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**Public Procurement**

**Guidance for practitioners on the avoidance of the most common errors**

**in projects funded by the European Structural and Investment Funds**

**Final Version**

**October 2017**

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|  | This document has been drawn up by the Commission Services in consultation with the European Investment Bank. |  |

**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

|  |  |
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| **Acronym** | **Definition** |
| CA | Contracting authority |
| CAN | Contract award notice |
| CEO | Chief Executive Officer, highest-ranking executive in an organisation |
| CN | Contract notice |
| DG EMPL | Directorate-General for Employment, Social Affairs and Inclusion of the European Commission |
| DG GROW | Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission |
| DG REGIO | Directorate-General for Regional and Urban Policy of the European Commission |
| EC | European Commission |
| ECA | European Court of Auditors |
| e-CERTIS | Cross-border certificate documentary |
| EEA | European Economic Area |
| EFTA | European Free Trade Association |
| EMAS | Eco-Management and Audit Scheme |
| ESI Funds | European Structural and Investment Funds |
| ESPD | European Single Procurement Document |
| EU | European Union |
| FIDIC | International Federation of Consulting Engineers |
| GDP | Gross Domestic Product |
| GPP | Green Public Procurement |
| IAASB | International Auditing and Assurance Standards Board |
| IATA | International Air Transport Association |
| ICAO | International Civil Aviation Organisation |
| ISA | International Standards on Auditing |
| ISO | International Organisation for Standardisation |
| LCC | Life-cycle cost |
| MEAT | “Most economically advantageous tender” criterion |
| OJEU | Official Journal of the European Union |
| OLAF | European Anti-Fraud Office |
| PCP | Pre-commercial procurement |
| PIN | Prior Information Notice |
| PPI | Public Procurement for Innovation |
| SIMAP | Information system for public procurement |
| SME | Small and medium-sized enterprise |
| SRPP | Socially Responsible Public Procurement |
| TED | Tenders Electronic Daily, the Supplement to the Official Journal of the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| ToR | Terms of reference |

# 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 a compliant, efficient, value-for-money purchase of public works, supplies or services.

Managing authorities of European Structural and Investment (ESI) Funds programmes and other EU-funded programme authorities may also find the guidance useful when acting themselves as public buyers as well as 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?

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| This guidance aims to **assist procurement officers in a practical way to avoid some of the most common errors and financial corrections** observed in the past years by the Commission services in the use of ESI Funds (see 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 persons involved in the procurement process comply with national legislation and with their own organisation’s internal rules, as well as the EU rules.

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

## Structure of the guidance

The present guidance is **structured around the main stages of a public procurement process** from planning to contract implementation, highlighting 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 helps to public buyers

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

Throughout the guidance, the following symbols flag crucial areas:

|  |  |
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| **red-warning-sign  RISK OF ERROR!** | HELP_GreenCross  **HELP!** |
| 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. | 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[[1]](#footnote-2) 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, such as, for example, building or civil engineering works like a road or a 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, for example, stationery, vehicles, or computers. | Public contracts other than public works or supply contracts having as their object the provision of services, such as, for example, consultancy, training or cleaning services. |
| Detailed list of works in Annex II of the Directive |  | Detailed list of services in Annex XV of the Directive |

Source: Directive 2014/24/EU

The present guidance provides advice and recommendations to contracting authorities on the basis of the European legal framework, in particular the Directive 2014/24/EU. This legislation is applicable above a set of EU thresholds, which means that it sets minimum requirements only for procurement procedures whose monetary value (i.e. contract value) exceeds certain amounts[[2]](#footnote-3). When the contract value is below these EU thresholds, the procurement processes are regulated by national rules, which nevertheless have to respect general principles of the Treaty on the Functioning of the EU[[3]](#footnote-4).

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

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| **HELP_GreenCross  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> * The SIGMA initiative: Key procurement publications and policy briefs: <http://www.sigmaweb.org/publications/key-public-procurement-publications.htm> |

# 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 design contests above certain thresholds. It aimed to ensure equal treatment and transparency, reduce fraud, corruption as well as 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 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[[4]](#footnote-5) 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;
* 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 which may be applicable as of 18 April 2016 even if the transposition process in all Member States has not been finalised (see section What if the new Directive 2014/24/EU has not been transposed yet in my country?).

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

* Increase the efficiency of public spending;
* Clarify basic notions and concepts to ensure legal certainty;
* Facilitate the participation of SMEs in public contracts;
* Promote integrity and equal treatment;
* Enable contracting authorities to make better use of procurement in support of innovation as well as 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[[5]](#footnote-6) brought by the reform that procurement practitioners used to the former Directives should pay attention to.

