authorities should make sure that the scoring is applied in the most objective and consistent way possible by an Evaluation Committee (see section 4.1. Set up the evaluation committee).

First of all, the approach to scoring needs to be agreed by the Evaluation Committee before any members start scoring. The scoring mechanism should have been disclosed in the contract notice and procurement documents and it should be clearly explained to each member of the Evaluation Committee.

Furthermore, it should be decided whether to score individually or as a group and how scores will be allocated. If individual scoring is applied, each member has to establish an individual assessment matrix to show each individual committee member's scores as well as the total. If preferred, the Evaluation Committee can agree a single score as a group rather than being an average of individual scores. A single assessment matrix should be used for this option.

During the assessment, each tenderer must be treated equally and the approach used for scoring must be consistent, non-discriminatory and fair.

The scores should be established only on the basis of the information contained in the tenders and the Evaluation Committee cannot take into account any other information received by any means, including personal knowledge or experience of the tenderer.

The contents of the Evaluation Committee's scores, individually or in total, should not be disclosed to any person outside of the Committee.

#### **3.3.2. Request for clarification**

If a tenderer does not comply with the exclusion grounds and selection criteria, it must be rejected.

At this stage, contracting authorities can ask tenderers to confirm or clarify information, for instance if some information is written unclearly or is clearly wrong. Contracting authorities may also invite tenderers to supplement or clarify the documentation submitted. Any request for clarification and the corresponding response must be in writing.



### **Double-check national procurement law before asking clarification**

In some countries, national procurement legislation may not allow contracting authorities to request tenderers to clarify information at this stage or may allow it only under certain conditions.

Contracting authorities are recommended to verify the corresponding national public procurement provisions or contact the competent national public procurement body.

Clarifications are not to be understood as negotiations. Missing certificate or supporting documents, accidental calculation, arithmetic errors, spelling mistakes or typos will be accepted as supplements or clarifications. Substantial changes or modifications of the tender is not allowed.

For example, a contracting authority could ask for a particular document (e.g. an existing certificate) which the tenderer had overlooked enclosing with the others. However, once it does it, the contracting authority is obliged to treat all tenderers equally and has to ask for additional documentation from all tenderers whose documents need to be supplemented.



### **Unequal treatment of tenderers**

During the selection process, contracting authorities must ensure that all requests for clarification or supplementary documents concerning selection criteria are made for all affected tenderers on an equal basis. The Evaluation Committee has to ask clarifications from all tenderers in relation to omissions on the same aspects of their tenders.

For example, requesting one tenderer to submit a tax compliance certificate that was obviously omitted from the tenderers submission whilst not requesting this from another tenderer would represent unequal treatment.

To ensure maximum competition, contracting authorities may request supplementary information as well, provided that this does not change the tender's content.

Following the assessment of the additional information requested, the Evaluation Committee should then proceed to evaluate all the selected tenders.

#### **3.3.3. Shortlist**

If the framework of certain procurement procedures such as the restricted procedure (see section 1.5. Choose the procedure), contracting authorities may choose to shortlist only a limited number of qualified tenderers if this has been indicated in the contract notice with the number or range of candidates to be shortlisted.

Shortlisting of tenderers who meet the minimum selection criteria must be carried out by non-discriminatory and transparent rules and criteria made known to candidates.

However, to ensure adequate competition, it is required that a minimum of five tenderers are invited to submit tenders provided that there is at least this number meeting the selection criteria, and a minimum of three tenderers in the case of competitive procedure with negotiation, competitive dialogue and innovation partnership.

It should be noted that shortlisting is not allowed in open procedures.

## 4. Evaluation of tenders and award

*The purpose for evaluating tenders is to identify which of them, meeting exclusion grounds and selection criteria, is the most economically advantageous based on the published award criteria.*

The evaluation of tenders should be carried out by an evaluation committee (sometimes referred to as evaluation panel) whose objective is to issue a recommendation on the contract award to the contracting authority.

The evaluation must be conducted in a fair and transparent manner on the basis of the award criteria published in the procurement documents.

The evaluation committee is often chaired by the contract manager in charge of the procurement procedure within the contracting authority.

He/she can be assisted by a secretary with a financial and/or legal background in public procurement. In smaller procurement procedures, the roles of chair and secretary can be taken on by one single person (e.g. the contract manager).

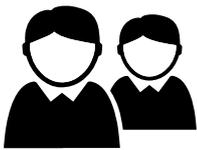
### 4.1. Set up the evaluation committee

It is best practice to establish an evaluation committee as soon as the decision has been taken to proceed with the procurement to ensure that its process involves all participants who have the necessary qualifications and expertise from the beginning (see section 1.2. Engage stakeholders).

The evaluators are technical staff from the contracting authority or external experts specialised in the subject matter of the contract. It is also possible to involve as non-voting members technical advisors or external stakeholders linked to the outcome of the contract.

The table below presents an example of a suitable evaluation committee that can be applied to most procurement procedures.

**Table 16. Example of evaluation committee structure**

Chair	Secretary	Evaluators
 <p>Leads, coordinates, gives guidance and controls the evaluation of tenders;</p> <p>Ensures that the evaluation is carried out in accordance with procurement law and Treaty principles;</p> <p>Signs a declaration of absence of conflict of interest and confidentiality.</p>	 <p>Supports the chair and carries out the administrative tasks linked to the evaluation;</p> <p>Drafts and records minutes of meetings and evaluation reports;</p> <p>Does not necessarily have voting power.</p>	 <p>Assess the tenders (independently or jointly) on the basis of the award criteria according to the evaluation method stated in the procurement documents;</p> <p>Sign a declaration of absence of conflict of interest and confidentiality.</p>

Contracting authorities should require that all members of the evaluation committee sign a declaration of absence of conflict of interest and confidentiality (see section 6.5. Template declaration of absence of conflict of interest and confidentiality).

In addition, separate red flag or data mining techniques should be used to identify and investigate any possible undisclosed links between members of the evaluation committee and tenderers (see section 1.2.3. Integrity and conflict of interest).



### **Avoid undisclosed conflict of interest**

Contracting authorities should have guidelines or protocols to deal with conflict of interest, in particular concerning members of evaluation committees.

For example, if the husband of a member of an evaluation committee is a senior employee of one of the tenderers, this member has to inform the contracting authority and withdraw from the committee as well as from the procurement procedure in general.

## **4.2. Apply the award criteria**

During the drafting of procurement documents, the contracting authority will have taken a decision as to which evaluation method to follow. This method has to be clearly presented in the procurement documents (2.3. Define the criteria) according to the type of award criteria:

- » price only;
- » cost only using a cost-effectiveness approach, such as life-cycle costing;
- » best price-quality ratio.



### **It is forbidden to modify a tender during evaluation**

Contracting authorities must not allow tenderers to modify their tenders during the evaluation process, for example through the submission of additional substantial information.

The chair of the evaluation committee and/or the procurement officer in charge must ensure that only the information presented at the deadline for submission is evaluated.

Similarly, contracting authorities must not modify a tender under any circumstances: this may be considered as favouritism or corruption.



### **Do not negotiate during the evaluation in an open or restricted procedure**

In the context of an open or restricted procedure, contracting authorities cannot negotiate with the tenderers during the evaluation stage. This would lead to a modification of the initial conditions set out in the contract notice and procurement documents (e.g. a significant change in the scope of the project or the contract price).

Any clarifications or communication with tenderers after they submit the tender should be in writing. If the contracting authority has concerns about the clarity of the procurement documents, it should consider re-launching the procedure with revised specifications.

#### **4.2.1. Price only**

If the lowest price criterion is chosen, the evaluation method is rather simple and transparent since it only involves comparing the different financial offers, provided that the technical offer, if any, is compliant with the technical specifications.

Nevertheless, some important aspects need to be taken into account when assessing tendered prices:

- » financial offers must include all price elements, in accordance with the requirements set in the procurement documents;

- » any arithmetical error must be corrected and recorded;
- » any discount must be applied;
- » tenders that appear to be abnormally low must be duly investigated.

The lowest price or price-only criterion is only advisable on condition that the technical specifications and quality minimum requirements are defined upfront by the contracting authority and, therefore, must be the same in all tenders.



### **Never change the scope of the contract**

If the scope of the contract is modified during the course of the procurement procedure, it will particularly affect the evaluation of financial offers.

Indeed, the financial offers proposed by the tenderers will not be proportionate to the new scope (either reduced or increased) and their evaluation will be irrelevant.

Such change should require the procedure to be cancelled because tenderers may have offered different prices and additional economic operators may have expressed an interest if they had known the contract's real value.

### 4.2.2. Life-cycle costing

If a cost-effectiveness approach is used, the evaluation committee has to apply the method published in the procurement documents to calculate the costs over the life-cycle of the products, services or works. Whenever a common method for calculating life-cycle costs (LCC) has been made mandatory in the legislation of the Member States, that method must be applied.