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

* The Directive 2014/24/EU brings new definitions to clarify the different **notions used in procurement procedures**, such as procurement document, economic operator (including candidate and tenderer) and presents new concepts that are essential in the context of public contracts, such as electronic means, life cycle, innovation or label.
* **Two categories of contracting authorities** are introduced in order to differentiate central government authorities (national public bodies) from sub-central contracting authorities operating at regional and local levels. This typology mainly impacts thresholds for the application of the directives (see below). The threshold is higher for sub-central contracting authorities in the cases of supply contracts and of most service contracts.
* The **thresholds** above which the European legislation for public procurement is applicable 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 two years, and can be regularly checked on the Commission’s website[[6]](#footnote-7).

Table 2. EU thresholds for public contracts for the period from 1 January 2016 to 31 December 2017

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| --- | --- | --- | --- | --- | --- |
|  | **Works** | **Supplies** | **Services** | | |
| **Social and specific services** | **Subsidised services** | **All other services** |
| **Central Government authorities** | € 5 225 000 | € 135 000[[7]](#footnote-8) | € 750 000 | € 209 000 | € 135 000 |
| **Sub-central contracting authorities** | € 5 225 000 | € 209 000 | € 750 000 | € 209 000 | |

Source: Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts.

## Facilitating SME participation in public contracts

* Contracting authorities are encouraged to **divide contracts into lots** to facilitate SME participation 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.
* An online tool called "**e-CERTIS**" allows economic operators to find out the administrative documents they may be asked to provide in any EU country. This should help them to participate to cross-border procurement if they are unfamiliar with requirements from other countries.
* The **European Single Procurement Document** (ESPD)[[8]](#footnote-9) 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 obligation could be lifted once evidence can be linked electronically to national databases.
* As of 18 October 2018, an economic operator might not have to provide administrative supporting documents if the contracting authority already possesses these documents.

## More provisions on the exclusion grounds and award criteria

* **New exclusion grounds** allow contracting authorities to reject economic operators for poor performances or significant deficiencies during the execution of a former public contract, or if they distort competition by practicing collusive tendering with other economic operators.
* Regarding 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 elements 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 communicated to the EC upon request.

## Improved safeguards against corruption

* The **definition and rules regarding conflict of interest** have been clarified and there are more requirements on contracting authorities to put in place appropriate measures against conflicts of interest. The rules do not establish which safeguards should be used. Nonetheless, some common practices could be developed, for instance asking all procurement officers to sign a declaration for each procurement procedure to confirm they have no interests with any participating tenderer.
* **Time limits for the exclusion of economic operators** are limited to three or five years depending on the reason for the exclusion.
* 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**.
* New provisions regulate the **modification of contracts** in order to avoid abuse and ensure fair competition regarding potential new tasks.
* Member States have to **report violations of public procurement rules** to national authorities, make the results of their monitoring available to the public, and submit a report to the Commission every three 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 uptake of **e-procurement contributes to increase transparency**, reduce unfair interaction between procurement practitioners and economic operators, and facilitate the detection of irregularities and corruption through transparent audit trails[[9]](#footnote-10).

## Inclusion of 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, but also achieving policy goals, notably in the fields of innovation, environment and social inclusion:

* 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 evidences concerning social and/or environmental considerations.
* Contracting authorities are allowed to use environmental or social aspects as **award criteria** or **contract performance conditions**.
* Contracting authorities are allowed to take the **full** **life-cycle cost** into account when awarding contracts. This may foster more sustainable and better value offers which might save money in the long term despite appearing on initial examination to be more costly.

## Electronic procurement

* As of 18 October 2018, contracting authorities have to implement **exclusive electronic public procurement** via dedicated e-procurement platforms[[10]](#footnote-11). This means that all steps of procurement procedure from the publication of notices to the submission of tenders must be conducted via electronic means.
* As of 18 October 2018, the **European Single Procurement Document** (ESPD) must be provided exclusively in electronic form. Until then, ESPD can be printed, filled in manually, scanned and sent electronically. The EC has actually developed a tool23 that allows contracting authorities to create their ESPD and attach it to tender documents.
* Within the Internal Market Information System (IMI), the EC has established an online service called **e-CERTIS**[[11]](#footnote-12) to identify the **correspondence between 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).