Life-cycle costs may cover costs borne by the contracting authority or other users as well as costs attributed to environmental externalities linked to the products, services or works during their life cycle, provided their monetary value can be determined and verified<sup>45</sup>.

The Evaluation Committee should make sure that:

- » tenders include the data that has been indicated in the LCC method published in the procurement documents;
- » the published method to determine the LCC has not been changed during the evaluation process;
- » The same method is used for each tender.

When evaluating and scoring the financial offers, the evaluators should follow the same logic as for the price-only criterion, making sure that all costs are included, arithmetical errors are corrected, discounts are applied and that any tender that appears to be abnormally low is investigated.

### 4.2.3. Best price-quality ratio

The most economically advantageous tender on the basis of the best price-quality ratio has become a **commonly used evaluation method** among contracting authorities, even though in some countries the price-only criterion remains the main practice.

In that context, contracting authorities need to have the capabilities to carry out an evaluation based on price and quality, technical merits and functional characteristics. The tenderers equally need to understand how to prepare a tender on that basis.

In some cases, contracting authorities may seek help from external experts who are independent of any tenderers (see section 1.2.2. External key stakeholders).

If a best price-quality ratio approach is used, the evaluation committee has to apply the published specific criteria and their relative weighting. If a more detailed evaluation methodology was disclosed in the tender documents, this methodology must be followed<sup>45</sup>.

An **evaluation matrix** may be used to carry out the evaluation of tenders. This matrix could serve as both a practical instrument and a record-keeping tool to be included in the evaluation report (see section 4.5.2. Evaluation report).

When scoring tenders against the award criteria, the scoring rationale must be decided before the evaluation committee members start evaluating. One suggestion is to have a graduated approach as shown in the following table:

The matrix below refers to best price-quality ratio criteria but can be adapted to other award criteria. The criteria and their corresponding weightings are merely indicative and should only serve as an example.

<sup>45</sup> ECD/SIGMA, Public procurement Brief 9, Tender Evaluation and Contract Award, September 2016. Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf>

**Table 17. Matrix for the evaluation of tenders based on the best price-quality ratio**

<b>Tender ID</b>	A, B, ...	
<b>Evaluation</b>	Evaluator(s) name:	Date:

MEAT	Weighting	Score	Category	Weighting	Score	Subset	Weighting	Score
<b>Price</b>	30	...	Cost	30	...	Cost	30	...
<b>Quality</b>	70	...	Technical	25	...	Relevance	12	...
						Added value	5	...
						Management	8	...
		...	Delivery	10	...	Responsiveness and flexibility	4	...
						Communication	4	...
						Risk management	2	...
						Resources	15	...
		...	Environment	10	...	Relevance	10	...
						Staff management	5	...
		...	Social responsibility	10	...	Commitment/ measures	7	...
Targets	3					...		
<b>TOTAL</b>	<b>100</b>	...						

While conducting the evaluation, the evaluation committee should pay particular attention to the following:

- » the published award criteria should always include a criterion on the price;
- » the award criteria and their weightings, including sub-criteria as well as any evaluation methodology, cannot be modified during the evaluation process.

The members of the evaluation committee must agree a consistent approach when scoring the tenders to ensure a meaningful and quality evaluation.

When evaluating and scoring the financial offers, the evaluators should follow the same logic as for the price-only criterion, making sure that all costs are included, arithmetical errors are corrected, discounts are applied and that any tender that appears to be abnormally low is investigated.



### **Modification of award criteria or evaluation methodology after the tender submission deadline**

Some evaluators might sometimes wrongly modify some criteria or develop additional criteria or sub-criteria during the evaluation process, even when these changes or additional aspects are not included in the procurement documents. These practices are unlawful and must be avoided.

Yet, if the award criteria are modified during the evaluation process, the award will be done on the basis of criteria that were not published, resulting in an incorrect evaluation of tenders.

If the award criteria need to be modified after the contract notice is published, the contracting authority has to either (i) cancel the procurement procedure and re-launch it; or (ii) issue an erratum and possibly an extension of the deadline for submission of tenders.

### **4.3. Deal with abnormally low tenders**

Evaluating ‘abnormally low tenders’ can be challenging for contracting authorities since there is no straightforward approach that can be used to identify them. Abnormally low tenders refer to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be carried out properly<sup>46</sup>.

When the financial offer of a tender seems to be abnormally low, the evaluation committee should require the tenderer to clarify in writing that the offer is economically sustainable and it can be carried out properly. It can be the case that the tenderer has misunderstood the specifications, has underestimated the workload or the risks or that the technical requirements were unclear.

The tenderer should explain why its financial offer is particularly low and whether there are any circumstances which would reasonably account for the low offer, such as:

- » innovative technical solutions;
- » possibility of the tenderer to obtain state aid;
- » particular circumstances allowing it to obtain supplies or subcontract tasks at favourable conditions.

Based upon the analysis of the justification provided by the tenderer, the evaluation committee should decide if the tender is to be rejected or accepted.

The rejection of an abnormally low tender must be duly justified in the evaluation report.

<sup>46</sup> OECD/SIGMA, Public procurement Brief 35, Abnormally Low Tenders, September 2016. Available at: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-35-200117.pdf>.



## Rejection of abnormally low tenders without justification

Contracting authorities must always give tenderers with low tenders the opportunity to justify their low offers and they cannot be automatically excluded. It is mandatory to seek for a written justification from the tenderer clarifying the reasons for the low-price offer.

When a tender is rejected, the decision must be clearly justified in the evaluation report and refer to the answer from the tenderer.

In addition, some contracting authorities use a benchmark minimum offer price, often calculated by using a mathematical formula.

Tenders below this benchmark are automatically eliminated before tenderers get a chance to justify their low offers. This practice is unlawful and must be avoided.

### 4.4. Request clarifications

In the case of open and restricted procedures, the evaluation committee can request clarifications from tenderers concerning their tenders. It should be noted that other procedures also allow for clarifications and even expect negotiations with the tenderers.

The requests for clarifications can only seek minor clarifications of information already submitted by the tenderer, regarding for example:

- » inconsistent or contradictory information within the tender;
- » unclear description of a product or service offered;
- » minor mistakes or omissions;
- » non-compliant aspects with the non-fundamental and/or formal requirements set out in the procurement documents.

It is recommended that contracting authorities always ask a tenderer to clarify or complete submitted

documents when the text of the tender is too vague or unclear and when certain circumstances, of which the contracting authority is aware, suggest that this ambiguity can be easily explained or eliminated. In such cases, the contracting authority should not exclude the tenderer without first requesting clarification or that additional documents be submitted.

In accordance with the principle of equal treatment, no substantial modifications to a tender can be sought or accepted through a request for clarification. Besides, a clarification request does not imply that there will be negotiations.

In addition, a request for clarification must always be sent in writing, preferably by the chair of the evaluation committee (and not by individual evaluators). The clarification correspondence must be summarised in detail in the evaluation report, clearly indicating whether the answers received are satisfactory to the evaluators. If they are not satisfactory then the report must give the reasons for this.

Any clarification submitted by a tenderer concerning its tender that is not provided in response to a request from the evaluation committee must not be taken into account in the evaluation.



### **Clarifications cannot change submitted tenders**

Clarifications should not have the effect of changing the already submitted tenders in relation to substantial information such as pricing, quality and service aspects.

Therefore, a request for clarification cannot allow, for example:

- » a non-compliant tender to be brought into compliance with the essential specifications that have been set;
- » a change in the tendered price (except for the correction of arithmetical errors discovered during the evaluation of the tender, if applicable).

## **4.5. Finalise the evaluation and decide**

The evaluation of tenders usually ends with an evaluation meeting where each tender can be jointly analysed and discussed and where the evaluation committee members can make a common decision.

The committee's decision is then communicated to the contracting authority as a recommendation to award the contract to a certain tenderer through a detailed evaluation report.

### **4.5.1. Evaluation meeting**

It is considered good practice to hold an evaluation meeting, gathering together all members of the evaluation committee. The meeting should be scheduled in advance by the chair so that the committee members can have enough time to complete their individual evaluation, if that approach has been adopted.

Each member should have completed an evaluation matrix for each tender (see the example in Table 17. Matrix for the evaluation of tenders based on the best price-quality ratio) in order to share the outcome and discuss the different tenders with the other members. Another option is to fill in one single evaluation matrix per tender during the evaluation meeting.

During the meeting, the committee discusses the scores allocated and comments provided by each

member, in order to establish the ranking of the evaluated tenders and to agree on the recommendation of the award to be included in the evaluation report.

If there are significant differences in the views and scores within the committee, specific measures to deal with this issue should be agreed in advance. These measures may involve requesting clarification from tenderers or engaging expert advice. In that event, more than one moderation meeting would have to be held<sup>46</sup>. When members disagree the chair should ultimately make a decision and make sure the disagreement is reflected in the evaluation report.

The winning tender should be chosen during the meeting, with this decision being communicated to the contracting authority in the evaluation report.

### **4.5.2. Evaluation report**

The recommendation for the award of the contract is contained in the evaluation report, which is normally prepared by the Evaluation Committee's chair or secretary, with the support of the evaluators (see section 4.2. Apply the award criteria).

The evaluation report should be clear and sufficiently detailed to show how the decision to award the contract was taken.

It should describe how the different criteria have been applied as well as the outcome from the evalu-

ation activities. The recommendation for the award of the contract has to be clearly justified and supported with the scoring mechanism, the clarifications when applicable and the decision-making process within the evaluation committee.

In addition, the work conducted during the evaluation meeting should be recorded and an attendance list should be included in the evaluation report.

An indicative structure of the evaluation report content is provided below.

**Table 18. Example of evaluation report structure**

Tender ID	A, B, ...	
Evaluation Committee	Members' names:	Date of the report:
<ol style="list-style-type: none"> <li>1. Introduction               <ol style="list-style-type: none"> <li>a. Name and address of the contracting authority</li> <li>b. Composition of the evaluation committee</li> <li>c. Timetable of the procurement procedure</li> </ol> </li> <li>2. Background and context               <ol style="list-style-type: none"> <li>a. Description of the contract (subject matter and value)</li> <li>b. Choice of the procedure and justification in the cases of competitive procedures with negotiation, competitive dialogue and negotiated procedure without prior publication</li> <li>c. Appointment of the members of the evaluation committee</li> <li>d. Published criteria</li> <li>e. List of tenderers</li> </ol> </li> <li>3. Evaluation activities               <ol style="list-style-type: none"> <li>a. Assessment of exclusion grounds</li> <li>b. Assessment of selection criteria</li> <li>c. Evaluation of tenders</li> <li>d. Clarifications (if applicable)</li> </ol> </li> <li>4. Recommendation for the award of the contract               <ol style="list-style-type: none"> <li>a. Final scoring and ranking</li> <li>b. Proposed candidate(s) or tenderer(s) (including subcontractors and their corresponding shares, if any) and justification</li> <li>c. Unsuccessful candidate(s) or tenderer(s) and justification</li> <li>d. Rejection of abnormally low tenders and justification</li> <li>e. Where applicable, reasons why the contracting authority has decided not to award a contract</li> <li>f. Where applicable, reasons why other means of communication than electronic means have been used for submitting tenders</li> <li>g. Where applicable, conflicts of interests detected and measures taken</li> </ol> </li> <li>5. Annexes               <ol style="list-style-type: none"> <li>a. Evaluation matrix(ces)</li> <li>b. List(s) of attendance at evaluation meeting(s)</li> <li>c. Signed declarations of absence of conflict of interest and confidentiality</li> <li>d. Other relevant documents (e.g. clarifications, working papers)</li> </ol> </li> </ol>		

In the framework of national reporting on public procurement, the European Commission can ask any European contracting authority for an individual report on the procedures used for the award of a particular contract. In this context, contracting authorities should make sure that they comply with the minimum requirements set out in Article 84 of

Directive 2014/14/EU. A well-documented and detailed evaluation report should help keep track and record all the necessary information. However, contracting authorities may also choose to comply with the requirements thanks to different sources of information (i.e. evaluation report, procurement decision, etc.) according to their internal processes.



### **Lack of transparency and equal treatment during evaluation**

If the scores given to each tender are unclear, unjustified, lack transparency or have not been fully recorded, the contracting authority will not be in the position to demonstrate how the evaluation committee has arrived to the award decision.

Contracting authorities have to carefully draw up an evaluation report and keep enough information on each contract to justify decisions taken on the selecting of tenderers and on the awarding of contracts.

The chair of the evaluation committee should ensure that there is written justification for each score given when tenders are being evaluated.

In addition, the scores and comments for each tenderer must be presented in a written letter to the tenderer and included in the evaluation report.

## **4.6. Award the contract**

Based on the evaluation committee's recommendation, contracting authorities should launch the necessary internal procedure to get an official award decision.

They will then have to notify the tenderers and make the award public.

### **4.6.1. Notification of tenderers and standstill period**

Once the award approval has been given, contracting authorities must, as soon as possible, write to the successful tenderer stating that its tender has been accepted for the contract award.

The unsuccessful tenderers also need to be informed about the award decision and its justification. The notification must include a summary of the reasons

for the decision, and in particular the name of the successful tenderer and the characteristics and relative advantages of the selected tender. Usually a summary table of the scoring and final ranking of the different tenders is included.

Upon request from any tenderer, contracting authorities must within 15 days from receipt of a written request, further inform any unsuccessful tenderer of the reasons for the rejection of its tender.

A period of at least 10 days, referred to as 'standstill period', must pass before the final contract can be concluded. The exact duration of the standstill period must also be mentioned in the notification to tenderers, so that they are aware of the amount of time available to contest the award decision, if they wish to do so.

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

In addition, the contracting authority may also decide not to award the contract, which may happen when no tenders or requests to participate were received or all of them were rejected. Other reasons leading to the cancellation of the procedure could

be that all tenders exceed the budget available, the circumstances of the contract have substantially changed or some irregularities occurred during the evaluation of tenders<sup>46</sup>.



### **Do not negotiate on the contract with the successful tenderer**

Once the successful tenderer is appointed and informed and before the signature of the contract, contracting authorities cannot negotiate any of the essential components of the contract.

These include, but are not limited to, price, nature of the works/supplies/services, completion period, terms of payment or materials to be used.

This type of negotiation is prohibited as it changes the nature of the advertised contract and means that the other tenderers have not had the opportunity to make an offer for the amended contract.

If a contracting authority discovers before signing the contract that it has to be re-scoped, then the entire procurement procedure must be cancelled. The contracting authority will then have to launch a new procedure so that all economic operators have another opportunity to compete for the amended contract.

This applies both in the case of a significant increase or a significant reduction in the scope or price of the contract.

#### **4.6.2. Contract and award notice**

When the contracting authority has decided to whom the contract will be awarded, and once the standstill period is over (assuming that no complaint has been filed), the contract can be signed between the successful tenderer and the contracting authority.

In principle, the tenderer should be aware of the content of the contract since it is recommended to include a draft contract in the procurement documents (see section 2.1.2. Draft contract).

Within 30 days of both parties signing the contract, the contracting authority must send a contract award notice to the OJEU for publication so that all interested stakeholders and the general public are informed of the results of the procurement procedure.

It should be recalled that the contract award notice aims to present the decision that resulted from the procurement procedure. This means that contracting authorities may publish a contract award notice regardless of whether the contract is finally awarded or not. In the case of non-award, it is not mandatory to publish the contract award notice, but is considered good practice since it provides the reasons for the decision.

The content of the contract award notice is presented above in section 2.5.2. Notices to be advertised.

<sup>46</sup> OECD/SIGMA, Public Procurement Training Manual, Update 2015. Module E Conducting the procurement process, 2.6 Evaluation report. Available at: <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>.



### **Make sure to publish the contract award notice**

Failure to publish the contract award notice is a relatively common error that can be eliminated through the use of checklists and key stage controls.

Upon realising that a contract award notice has not been published, even after the 30-day delay, contracting authorities should nonetheless take immediate action to ensure that it is published.

## 5. Contract implementation

*After the award of the contract, the successful tenderer becomes the contractor in charge of implementing the contract by delivering the work, supplies or services to the contracting authority.*

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

Public contracts usually involve various interested parties, are carried out over long periods of time and require substantial resources. In that context, complex situations, unforeseen circumstances can arise and delays can occur. That is why it is crucial that contracting authorities invest time and resources to properly manage and monitor their contracts.

The contract implementation covers numerous parts that contracting authorities have to carefully consider:

- » Communication and relationship management with the contractor;
- » Contract management (i.e. delivery, timeframe, risks, record keeping);
- » Contract modifications and the option to terminate the contract before its end;
- » Complaints and remedies mechanisms;
- » Closing of the contract.

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### 5.1. Manage the relationship with the contractor

It is beneficial for all parties to create and maintain an open and constructive relationship between the contractor and the contracting authority during

the implementation of the contract. A regular and smooth communication will enable knowledge-sharing, common understanding and a greater ability to anticipate possible problems or risks.

It is in the contracting authority's own interest to make the relationship work, as the costs of early termination, the consequences of poor performance or unplanned changes of economic operator are highly damaging<sup>47</sup>.

To establish and keep a good relationship, contracting authorities should make sure that **regular meetings** are organised in particular at the beginning of the implementation of the contract.

A kick-off meeting should always take place at the start of the contract. It should be a face-to-face meeting with the main persons involved in the contract both from the contractor and the contracting authority.