## Changes in procedures

* The open and restricted procedure remain the **main types of procedures**, available for all types of public procurement.
* The **minimum time limits** by which economic operators need 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 off-the-shelf. Contracting authorities get 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 from Annex II B of Directive 2004/18/EC.
* The directives now explicitly refer to **pre-commercial procurement** and have facilitated its wider use by clarifying the exemption for R&D services.
* A new procedure, the **innovation partnership**, was also introduced that combines the purchase of R&D services and the purchase of the developed innovative solutions in one procedure through a partnership between the economic operator and the contracting authority.
* **Mixed contracts** allow for the combination of several types of procurement (works, services or supplies) in one procurement procedure. The rules to apply in that case are the ones 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.

## 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 the Directive 2014/24/EU on public contracts. The new **Directive 2014/23/EU[[12]](#footnote-13) 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, if the contracting authority exercises a control on the contractor which is similar to that which it exercises over its own departments; second, if more than 80% of the activities of the contractor are entrusted by the controlling contracting authority; and finally, if there is no direct private capital participation of the contracting authority in the contractor. The nature and extent of this control is precisely described in the Directive 2014/24/EU and should be carefully checked on a case-by-case basis before contracting "in house"[[13]](#footnote-14).
* Where **inter-administrative cooperation** leads two or more contracting authorities to conclude a contract to achieve common objectives related to 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.

## What if the new Directive 2014/24/EU has not been transposed yet in my country?

The 2014 public procurement Directives, including Directive 2014/24/EU, should have been transposed into national law by 18 April 2016, but the transposition is delayed in numerous Member States. This has created uncertainty for contracting authorities on the rules to apply to procurement procedures above EU thresholds.

In countries where the new Directives are not transposed, there is no straightforward answer for public procurers who wish to know if the new Directive 2014/24/EU applies to their work or not. Every situation must be analysed on a case-by-case basis and ultimately checked with the relevant authorities.

Nevertheless, some general rules and principles can provide some initial guidance as to which legislation to apply.

**In principle, 2004 Directives are applicable if the procurement procedure was initiated before 18 April 2016** but not yet finalised on that date. As a general indication, one can consider that the initiation of the procurement procedure is the point in time when the contracting authority chooses the type of procedure to be followed and decides definitively whether a call for competition is necessary for the award of the public contract.

According to the Court of Justice of the European Union, if the procurement procedure was initiated after 17 April 2016[[14]](#footnote-15), **the 2014 Directives provisions that are “sufficiently clear, precise and unconditional” are directly applicable** provided that they are favourable to economic operators against contracting authorities.

As a general principle, **public authorities cannot take advantage of non-transposed directives on economic operators or individuals**. As a result, contracting authorities should always apply provisions that are more favourable to economic operators.

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| **red-warning-sign  When in doubt, don't! And ask.** |
| Coping with this period of legal uncertainty is clearly not ideal for procurers and they should be able to carry out their tasks without taking unnecessary risks.  Whenever in doubt, contracting authorities should always **seek clarification in writing** from the relevant public procurement authorities in the Member State.  The support might come from either public procurement policy-making bodies, official ad hoc support structures or managing and audit authorities, for example in the context of projects co-financed by ESI Funds.  A study from the EC published in 2016[[15]](#footnote-16) provides useful information on the public procurement **institutional and support structures in each Member States**. This information can be found in dedicated country profiles available [here](http://bookshop.europa.eu/en/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-pbKN0416321/downloads/KN-04-16-321-EN-N/KN0416321ENN_002.pdf?FileName=KN0416321ENN_002.pdf&SKU=KN0416321ENN_PDF&CatalogueNumber=KN-04-16-321-EN-N). |

### In which cases contracting authorities may continue to apply the 2004 Directives?

Contracting authorities can continue to apply the 2004 Directives and the related national legislation if the procurement procedure was initiated before 18 April 2016 unless the Directive 2014/24/EU has been transposed before this date in the corresponding Member State.

### How to deal with modifications of contracts already initiated if the 2014 Directives are not transposed?

Before transposition, the contracting authorities should treat modifications as if the old 2004 Directives apply, along with the case law rules that clarify the subject matter. In this context, modifications made to a contract during its implementation must be considered as a new award in the following conditions:

* When the amendment substantially changes essential terms of the original contract and therefore demonstrates the intention of the parties to renegotiate;
* When the amendment introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted;
* When the amendment extends the scope of the contract considerably to encompass tasks not initially covered;
* When the amendment changes the economic balance of the contract in favour of the contractor in a manner which was not foreseen in the terms of the initial contract.

# Preparation and planning

The preparatory phase of a procurement procedure aims to design a robust process for the delivery of 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 steps and phases that go from planning to implementation and closure and are closely inter-connected.