The goal of this meeting is twofold:

- » Get to know each other and define clearly key roles and responsibilities; and
- » Agree on a common understanding of the context and objectives of the contract as well as on the means proposed to achieve them and ultimately fulfil the needs of the contracting authority.

During the course of the implementation, regular communication, including feedback channels and review meetings need to take place to develop mutual trust and understanding and ensure a joined up approach to fulfilling the contract objectives.

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<sup>47</sup> OECD/SIGMA, Public procurement Brief 22, Contract Management, September 2011:  
[http://www.sigmaweb.org/publications/Contract\\_Management\\_Public\\_Procurement\\_2011.pdf](http://www.sigmaweb.org/publications/Contract_Management_Public_Procurement_2011.pdf)

## 5.2. Manage the contract

### 5.2.1. Contract management tools and techniques

A number of project management tools and techniques can be used to help manage and monitor the implementation of public contracts.

These tools do not have to create a disproportionate extra-burden for procurement practitioners and can be implemented in a simple way. Furthermore, the small extra efforts that they will require at the beginning will certainly help to save time and avoid difficulties in the course of the implementation.

The following table presents common and easy-to-use contract management tools.

**Table 19. Common tools and techniques for contract management**

Tool/Technique	Description	Applicable to
<b>Inaugural kick-off meeting</b>	Physical meeting between the main interested parties from the contracting authority and the contractor which allows to: <ul style="list-style-type: none"> <li>» Build trust between parties;</li> <li>» Agree on a common understanding of the subject and scope of the contract;</li> <li>» Help the contractor understand expectations and underlying objectives;</li> <li>» Define the work plan;</li> <li>» Plan the frequency of communication, progress reporting, review meetings.</li> </ul>	All contracts
<b>Progress reports</b>	Timely reporting at a high and/or summary level on progress and achievements in relation to the work plan.	All contracts
<b>Interim reviews</b> <b>(e.g. via regular review meetings)</b>	Review by the contracting authority of the tasks accomplished and/or interim deliverables. Interim reviews allow to: <ul style="list-style-type: none"> <li>» Adapt the timeframe if necessary;</li> <li>» Validate minor adjustments to the implementation;</li> <li>» Formulate recommendations;</li> <li>» Issue interim payments.</li> </ul>	All contracts
<b>Self-assessment</b>	Self-assessment of the procedure by the contracting authority thanks to a <b>control checklist</b> covering of all stages of public procurement (see 6.4 Checklist for the control of public procurement).	All contracts
<b>Issue logs</b>	Mechanism for notifying and managing issues arising during the contract implementation. It records issues as they arise along with the actions taken to address them.	Complex contracts

Tool/Technique	Description	Applicable to
<b>Service level agreements</b>	<p>Performance of equipment or facilities, where the requirements may be expressed, for example, in terms of processing capacity, availability, average time between technical problems, or consumption of energy.</p> <p>These requirements are incorporated into the contract (often in schedules) and must be closely monitored.</p>	Complex contracts
<b>Gateway review</b>	<p>Mechanism for reviewing procurement procedures at key milestones in their development, before important decisions are taken.</p> <p>It is a control process that contracting authorities can use to ensure that the activities have been satisfactorily completed at each stage of the implementation before an approval is given to move on to the next stage (see Section 5.2.2. Risk management).</p>	Complex contracts
<b>Risk management</b>	<p>Identification, analysing and monitoring of all kinds of risks throughout the contract implementation.</p> <p>Regardless of the size of the contract, contracting authorities should perform a risk assessment at the planning phase of the procurement procedure to identify potential risks and define mitigation measures.</p> <p>In addition, they should request that potential tenderers, or ultimately the contractor, also identify possible risks based on their offer and their knowledge of the context.</p> <p>A follow-up of the risks should be then conducted at key stages of the contract implementation (see Section 5.2.2. Risk management).</p>	All contracts

### 5.2.2. Risk management

Complex procurement procedures take significant time and effort and may involve a large number of staff within the contracting authority as well as external interested parties. In this context, the combination of many different factors and influences leads to a number of risks that need to be properly identified, assessed, mitigated and monitored during the course of the implementation.

No major errors are due to poorly conducted risk analysis exercises. The most common mistakes arise when risks analysis exercises are not carried out at all.

There is no need for procurement practitioners to have specific skills to carry out risk analysis and contingency planning. A proper knowledge of the context of the procurement procedure and a standard methodology should be sufficient.



### **Anticipate possible risks, even for small and simple contracts**

Even though complex contracts are more exposed to risks than simple ones, risk management should be integrated into all contract management processes.

Contracting authorities should carry out risk assessments as early as possible during the planning of the procurement procedure.

For small and simple contracts, **two easy methods** may be used to identify risks and the corresponding mitigation measures:

1. Conduct a critical analysis of the procurement documents, in particular technical specifications, trying to answer the question ‘What could go wrong?’. This can be done by a person who is not directly involved in the preparation of the project;
2. Gather feedback and ‘lessons-learned’ from the implementation of previous similar contracts, eventually contacting other contracting authorities.

Contracting authorities carrying out complex procurement procedures should ensure that a risk register and associated contingency plan are prepared during the early stages of the procurement lifecycle and that they are regularly updated at key stages throughout the contract implementation. Good risk management helps achieve the expected goals, reduces the likelihood of aborted processes, the need for contract modifications during implementation and the risk of financial corrections in the context of EU-funded projects.

When conducting an initial risk assessment during the preparation and planning phase of the procurement, contracting authorities should:

- » Identify and quantify the main risks related to the procurement process;
- » Identify where risk comes from;
- » Allocate responsibilities for the risk assessment and its regular review and monitoring.

To do so, contracting authorities can use the ‘risk register’ tool (or risk matrix) which helps list the risks, assess their probability, severity and define appropriate mitigation measures and responsible persons.

The example below gives an overview of what contracting authorities can prepare and provides a few examples of potential risks for a procurement procedure.

**Table 20. Example of a risk register for a procurement procedure**

Risks	Source	Potential consequences	Impact	Likelihood	Mitigation measures	Person in charge
(...)	<input type="checkbox"/> Internal <input type="checkbox"/> External	(...)	<input type="checkbox"/> Low <input type="checkbox"/> Medium <input type="checkbox"/> High	<input type="checkbox"/> Low <input type="checkbox"/> Medium <input type="checkbox"/> High	(...)	(...)
(...)	<input type="checkbox"/> Internal <input type="checkbox"/> External	(...)	<input type="checkbox"/> Low <input type="checkbox"/> Medium <input type="checkbox"/> High	<input type="checkbox"/> Low <input type="checkbox"/> Medium <input type="checkbox"/> High	(...)	(...)

In order to fill in and use the risk register tool, contracting authorities should follow the steps below:

- » Identify potential risks by spotting problems and obstacles to the correct implementation of the contract. For instance from changes in staff (either within the contracting authority or the contractor) to low quality output or unexpected conflict of interests.
- » Many risks involve the contractor being unable to deliver, or not delivering the expected quality. These could include:
  - » Lack of capacity;
  - » Key staff being redeployed elsewhere;
  - » The contractor’s business focus moving to other areas after contract award, reducing the added value for the contracting authority in the arrangement;
  - » The contractor’s financial standing deteriorating after contract award, eventually endangering their ability to maintain agreed levels of service; or
  - » Problems within the contractor’s own supply chain.
- » Identify the source of the risk which can either internal (linked to the contracting authority) or

external. External risks can arise from the contractor but also from other factors beyond the control of the parties (e.g. brutal socio-economic changes, natural disasters);

- » Assess the consequences and impacts on the contracting authority if the identified risks were to materialise and qualify them (high/medium/low);
- » Assess the probability of the risks occurring and qualify them (high/medium/low);
- » Define mitigation measures to reduce the risk taking into account the cost/benefit;
- » Identify who is best placed to reduce, control and manage the risk.

During the life of the contract, the contract manager must **monitor the risks regularly**, and highlight any emerging problems speedily.

A solution that can also help identify and monitor risks is to set up of ‘gateways’ throughout the procurement process. Gateways are a mechanism to **review procurement procedures at several key points in their development**, before important decisions are taken. The use of public procurement gateways came as a result of various lessons-learned exercises (prompted by the question: ‘how did this happen?’) on public contracts that had gone wrong for various reasons, resulting in major cost or time overruns or failure to deliver expected results.

Gateways aim to ensure that the procurement is soundly-based, well-planned, that all relevant interested parties are involved, so that the objectives are achieved. They should only be applied to complex, strategically important or high-risk contracts.

A simplified 'gateway' format is proposed below to support contracting authorities in carrying out regular 'go/no-go' breakpoints in conducting the procurement procedure.

**Table 21. Possible procurement 'gateways'**

Gateways	Indicative content
Gateway 0 — Completion of the planning	This review should take place at the very early stages to check the set-up of realistic, coherent and achievable milestones for the procurement procedure and contract implementation.
Gateway 1 — Contract scope	This review should take place on the basis of the draft procurement documents before any advertising or publication of information.
Gateway 2 — Shortlisting	This review takes place following the evaluation of the selection criteria (ESPD).
Gateway 3 — Tender evaluation	This review takes place when the preferred tenderer has been selected, but before the contract award; or before proceeding to final tendering in the case of a two-stage procedure.
Gateway 4 — Contract	This review takes place before the signature of the contract.
Gateway 5 — Interim and final deliveries	These reviews take place regularly during the contract implementation at each stage of delivery.

### 5.2.3. Documentation and record keeping

Documenting the entire procurement procedure and justifying all key decisions is a crucial requirement to ensure that the whole process can be subsequently checked or audited.

The systems for recording information can be manual or electronic or both, but the trend is towards fully electronic processing and storage.

Contracting authorities must store and file the documents covering all stages of the procedure:

- » planning;
- » preparation of procurement documents;
- » advertising;

- » selection and evaluation;
- » award;
- » implementation; and
- » closure.

If applicable, this also includes all communications with economic operators such as market consultations, requests for clarification to tenderers and dialogue or negotiation.

The documentation must be kept for a period of **at least three years from the date of the contract award**.

In the context of **European Structural and Investment (ESI) Funds**, it is essential to keep a complete

audit trail to demonstrate the eligibility of expenditure and **to store it according to the time-limits stated in the fund-specific rules.**

The list below indicates what documents controllers or auditors may check in the context of procurement procedures co-funded by the ESI Funds<sup>48</sup>.

**Table 22. Key documents to be checked during ESI Funds controls or audits**

Evidence of a competitive process
Contract notice and prior information notice, if relevant (OJEU);
Procurement documents including technical specifications;
Record of tenders received;
Evidence of the opening of tenders;
Evidence of the selection of tenders including scoring against the set criteria;
Evidence of the evaluation of tenders including scoring against the set criteria;
Evaluation report;
Notifications to successful and unsuccessful tenderers;
Formal contract;
Contract award notice (OJEU).
Evidence of an adequate implementation
Proof/acceptance of deliveries;
Evidence that deliveries are at the tendered cost;
Evidence that deliveries correspond to the technical specifications;
Invoices;
Justification of contract modifications in specific circumstances, if relevant.

The checklist on the control of public procurement can also provide useful information on the documen-

tation to prepare in case of audits (see section 6.4. Checklist for the control of public procurement).

<sup>48</sup> European Commission, DG REGIO Training on Management Verifications in Structural Funds 2014-2020 — Public Procurement, September 2014: [http://ec.europa.eu/regional\\_policy/sources/docgener/informat/expert\\_training/management\\_verifications.pdf](http://ec.europa.eu/regional_policy/sources/docgener/informat/expert_training/management_verifications.pdf)

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### 5.3. Deal with contract modifications

With good planning, a comprehensive, robust specification, and a well-designed contract prepared by a diligent contracting authority, the need for any contract modifications or contracts for additional works, supplies or services during the implementation stage should be minimised.

As a general rule, if a contracting authority wants to purchase additional works, supplies or services during the implementation of a contract, these supplementary tasks should be tendered under the EU and national procurement legislation.

However, in some very specific cases, the modification of contracts during their term are allowed as a derogation from the general rule because of specific circumstances or because they represent only a small part of the overall contract value (see Table 23. Modifications of contracts without a new procurement procedure).

As a result, this derogation should only be used in exceptional circumstances and needs to be justified. The burden of proof for the circumstances allowing for reliance on this derogation rests with the contracting authority.



#### **Audits focus very closely on contract modifications**

Many contracting authorities wrongly assume that changes required during the implementation stage can simply be accommodated by either modifying the existing contract or concluding a contract for additional works, supplies or services with the contractor performing the contract, provided such changes do not increase the value of the contract by more than 50 %.

Modifications of contracts and/or the use of a negotiated procedure for additional tasks with an existing contractor without any tendering of these additional works, supplies or services is one of the most common and serious errors in public procurement procedure.

In most cases, if significant additional works, supplies or services are needed then a new contract should be tendered.

It is up to each contracting authority to carefully study the clauses of their contract and the relevant circumstances that bring about the need for a modification. Yet, in practice, it is rather challenging for contracting authorities to determine if they can make use of the provisions for contract modifications during its term.

The best option is to envisage all of the possible changes and clearly include them in the procurement documents. This is not always possible for every modification but care should be taken in the preparation phase to try and identify all of the cases.

For unforeseen (or more practically, unforeseeable) situations, there are other rules.

Contracting authorities should primarily check the value of the modification compared to the initial contract value. This is because a modification is possible below 10% for services and supplies, 15% for works, and below EU thresholds (see Table 2. EU thresholds for public contracts from 1 January 2016 to 31 December 2017). Nevertheless, special care needs to be taken that such 'low-value' modifications do not alter the overall nature of the contract.



### **Do not substantially change the scope or value of the contract during implementation**

During contract implementation, a contracting authority and its contractor cannot agree to reduce significantly the scope of the works, supplies or services with a corresponding decrease in the contract price.

As this would involve a significant change in the contract, it is likely that other smaller companies would have been interested in tendering for the reduced size contract.

If a contracting authority wants to substantially reduce the scope and value of a contract, it must cancel the initial procurement procedure and re-tender the reduced size contract so that the market has another opportunity to tender for the revised contract.

This should be avoided at the planning stage by involving all interested parties to review the scope and risks, including the availability of sufficient funds.

The options and the relevant questions contracting authorities need to ask themselves before deciding a contract modification are outlined in Table 23.

**Table 23. Modifications of contracts without a new procurement procedure**

<p><b>GENERAL RULE</b></p>	<p>A new contract for additional tasks should be tendered in line with the EU Directive and national rules during its term. However, as an exception to that general rule, <b>in specific exceptional circumstances the contract may be modified without a new public procurement procedure.</b></p> <p>Below are outlined the criteria which need to be met in order to determine whether the specific circumstances exist. If there is a need to modify the contract, the circumstances of any specific contract are to be checked against the criteria outlined below. However, the assessment of these criteria must be performed carefully and thoroughly by the contracting authority. They must be well documented and justified. The burden of proof for the circumstances rests with the contracting authority.</p>							
<p><b>MODIFICATION IS NOT SUBSTANTIAL (based on the value)</b></p>	<p><b>None</b> of the specific conditions set out by the Directive need to be checked, and the contract may be modified without a new procurement procedure if:</p>	<p>a) the modification is below the EU thresholds</p>	<p>AND (meaning, a and b have to be fulfilled at the same time)</p>	<p>b) the modification is below 10% of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts. See note 1 below.</p>	<p>Are you certain that even such a low-value modification does not alter the overall nature of the contract or framework agreement?</p>	 <p>If all are 'yes', proceed with modification.</p>	 <p>If 'no', check other possibilities, <b>tender out new contract.</b></p>	
<p><b>MODIFICATION IS NOT SUBSTANTIAL (irrespective of the monetary value)</b></p>	<p>Modifications are allowed when they are not substantial. A modification of a contract or a framework agreement during its term is considered to be <b>substantial</b> when it renders the contract or the framework agreement <b>materially different</b> in character from the one initially concluded. <b>Whether the modification is substantial is for the contracting authority to decide, document and justify on a case-by-case basis.</b></p> <p>HOWEVER:</p>	<p>Regardless of the situation described above (non-substantial modification based on the value), modifications are <b>always</b> considered substantial if one or more of the following conditions are met:</p>	<p>a) modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure.</p> <p><b>In other words, if other economic operators could have participated under those new conditions.</b></p>	<p>b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement.</p> <p><b>In other words, if the economic operator is more highly remunerated, which could have attracted other economic operators.</b></p>	<p>c) the modification extends the scope of the contract or framework agreement considerably.</p> <p><b>In other words, such a changed scope could have attracted other economic operators.</b></p>	<p>d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than the ones presented below (replacement of contractor).</p>	 <p>If all are 'no', check for other possible circumstances which render the modification substantial, before proceeding with modification.</p>	 <p>If any of these is 'yes', <b>DO NOT proceed</b> with the modification. Check other possibilities, <b>tender out new contract.</b></p>