Figure 2. Typical public procurement procedure stages

If the preparatory phase of the procurement procedure is done correctly then the rest is more likely to flow without difficulty, but the reverse is also true. It is often the case that the contracting authority will either underestimate the planning stage of the process or not carry it out at all.

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| HELP_GreenCross  **Preparation requires time and expertise** |
| Preparation can sometimes be long but is always a crucial phase.  Depending upon the size and complexity of the contract, the preparation might take from days to months before the contract notice is due to be published. However, a good planning should minimise the risk of needing contract modifications or variations during the implementation and 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 a procurement process, is to blame for the biggest errors.  As a result, contracting authorities increasingly employ **dedicated procurement officers** particularly to conduct complex, risky and high-value public procurements. This increasing professionalisation of the procurement function is considered best practice. |

The present section will take practitioners through the different “must-do’s” of the preparation of a procurement procedure.

## 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. 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.

In this context, any contracting authority should be able to duly justify a procurement procedure in the light of a specific need required to carry out a mission of public interest.

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| **HELP_GreenCross  Start with why** |
| Often, the subject matter of a contract is established too quickly without a proper rationale and definition of the need. 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 an inefficient use of public funds and a low value for money of the purchase.  It should be clarified that **the need is not the product nor the service we want to obtain**. **The need is the function which is missing to achieve an objective or a mission.**  For example, procurers should not start the 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 other options than a purchase such as mutualisation with other departments, or the rental or lease with an external company. All these alternatives must be taken into account before engaging the procurement procedure.  In a nutshell, the **key process** procurers should have in mind is:   * First, think of the need with relevant stakeholders. * Then, choose the procedure. * Finally, write the technical specifications, often called Terms of Reference (ToR) in the case of services (see section 2.1 Draft procurement documents). |

In the framework of EU-funded projects or programmes, working plans are normally defined for several years and it should be easier for contracting authorities to anticipate their needs of procurement of works, supplies or services.

Once needs are 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).

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| HELP_GreenCross  **Possible questions to help assess the need** |
| The following list of questions can help steering the discussions on the analysis of the need:   * What is my need? Which missing function do I need to achieve my objectives? * Do we have available human and/or technical resources internally? * Is there a way to satisfy the need without engaging a procurement procedure? Often ignored, alternatives to public procurement should be carefully considered and properly compared. * Has an analysis of alternatives been carried out to look at different ways of meeting the identified needs? Consider, for example, whether to buy, lease, rent or set a public-private partnership whatever it is we intend to procure. * What final results do we seek 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 are the critical success factors to satisfy the need? * Would it be appropriate to purchase ready-made solutions or would a tailored solution be able to satisfy our needs? * Would it be relevant to engage a dialogue with the business community? * What could be the environmental impacts of this purchase? * What could be the social impacts of this purchase? * Would 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, this assessment allows being open about alternative means of fulfilling a need, which are not necessarily linked to specific works, products or services. Furthermore, this enables contracting authorities to take into account other considerations such as environmental and social potential impacts when defining the procurement need.

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| red-warning-sign  **Examples of lack of need assessment spotted by auditors** |
| The two case studies below show how a proper assessment of needs can help further an efficient use of public funds.  *1. Needless purchase of IT equipment*  *A department procured 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 in total were already being operated and charged to capacity. He/she learned that several rollers in other offices had only had a few hours of operation and inferred from the data available that one of those rollers, in accordance with the actual local needs, could have been relocated instead of buying a new one for the office in question.”* |

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

## 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 for the elaboration of technical specifications and for the monitoring of the contract performance.

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

* A **core team in charge of the contract management**. It can be composed of 1 to 3 persons depending on the complexity of the subject, for example one procurement officer and one technical project manager. All contracts of any size or complexity will require, as a minimum, a project manager in charge of the contract who has both procurement and technical competencies;
* A **larger working group** composed of the core team and of internal experts specialised on 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. Depending on the planned number and complexity of contracts, external specialist advisors may need to be brought into the working group.

Roles and responsibilities during the procurement process should be clearly defined in the operational manuals of the CA, in particular to engage internal and external stakeholders.

### Internal key stakeholders

Recognition of internal stakeholders is a vital aspect of the future contract and it is important for the contract’s success that they are recognised and managed correctly. Stakeholders may be customers/users or other internal parties that have an interest in the contract. It can also be relevant to involve elected representatives at this early stage of the procedure through the organisation of a procurement commission.