<b>FORESEEN CHANGES</b> (irrespective of their monetary value)	Were the modifications envisaged by special review clauses (which may include price revision clauses, or options) in the initial procurement documents?	Are these clauses clear?	Are these clauses precise?	Are these clauses unequivocal?	Do the clauses state the scope and nature of possible modifications or options?	Do the clauses state the conditions under which they may be used?	Can you justify that the clauses do not provide for modifications or options which would alter the overall nature of the contract or the framework agreement?	 If all are 'yes', proceed with modification.	 If 'no', check other possibilities, <b>tender out new contract.</b>
<b>NECESSARY ADDITIONS</b>	Are there additional works, services or supplies (additional meaning, not included in the initial procurement) by the original contractor, which have become necessary?	Are you sure that change of contractor:	a) cannot be made because of economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement.	AND (meaning, a and b have to be fulfilled at the same time)	b) would cause significant inconvenience or substantial duplication of costs for the contracting authority	Are you sure that increase in price does not exceed 50% of the value of the original contract? See note 2 below.	Are you sure that such consecutive modifications are not aimed at circumventing the application of public procurement rules?	 If all are 'yes', proceed with modification.	 If 'no', check other possibilities, <b>tender out new contract.</b>
<b>UNFORESEEN CIRCUMSTANCES</b>	Has the need for modification been brought about by circumstances which a diligent contracting authority could not have foreseen?		Are you sure that the modification does not alter the overall nature of the contract?	Are you sure that increase in price is not higher than 50% of the value of the original contract or framework agreement? See note 2 below.		Are you sure that such consecutive modifications are not aimed at circumventing the application of public procurement rules?		 If all are 'yes', proceed with modification.	 If 'no', check other possibilities, <b>tender out new contract.</b>

<b>REPLACEMENT OF CONTRACTOR</b>	Is there now a new contractor which replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:	a) an unequivocal review clause or option in conformity with the provisions on foreseen changes	b) OR a universal or partial succession into the position of the initial contractor of another economic operator, following corporate restructuring (takeover, merger, acquisition or insolvency etc.)? ***!	***Extra conditions for 'b': - Does the other economic operator fulfil the criteria for qualitative selection initially established? - Are you sure that this does not entail other substantial modifications to the contract? - Are you sure that this is not aimed at circumventing the application of public procurement rules?	c) OR the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation in line with Directive rules on subcontracting	These conditions are NOT cumulative. One of them is enough, so either a, or b or c. All of the sub-conditions under 'b' are cumulative, all of them have to be fulfilled.		If there is a 'yes' on either a, or b with all sub-questions, or c, proceed with modification.		If 'no', check other possibilities, tender out new contract.

Note 1: Take care that where several successive modifications are made, the value must be assessed on the basis of the net cumulative value of the successive modifications. That means that all of the modifications count toward the maximum. Example (supplies): Modification 1 is 3%. This is ok. Modification 2 is 5%. Total= 8%. Still ok. Modification 3 is 3%. Total would be=11%. Not ok. Modification 3 cannot take place.

Note 2: Take care that where several successive modifications are made, that limitation must apply to the value of each modification. That means that every modification can go up to 50%. Example 1: Modification 1 is 20%, modification 2 is 67%. First is ok, second is not. Example 2: Modification 1 is 40%, modification 2 is 45%. Both are fine. For the purpose of this calculation of the price in these cases, the updated price is the reference value when the contract includes an indexation clause. It should be stressed that the introduction of modifications without a new award procedure constitutes an exception; the possibility of introducing consecutive modifications should be used with extreme caution and should not be aimed at circumventing the public procurement directives and the principles of equal treatment, non-discrimination and transparency that underlie them.

Source: Article 72 of Directive 2014/24/EU.

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## 5.4. Deal with complaints and remedies

Economic operators can launch legal actions to request the enforcement of their rights under European or national public procurement rules in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement<sup>49</sup>.

Remedies are regulated by several EU Directives<sup>50</sup> and allow for the suspension of any decision taken by a contracting authority, setting aside unlawful decisions, including the contract itself and awarding damages to contractors.

In addition, failure to comply with the Remedies Directives could prejudice future EU grants to the contracting authority, or could lead to the reclaiming of grants already awarded.

Furthermore, failure to respect the rules on public procurement can lead to financial consequences for the contracting authority, but also for its staff who may be personally liable in some jurisdictions.

If necessary, contracting authorities can seek legal advice on handling a complaint via their respective national public procurement authorities.

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## 5.5. Terminate a contract during its term

Contracting authorities may have to terminate a contract during its term when they become aware that the contract is in breach of EU or national legislation.

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<sup>49</sup> OECD/SIGMA, Public procurement Brief 12, Remedies, September 2016, September 2016: <http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf>.

<sup>50</sup> Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 21 December 1989, as amended. Available at: <http://eur-lex.europa.eu/eli/dir/1989/665/oj>.

Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, 25 February 1992, as amended. Available at: <http://eur-lex.europa.eu/eli/dir/1992/13/oj>.

Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, 11 December 2007, as amended. Available at: <http://eur-lex.europa.eu/eli/dir/2007/66/oj>.

On the European procurement legal framework, contracting authorities are allowed to terminate a contract during its implementation on one of the following grounds:

- » The contract has been substantially modified whereas a new procurement procedure should have been launched;
- » The contractor should have been excluded from the procurement procedure because it is not compliant with the exclusion grounds set out in the procurement documents and/or in the national legislation;
- » The contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and Directive 2014/24/EU that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty on the Functioning of the European Union.

In addition, as in any contractual relationship, contracts may also be terminated because of evidenced failure of the contractor to fulfil its obligations.

In all cases, the provisions ruling the termination of the contract must be determined in advance in the public contract through dedicated provisions.

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## 5.6. Close the contract

Once the contracting authority has formally accepted the final deliveries and has paid the related invoices, the public contract can be closed.

On completion of the contract, some economic operators may ask the contracting authority to issue a certificate of satisfactory execution and to fill in a satisfaction survey or a questionnaire to gather feedback and recommendations on their performance.

Similarly, it is important that the contracting authority draws some conclusions and identifies **key take-aways from the work achieved** which can be recorded in the contract file. For example, the contract manager may briefly answer the following questions:

- » Did we get what we requested?
- » Did we get what we actually needed?
- » Can we see a difference between the two? If yes, can we explain the difference between the two?
- » Are there any lessons-learned (positive or negative) for future contracts/projects?

For bigger contracts, the contract manager may organise a **closure meeting** with the main interested parties involved to assess how the contract has performed against its original expectations. This meeting should be an opportunity to:

- » Communicate the results of the implementation to all interested parties involved;
- » Acknowledge the performance of those who contributed to the success of the project. Expressing gratitude and recognition to useful contributors will also help mobilise them in the future;
- » Learn from errors, external issues or risks realised and analyse how these problems could have been overcome or minimised;
- » Draw key take-aways and recommendations for future contracts.

## 6. Toolkit

### 6.1. Most common errors in public procurement

Errors in public procurement are understood as breach of public procurement rules, regardless of what stage they occur in the procedure and their impact on the final results of the public contract.

Errors are usually detected during:

- » internal financial controls and audits;

- » review procedures triggered by appeals of economic operators against decisions of contracting authorities; or

- » audits and checks performed by external bodies<sup>51</sup>.

The table below presents the most common errors detected in previous years by the Commission, in particular during audits of ESI funds. For each type of error, guidance and advice are provided in one of the sections of this document.

Most common errors	Most relevant section of the guidance
<b>Choice of the procedure</b>	<b>Chapter 1</b>
Absence of tendering or inappropriate procedure	1.5. Choose the procedure
Cases not justifying the use of the negotiated procedure with prior publication of a contract notice	
Unlawful splitting of contracts	1.4.2. Single contract or lots 1.4.4. Contract value
Underestimated contract value	1.4.4. Contract value
<b>Publication</b>	<b>Chapter 2</b>
Non-compliance with publication requirements	2.1. Draft procurement documents 2.5. Advertise the contract
Non-compliance with time limits and/or extended time limits for receipt of tenders or requests to participate	2.4. Set the time limits
Insufficient time for potential tenderers/candidates to obtain tender documentation	
Failure to publish the selection and/or award criteria in the contract notice or in the specifications	2.3. Define the criteria

<sup>51</sup> OECD/SIGMA, Public procurement Brief 29, Detecting and Correcting Common Errors in Public Procurement, July 2013. Available at: [http://www.sigmaxweb.org/bytopic/publicprocurement/Common\\_Errors\\_Public\\_Procurement\\_2013.pdf](http://www.sigmaxweb.org/bytopic/publicprocurement/Common_Errors_Public_Procurement_2013.pdf).