The core team has to make sure to involve these internal stakeholders 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 specification is vital for the contract implementation and result, therefore technical qualified stakeholders should be involved from the beginning. As the contract progresses and its focus changes, the stakeholders and their needs may also change.

### External key stakeholders.

Engagement of external stakeholders is very useful when the required expertise is not available within the contracting authority. These stakeholders may be specialised experts (e.g. architects, engineers, lawyers, economists) or even business organisations, other public authorities or economic operators.

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| **red-warning-sign  Lack of involvement of the right stakeholders entails costs at a later stage** |
| Failure to recognise the need for involvement of both internal and external stakeholders is a common criticism of many contracts and this 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 investing in outside technical expertise during the preparation of the procurement is valuable for the contracting authority to make the most of the money spent and to avoid modifications or costs of relaunching the procedure at a later stage. |

However, such important involvement and consultations 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 equal treatment and transparency principles. In this regard, it is recommended to apply the same principles of confidentiality and integrity as for the market consultation (see section 1.3.2 Preliminary market consultation).

### Integrity and conflict of interest

In the context of a public procurement procedure, a conflict of interest arises where the impartial and objective exercise of the function of a person is compromised. This applies to the persons and authorising officer in charge of the procedure as well as to persons involved in the opening and evaluation phases.

More specifically, a conflict of interest covers any situation where staff members of the contracting authority (or other stakeholders) involved in the conduct of the procurement procedure and who 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.

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| **red-warning-sign  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 the examples below:   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 the existence of possible conflicts of interest and take appropriate measures in order to prevent, detect conflicts of interest and remedy them. The practical guide[[16]](#footnote-17) issued by OLAF in 2013 can help them in this sense.

In particular, an easy way to prevent conflicts of interest consists in requiring that the persons taking part in the selection, evaluation and award of the contract 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).

Such declaration must include at least the following elements:

* 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;
* A statement ensuring that the person will report any conflict of interest as soon as it is detected to his/her 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 appendix (see 6.5 Template declaration of absence of conflict of interest and confidentiality).

Also, public buyers should 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 of all economic operators. In particular, Directive 2014/24/EU considers conflict of interest as a ground for exclusion of an economic operator.

Additionally, more advices can be drawn from the best practices listed below.

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| HELP_GreenCross  **Best practices to avoid conflicts of interest in public procurement** |
| * A **code of conduct** covering public procurement activities should be set up and hugely disseminated in all public organisations. Such code should require minimum standards of behaviour expected from civil servants in general – since their tasks normally involve public money or areas where it is essential to treat everyone fairly – and in particular from staff dealing with procurement. * **Systems, controls 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. * Any person involved in the Evaluation Committee or the project team in charge of the contract signs a **declaration of absence of conflict of interest**. Anyone with a potential conflict of interest should not play any role in the procurement; * Furthermore, the Evaluation Committee should be asked to **declare any actual or potential conflict of interest at the start of the procurement process**. Those declarations should be recorded and kept in the contract file; * Finally, **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[[17]](#footnote-18). |

## Analyse 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 the conduction of a preliminary market analysis in relation to the needs identified previously. For smaller contracts, this analysis can be limited but is still useful to better define the subject matter and scope of the contract.

Analysing the relevant market allows the contracting authority to achieve several objectives:

* 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.

Contracting authorities are particularly recommended to conduct a preliminary market analysis when envisaging a negotiated procedure without prior publication for a contract that can be awarded only to a particular economic operator.

Furthermore, it should be noted that a preliminary market analysis is needed in the case of pre-commercial procurements and innovation partnerships, considering that it is necessary to ensure that these types of procurement are used only when the desired product does not exist on the market.

In the case of innovation partnerships preliminary market analysis is also needed to establish the amount of potentially interested suppliers on the market to prevent crowding out of other R&D investments and foreclosing of competition for the ultimate supply of the innovative solutions.

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| **red-warning-sign** | **Not all procurements are achievable** |
| A common area for mistakes is where the contracting authority assumes that the market can deliver a contract without consulting the market on its proposals. Yet not all procurements are achievable.  It can happen that procurement procedures simply fail because no economic operators have submitted an offer or no offers was acceptable. Indeed, the market is sometimes 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 be foreseeing unrealistic timescales and budget.  In such situations, contracting authorities must start again the procurement process and reconsider the objectives, scope as well as the technical and economic conditions of the contract. These additional tasks consequently increase the workload, time and resources dedicated to the procurement process which could have been avoided with an adequate prior market analysis. | |

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, in order to ensure transparency and auditability.

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| **HELP_GreenCross  Standardised template for market analysis** |
| The OECD has developed a comprehensive methodology[[18]](#footnote-19) for market analysis including a standard template of market analysis report which is useful to:   * Guide practitioners in the conduction of the market analysis; * Document the actions carried to ensure full transparency of this stage of the process for internal capitalisation of knowledge and audit purposes.   Detailed recommendations on the approach to be followed can be found [here](http://www.oecd.org/governance/procurement/toolbox/search/template-market-study-report.pdf). |

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| **HELP_GreenCross  Toolkit on market analysis** |
| Procurement Journey Scotland has developed a **comprehensive toolkit on market analysis** publicly available online.  It provides advice and tools which can be useful to contracting authorities in other countries, such as the following market analysis summary template.    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 a market research carried out well in advance before the publication of the contract notice (CN) can be extremely useful. Moreover, advertising in the OJEU for open pre-tender dialogue via the publication of a prior information notice (PIN) is positively accepted by the market, result in more qualitative procurement documents and submitted tenders as well as reduce risk of following complaints.

The analysis of the market can be achieved thanks to two methods which are presented below:

* Market research;
* Preliminary market consultation involving candidates or tenderers.

The scope and depth of the market analysis varies according to the nature and size of the procurement. A desk-based research used to clarify the market structure, identify active economic operators, and understand prices may be an appropriate approach for standard procurement procedures.

### Market research

The most commonly used method of market analysis in view of preparing a procurement procedure is the desk research that can be carried out with internal resources of the contracting authority. It consists in gathering information, mainly from the Internet and mail or phone contacts.

A desk-based market research can provide information on the availability of products or services which meet the CA’s needs, allowing the most appropriate procurement approach to be determined without requiring much time and resources.

Frequent **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.

From this basis, public buyers should analyse the different sources of information in the light of the following framework.

Table 3. Indicative framework for market analysis

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| **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. |

In case of a complex contract, a series of predetermined benchmarks should be established to show what would be considered as an acceptable tender or even as an optimum theoretical tender prepared beforehand by the contracting authority.

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

### Preliminary market consultation

A preliminary market consultation consists in interviewing market stakeholders or contacting knowledgeable persons in the relevant field such as independent experts, specialised bodies, business organisations or economic operators.

The purpose of market consultation is twofold:

* Better prepare the procurement procedure;
* Inform economic operators of the relevant market about the planned procurement.

A dialogue with the market before the procurement process begins can help identify innovative solutions or new products or services which the public authority may not have been aware of. It can also assist the market in meeting the criteria which will be applied in the procurement process, by providing information about the public authority’s expected requirements.

Even though there are no specific rules regulating the process of market consultation, the fundamental principles of non-discrimination, equal treatment and transparency must always be respected. This is particularly important in case the contracting authority undertakes to seek or accept advice from external persons or individual economic operators.

The market must be approached in a way that ensures respect for the principles of transparency and equal treatment, avoiding disclosure of privileged information and/or privileged market positions.

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| HELP_GreenCross **Consult market without distorting competition** |
| Particular care must be taken not to impair fair competition by providing some economic operators with early knowledge of a planned procurement procedure and/or its parameters. Competition could be also impaired if the technical specifications may 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 the involvement of a previously consulted company does not distort competition within the tender procedure and that any information shared with a company as a result of its prior involvement must be made available to the other participating companies as well.  The following measures should help contracting authorities to ensure fair competition and to avoid the exclusion of a more advantaged tenderer:   * Openly announcing the preliminary market consultation (e.g. by publishing a prior information notice in national procurement portals and TED) * Communicating to other candidates and tenderers of relevant information that result from the involvement of the candidate or tenderer in the preparation of the procurement procedure; * Fixing adequate time limits for the receipt of tenders in order to give sufficient time to all candidates to analyse the information.   The contracting authority should pay attention when excluding a potential candidate for reasons related to its prior involvement in the procedure preparation. Exclusion should indeed be considered if there are no other possibilities to ensure equal treatment and 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 consider as well a comparison of the tender with the rest of the tenders received from tenderers not involved in the procedure preparation. |

Pre-commercial procurement (PCP)[[19]](#footnote-20) and specific procedure such as competitive dialogue or innovation partnership offer greater opportunities for public authorities to engage in market dialogue.

## Define the subject matter

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

Apart from the definition of the subject matter, the contracting authority has to determine during this phase the contract’s type, duration and timetable, value and structure.

### Subject matter

It is essential that public buyers identify clearly the subject matter in order to select the procurement procedure to be followed and the type of contract. The reference nomenclature provided by the common procurement vocabulary[[20]](#footnote-21) (CPV) gives a detailed description of the various types of subject to be found and can support the definition task.