Most common errors	Most relevant section of the guidance
<b>Technical specifications and criteria</b>	<b>Chapter 2</b>
Insufficient definition of the subject matter of the contract	2.2. Define specifications and standards
Restrictive technical specifications breaching equal treatment, non-discrimination and transparency requirements	
Unlawful, disproportionate and/or discriminatory selection and/or award criteria	2.3. Define the criteria
Mixing-up of selection and award criteria	
<b>Selection, evaluation, award</b>	<b>Chapters 3 and 4</b>
Lack of transparency and/or equal treatment during evaluation	3.3. Assess and select tenders 4. Evaluation of tenders and award
Changing of selection/award criteria after opening of tenders, resulting in incorrect acceptance of tenderers	3.3. Assess and select tenders 4.2. Apply the award criteria
Changing a tender during evaluation	
Negotiation during the award procedure	
Arithmetic errors when adding up scores and ranking tenders	
Use of average pricing	
Insufficient rejection of abnormally low tenders	4.3. Deal with abnormally low tenders
Conflict of interest	1.2.3. Integrity and conflict of interest 4.1. Set up the evaluation committee
Inappropriate contract terms	2.1.2. Draft contract
<b>Contract implementation</b>	<b>Chapter 5</b>
Award of additional works/services/supplies contracts without competition when none of the exceptional circumstances stated in Directive 2014/24/EU have been demonstrated	5. Contract implementation
Change in the scope and/or value of the contract	5.3. Deal with contract modifications

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## 6.2. Resources and references

### 6.2.1. Legal framework

European Commission, DG GROW, Public procurement — Legal rules and implementation. Available at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/>

Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT?uri=celex:12012E/TXT>

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Available at: <http://eur-lex.europa.eu/eli/dir/2014/24/oj>

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Available at: <http://data.europa.eu/eli/dir/2014/25/2016-01-01>

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Available at: <http://data.europa.eu/eli/dir/2014/23/2016-01-01>

Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document. Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT?uri=OJ:JOL\\_2016\\_003\\_R\\_0004](http://eur-lex.europa.eu/legal-content/EN/TXT?uri=OJ:JOL_2016_003_R_0004)

Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the

European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006. Available at: <http://eur-lex.europa.eu/eli/reg/2013/1303/oj>

Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 21 December 1989, as amended. Available at: <http://eur-lex.europa.eu/eli/dir/1989/665/oj>

Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, 25 February 1992. Available at: <http://eur-lex.europa.eu/eli/dir/1992/13/oj>

Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, 11 December 2007. Available at: <http://eur-lex.europa.eu/eli/dir/2007/66/oj>

World Trade Organisation, Agreement on Government Procurement — Revised version, 2012. Available at: [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_1994\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_1994_e.htm)

### 6.2.2. General guidance and tools

European Commission, DG GROW, Public procurement website. Available at: [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en)

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## **SIGMA, Support for Improvement in Governance and Management**

SIGMA is a joint initiative of the OECD and the European Union. Its key objective is to strengthen the foundations for improved public governance through building the capacities of the public sector, improving collaboration between all the different strands of governance and improving the design and implementation of public administration reforms.

SIGMA has developed **extensive materials on public procurement** that can be useful to all kinds of contracting authorities. This includes multi-country comparative studies, procurement training manuals, targeted papers and policy briefs.

In particular, the **SIGMA Public Procurement Training Manual and the SIGMA public procurement briefs** provide guidance, advice, practical examples and recommendations to contracting authorities on how to comply with EU public procurement legislation and make the most out of effective procurement procedures. The training manual and procurement briefs contribute to improving the professional skills of procurement officers and managers both in the public sector (contracting authorities) and the private sector (economic operators).

Available at: <http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>



### OECD Public procurement toolbox

This online resource provides a collection of policy instruments and specific country examples and proposes practical tools, reports and indicators on numerous aspects of public procurement.

Available at: <http://www.oecd.org/governance/procurement/toolbox/>



### SIMAP, Information on European public procurement

SIMAP is the information system for public procurement developed by the European Commission. The SIMAP portal provides access to the most important information about public procurement in Europe:

- » **TED (Tenders Electronic Daily)** is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement. It is the single official source of public contracts in Europe.
- » **e-Notices** is a web-based tool that simplifies and speeds up the preparation and publication of notices to the OJEU.
- » **e-Senders** service allows qualified organisations to submit notices directly as XML files.
- » **e-Tendering** is an e-procurement platform dedicated to EU institutions.

In addition, SIMAP contains many useful resources, including codes and nomenclatures, templates for publications and key procurement documents.

Available at: <http://simap.ted.europa.eu>

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#### 6.2.5. Management and control of ESI funds

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## 6.3. Checklist for specifications drafting

The 'specifications' are the key procurement document setting out the needs to be satisfied by the contract. They form the basis for choosing the successful tenderer and will be incorporated into the contract setting out what the contractor has to deliver.

The purpose of the specifications is to provide economic operators with a clear, accurate and full description of the contracting authority's needs, and thus to enable them to propose a solution to meet those needs.

Their final review and validation is therefore a key decision point in the procurement procedure, and it

is important that those undertaking it have the necessary knowledge, authority and experience.

Unclear, inconsistent and misleading specifications will negatively impact the whole procedure and will certainly prevent the contract from achieving its primary goal.

To avoid errors and to build the best specifications possible, it is very useful if contracting authorities carefully review and self-assess their own work, for example by using the checklist below.

If the specifications are clear, comprehensive and compliant, all answers should be 'Yes' or 'N/A' if irrelevant. If any of the answers is 'No', a comment and/or a justification must be provided and the specifications should be improved.

Questions	Yes, No, N/A	Comments
<b>Before drafting the specifications</b>		
1. Has the contracting authority researched the market and/or consulted internal or external stakeholders?		
2. Has the contracting authority considered alternative delivery mechanisms, including cooperating with other procurers?		
3. Has the contracting authority identified useful sources of information and gathered relevant documentation, including examples of previous specifications for similar purchases?		
4. Has the contracting authority carried out a risk assessment and allocated risks appropriately?		
5. Has the contracting authority considered dividing the contract into lots?		
6. Has the contracting authority ensured that funding is available?		
<b>Context and subject matter</b>		
7. Do the specifications contain background material to help the tenderers understand the requirements in context?		
8. If there is a significant volume of background material, are the supporting documents easily available for all interested tenderers? (e.g. Do tenderers have access to a data room? Are documents sent electronically upon request?)		
9. Do the specifications accurately identify the contracting authority's needs and requirements?		

Questions	Yes, No, N/A	Comments
10. Is the subject matter of the contract reflecting the contracting authority's priorities?		
11. Are the specifications consistent with the business case?		
12. Do the specifications avoid including items that could be covered better elsewhere through another contract?		
13. If applicable, do the specifications fit with standard specifications template in use in the contracting authority?		

### Delivery

14. Has the contracting authority determined precisely the scope and the range of goods/services/works required?		
15. Do the specification accurately define the required outputs and/or outcomes?		
16. Do the specifications present a realistic timetable for the procurement procedure and the implementation of the contract?		
17. Do the specifications state clearly the contract period and any possible extensions?		

### Criteria (either included in the specifications or in other procurement documents)

18. Do the specifications detail exclusion grounds, selection criteria and award criteria as well as their respective weighting, scoring and evaluation method?		
19. Are the award criteria linked to the subject matter of the contract?		
20. Are the award criteria based on the most economically advantageous tender (i.e. either price-only criteria, cost-effectiveness or best price-quality ratio)?		
21. Has the contracting authority ensured that selection and award criteria are clear to all?		
22. Has the contracting authority carried out trial runs to test the selection and award criteria?		

### Review

23. Are the specifications clear, complete and reliable and have they been proofread?		
24. Are the specifications incorporated into a contract?		
25. Do the specifications avoid asking for irrelevant information?		
26. Do the specifications have a version numbering control mechanism (e.g. version 1, version 2, final version)?		
27. Are the specifications validated and signed off by a person/body with the necessary authority within the organisation?		

## 6.4. Checklist for the control of public procurement

Procurement procedures are often checked ex post, particularly in the context of checks and audits of ESI funds. However, numerous errors could be avoided if contracting authorities (CA) were to carry out self-assessment of their ongoing work during the preparation and implementation of procurement procedures.

The checklist should not be used only by controllers and auditors, but also by practitioners while performing their tasks. This will enable them to verify

if they are on the right track and that they are not overlooking an important aspect of the process.

To avoid errors, it is very useful if contracting authorities review this checklist as part of a self-assessment while planning a procurement procedure, as well as at each stage of that procedure.

If the procurement procedure has been conducted correctly, all answers should be 'Yes' or 'N/A' if irrelevant. If any of the answers are 'No', a comment and/or a justification must be provided and the process should be improved.

Questions	Yes, No, N/A	Comments
<b>Definition of the need</b>		
1. Were the needs the procurement procedure aimed to satisfy clearly identified by the CA?		
2. Did the CA consider all reasonable alternatives?		
3. Was the number/scope necessary or would fewer/less not be sufficient?		
4. Were the technical requirements indispensable or would a lower level have sufficed?		
<b>Procurement team</b>		
5. Was a procurement team formed at the planning stage of the procurement procedure?		
6. Did the procurement team authorise the key steps in the procurement or was this done by the senior management of the CA?		
7. Where the CA engaged external stakeholders to contribute to the procurement procedure, were they free from influence of the particular interests of economic operators?		
8. Did all those involved in the procurement procedure, and in particular external stakeholders, sign a declaration of absence of conflict of interest and confidentiality?		
<b>Choice of procedure</b>		
9. Was the choice of the procurement procedure explained and documented in accordance with the principles of competition, transparency, non-discrimination/equal treatment and economic proportionality?		
10. Was the procurement procedure chosen appropriate for the specific circumstances and was it admissible?		