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

The business case constitutes 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 to be approved by the corresponding hierarchy.

#### Business case

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

Before initiating a procurement procedure, contracting authorities should prepare a business case that provides a clear rationale as to why the procurement should go ahead and that demonstrates that key planning aspects have been considered.

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

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 hierarchical level within the contracting authority for the required budget as part of the procurement planning stage and certainly before the commencement of the actual procurement procedure.

Two indicative structures of business case are proposed either for usual procurement procedures or for more complex ones.

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

* Context and description of the need;
* Benefits to be realised/problems that the contract will solve;
* Estimated costs and budget availability;
* Outline of the timescale;
* Involvement of internal resources and of 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 during the contract preparation and implementation in case the contract is challenged and to face possible difficulties and unforeseen circumstances.

The business case should then provide more elaborated information that can be organised as follows.

Table 4. Detailed structure of business case for complex procurements

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| **Section** | **Indicative content** |
| STRATEGIC FIT | * 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 |
| MARKET RESEARCH | * Market overview; * Suppliers analysis; * Market prices; * Outcome of consultations (when applicable); * Trends and developments. |
| OPTIONS APPRAISAL | * 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 already procured contract? |
| AFFORDABILITY | * Available funding and sources; * Cost estimate; * Life-cycle cost (when applicable). |
| ACHIEVABILITY | * High-level plan of tasks; * Timetable to deliver the contract. |
| CONCLUSION | * Key take-aways; * Next steps; * Main points of attention; * Recommendation for approval. |

#### Type of contract

Another step is to **establish if the subject matter of the contract constitutes a works, supply or service** contract (see Table 1. Type of public contracts) which will especially determine which thresholds to consider for the application of EU legislation.

The outcome of this analysis can also lead to the conclusion that a concession contract is appropriate.

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

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| HELP_GreenCross **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 the satisfaction of the need.  Specifically, here are the criteria to be applied by public buyers to determine the type of contract when facing the following situations:   |  |  | | --- | --- | | **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, it can also happen that the subject matter of the contract refers to more than one EU public procurement directive.

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| HELP_GreenCross **Mixed contract falling under several EU Directives** |
| In the case of mixed contracts which have as their subject matter procurement covered by Directive 2014/24/EU as well as procurement not covered by Directive 2014/24/EU, the contracting authority may choose to award separate contracts for the separate parts or to award a single contract.  Where the contracting authority choose to award separate contracts for separate parts, the decision as to which legislation applies to any one of such separate contracts must be taken on the basis of the characteristics of the separate part concerned.  Where the contracting authority decides to award a single contract, the contracting authority has to assess whether or not the different parts of the contract are objectively separable. If they are not separable, the applicable legislation must be determined on the basis of the main subject matter of that contract. If the different parts of the contract are separable, Directive 2014/24/EU applies. |

### 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 as one of the means of facilitating small and medium-sized enterprises (SMEs) participation in public procurement.

Indeed, 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, so that any operator who is interested can tender for one or more lots.

**Dividing a contract into lots increases competition** because contracting authorities are more likely to get more tenderers and a wider range of tenderers by going to the market with more and smaller contracts. So, whereas division into lots should not be made mandatory for all contracts, it should be considered when the business case is being developed.

Splitting into lots is also appropriate when a contract for a single global 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.

In addition, **dividing a contract into lots makes it easier for SMEs to participate**. For instance, in the case of 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, thus placing the contracting authority in a position of dependence towards them.

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| HELP_GreenCross **Divide in lots, or explain** |
| Contracting authorities must, except if a single lot has been made mandatory by the Member State, provide a written indication of 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 can tend not to divide because having just one contract can lead to economies of scale and it is easier to organise. 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 such lots. |

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 or only several or only one lot. Even where 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, but 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 application of 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 they reserve the possibility of doing so and 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.

### 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 conditions the continuation of the execution of the tasks by the contractor. In addition, the time taken for the contracting authority to approve a deliverable should not be at the detriment of 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. In addition, some conditions linked to confidentiality and access for auditors are still in force long after the end of the performance.

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| HELP_GreenCross**Set up a realistic timetable** |
| A realistic timetable for the entire procurement process including potential remedy procedures, through to 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, due to unrealistic tender preparation periods thereby limiting the number of tenders and affecting their quality. |

Public procurement of works, supplies or services involving EU funds often takes place in the context of 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 for the launching of procurement procedures and needs to be taken into account well in advance by contracting authorities.