Questions	Yes, No, N/A	Comments
11. If exceptional negotiated procedures were used, did the CA give sufficient and reasonable reasons for choosing its option (did it provide a detailed explanation as to why an open or restricted procedure was not possible)?		
12. For below-threshold procurements, can it be confirmed that there is no evidence that national public procurement legislation has been breached?		
13. If the CA opted for an accelerated procedure, was this duly justified?		

### Contract value

14. Did the CA identify the full contract value and include options and provisions for renewals?		
15. Was the estimated contract value based on realistic and up-to-date prices?		
16. Was the estimated contract value in line with the final cost of the contract awarded?		
17. Can it be confirmed that the contract has not been artificially split in order to avoid the requirement to publish the contract notice in the OJEU?		

### Advertising

18. Was the contract advertised in the OJEU, and in relevant national publications if needed?		
19. Were the minimum time limits (depending on whether a prior information notice was published) complied with?		
20. As of 18 October 2018, did the CA check the availability of e-submission and make sure it worked?		
21. Were all procurement documents accessible to all tenderers in the same way (i.e. specific documents were not easier to obtain for domestic tenderers)?		
22. Did the CA make sure that the use of the European Single Procurement Document was available above EU thresholds?		
23. Was the use of EU grant funding indicated in the contract notice? (This is not compulsory, but it is good practice for EU grant-supported projects.)		
24. Did the contract notice or related documents clearly state the criteria to be used for selecting capable tenderers and evaluating the most economically advantageous tender?		
25. Were weightings for the award criteria listed in the contract notice or in a related procurement document?		

Questions	Yes, No, N/A	Comments
26. Did the technical specifications allow equal access to compete to all tenderers and without creating unjustified obstacles to competition, e.g. did they avoid setting national standards without recognising the possibility for equivalent standards?		
27. Were requests for information from tenderers answered ensuring equal treatment for all tenderers and within the time limits?		

### Procurement documents

28. Could tenderers access all relevant information straight from the procurement documents?		
29. Did the CA make sources of information beyond the procurement documents equally available for all economic operators?		
30. Did tenderers fully understand, without any ambiguity, which documents and declarations had to be presented with the tender?		
31. Were the technical specifications clear, unambiguous and comprehensive, giving a precise definition of the characteristics of the works/supplies/ services to be provided and thereby making it possible for all economic operators to understand it in the same way?		
32. Was there a specific request for economic operators to comply with social and labour law obligations including international conventions?		
33. When the CA set social or environmental conditions for the performance of the contract, were these compatible with EU law and was appropriate information given to the tenderers?		
34. Were any unjustified references to a specific make or source, a particular process, trademark, patent, type, or specific origin or production excluded from the technical specifications, thereby preventing the CA from favouring or eliminating specific undertakings or products?		
35. Were there no inconsistencies between the several procurement documents?		

### Criteria

36. Did the procurement documents fix requirements for the selection of tenderers in terms of their personal situation, minimum capacity levels concerning economic and financial standing, and technical and/or professional ability?		
37. Where the CA weighted selection criteria, did it publish the weightings in the procurement documents, i.e. in advance of the receipt of the tenders?		
38. Did the CA clearly define the award criteria?		
39. Where the award criteria target the best price-quality ratio, were they different from those for the selection of tenderers?		
40. Where the award criteria target the best price-quality ratio, were they linked to the subject matter of the contract?		

Questions	Yes, No, N/A	Comments
41. Were the weighting/scoring systems coherent, convincing and concise, leaving little scope for arbitrary evaluation?		
42. Were the award criteria suitable for selecting the tender that offers the best value for money?		

### Variants

43. If variants were allowed, was the award criteria that of the most economically advantageous tender?		
44. Was the admissibility of variants displayed in the contract notice?		
45. Did the CA state the minimum requirements to be met by the variants in the procurement documents?		

### Selection

46. Did the CA only assess tenders submitted within the time limit and that met formal requirements?		
47. Was the selection of tenderers independently conducted?		
48. Were the reasons for the selection and rejection of tenderers in line with the published criteria and properly documented?		

### Evaluation and award

49. Did the members of the evaluation committee have the appropriate knowledge given the subject matter of the contract?		
50. Did all members of the evaluation committee sign a declaration of absence of conflict of interest and confidentiality?		
51. Were the award criteria used to evaluate the tenders and the related weightings those and only those set out in the procurement documents?		
52. In the case of a restricted, negotiated or competitive dialogue procedure, did the CA make sure not to re-use criteria used at the pre-selection phase for the evaluation?		
53. Did the evaluation committee carry out a non-discriminatory evaluation procedure following the methodology described in the procurement documents in order to award the contract?		
54. If any tender seemed 'abnormally low', did the CA request in writing the reasons for the abnormally low tender price?		
55. Is there a complete evaluation report signed by all members of the evaluation committee?		
56. Was the contract actually awarded to the tenderer chosen by the evaluation committee?		
57. Were all unsuccessful tenderers notified with the correct information, within the relevant timescale, and was a 'standstill period' applied before the contract was signed?		

Questions	Yes, No, N/A	Comments
58. Was the contract award notice published in the OJEU within 30 days of the contract signature date?		
59. If a tenderer submitted a complaint or appeal to the CA or other relevant body, did the CA treat the complaint fairly in a transparent and documented way?		

### Changes to contracts

60. If any additional works/services/supplies were awarded without competition, did all of the relevant exceptional conditions apply?		
61. If the scope was changed, was this done without revisiting the initial decision to award the contract to the contractor?		
62. Were contracted timescales altered without revisiting the original decision to award the contract to the contractor?		
63. Provided that a change to the contract value did not alter the overall nature of the contract, was the change below EU thresholds?		
64. Provided that a change in the contract value did not alter the overall nature of the contract, was the change below 10% of the initial contract value for services and supplies, and below 15% for works?		
65. If the contract value was changed, was this done without altering the economic balance in the favour of the contractor?		

### Record keeping

<p>66. Did the CA keep a physical or electronic record of the following key documents of the procurement procedure?</p> <ul style="list-style-type: none"> <li>» contract notice (OJEU)</li> <li>» procurement documents including technical specifications</li> <li>» record of tenders received</li> <li>» evidence of the opening of tenders</li> <li>» evidence of the selection of tenders including scoring against the set criteria</li> <li>» evidence of the evaluation of tenders including scoring against the set criteria</li> <li>» evaluation report</li> <li>» notifications to successful and unsuccessful tenderers</li> <li>» formal contract</li> <li>» contract award notice (OJEU)</li> <li>» proof or acceptance of deliveries</li> <li>» evidence that deliveries are at the tendered cost</li> <li>» evidence that deliveries correspond to the technical specifications</li> <li>» invoices</li> <li>» justification of changes to the contract in specific circumstances, if relevant</li> </ul>		
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## 6.5. Template declaration of absence of conflict of interest and confidentiality

### Declaration of absence of conflict of interest and confidentiality

<b>Contracting authority</b>	[Full name]
<b>Title of contract</b>	[Title and number if applicable]
<b>Type of contract</b>	[Works/Supplies/Services]
<b>Procedure</b>	[Open/Restricted/Negotiated/Direct award/Competitive dialogue/Competitive procedure with negotiation/Innovation partnership/Other]
<b>Contract value</b>	[Amount and applicable currency]
<b>Date of dispatch of contract notice</b>	[If applicable]

I, the undersigned, \_\_\_\_\_, having being appointed to take part to the [project team/evaluation committee] for the above-mentioned public contract, hereby declare that:

- » I am aware of Article 24 of Directive 2014/24/EU on public procurement, which states that: 'The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.'
- » to the best of my knowledge and belief I have no conflict of interest with the operators who have submitted a tender for this procurement, including persons or members of a consortium, or with the subcontractors proposed;
- » there are no facts or circumstances, past or present, or that could arise in the foreseeable future, which might call into question my independence in the eyes of any party;
- » if I discover during the course of the [project/evaluation] that such a conflict exists or could arise, I will inform the contracting authority with-

out delay;

- » I am encouraged to report a situation or risk of conflict of interest as well as any type of wrongdoing or fraud (i.e. whistleblowing), and if I do so, I should not be treated unfairly or be sanctioned;
- » I understand that the contracting authority reserves the right to verify this information.

Finally, I also confirm that I will keep all matters entrusted to me confidential. I will not communicate outside the [project team/evaluation committee] any confidential information that is revealed to me or that I have discovered. I will not make any adverse use of information given to me.

Date and place:

\_\_\_\_\_

Full name:

\_\_\_\_\_

Signature:

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