### Contract value

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

Defining a realistic budget for a contract to achieve the desired results, while achieving value for money, is another critical activity which 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 for other staff from the contracting authority or for potential auditors. The contracting authority will have to demonstrate not only the sources and method used for the estimation but also value for money of the purchase.

#### 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, transport, but also additional costs like maintenance, bespoke licences, operational costs or travel and subsistence expenses.

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| **red-warning-sign  Artificial splitting of the contract value is illegal** |
| In particular, 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 the application of 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.  If a contracting authority needs to paint a building with 10 rooms, it cannot split the contract into 10 or less contracts (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, the contract value must be calculated in this example in the total value of the 10 contracts. The overall value decides on the requirement for a tender 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 CA.*  *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 publication of the contract in the OJEU for the whole set of supplies.* |

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

Procurement rules require that the value is valid at the moment of calling for competition or launching of the procedure without publication. However, public buyers are recommended to estimate the contract value much sooner, at the beginning of the process together with the definition of the subject matter. In any case, when the Directive 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 a preliminary market research or consultation.

It must be calculated without VAT.

If the contract is split into lots, the combined value of all lots should be taken into account.

Life-cycle costs can be taken into consideration at this point, in terms of those being a method to assess the needed budget (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.

### Joint procurement

Joint procurement consists in 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 occasionally between several contracting authorities from the same Member State but also 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 common procurement procedure. In this case, where 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.

On the contrary, 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 must be jointly responsible only for those parts carried out jointly.

#### Cross-border procurement

**Contracting authorities from different Member States** can conduct joint procurement. Indeed, cross-border joint procurement can be conducted between public institutions from different Member States or by using centralised purchasing bodies located in another Member State.

The provision of centralised purchasing activities by a central purchasing body located in another Member State must be conducted in accordance with the national provisions of the Member State where 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.

## 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 made and justified at the planning stage.

Directive 2014/24/EU foresees five main procedures as well as specific regimes for particular situations which are presented in this section.

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 as well as 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 the use of 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** |
| **Open** | 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. | LOW |
| **Restricted** | 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 |
| **Competitive procedure with negotiation** | Fulfil one or more of the following criteria:   * An open or restricted procedure has attracted only irregular or unacceptable tenders. * The needs of the CA cannot be met without the adaptation of available solutions. * The subject matter includes design or innovative solutions. * The technical specifications cannot be established with sufficient precision by the CA with reference to defined standards or technical requirements. * The contract cannot be awarded without prior negotiations due to specific risks or circumstances related to the nature, complexity, or legal and financial matters. | 1. Prequalification  2. Negotiation and evaluation | All interested candidates may request participation in response to a contract notice.  At least 3 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. | HIGH   * The burden of proof for the circumstances allowing for the use of the procedure rests with the CA. * The CA is highly involved in the negotiation/dialogue with tenderers. * Limited number of tenders to evaluate and therefore less resource intensive for the evaluation committee/CA. * Two-stage or three-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. | MEDIUM |
| **Competitive dialogue** | 1. Prequalification  2. Dialogue  3. Selection and evaluation | HIGH   * Greater potential for collusion/corruption due to the increased exercise of discretion by the CA. * Transparency requirements are particularly challenging during the dialogue. | HIGH |
| **Innovation partnership** | The CA procures both the development and purchase of innovative products, services or works which are not already available in the market. | 1. Prequalification  2. Negotiation  3. Delivery | All interested candidates may request participation in response to a contract notice.  At least 3 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. | HIGH   * The burden of proof for the circumstances allowing for the use of the procedure rests with the CA. * 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. * Potentially, limited number of tenders to evaluate and therefore less resource intensive for the evaluation committee/CA. * Three-stage procedures might be longer in order to respect the required time limits. | HIGH   * Greater potential for collusion/corruption due to the increased exercise of discretion by the CA. * Transparency requirements are particularly challenging during the negotiation and the contract implementation. * Risk of crowding out of other R&D investments and foreclosing of competition for the delivery/deployment stage (2014 R&D&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). | HIGH |
| **Design contest** | 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 |
| **Negotiated procedure without prior publication** | This procedure is a derogation from general rules and can be used only under one or more of the following exceptional instances:  **For works, supplies or services:**   * An open or restricted procedure has not attracted any tenders or any suitable tenders; * Extreme urgency justified by unforeseeable circumstances; * 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.   **For works or services:**   * New works or services in case of repetition of similar works or services provided that they are in conformity with a basic project for which the original contract was awarded.   **For supplies or services:**   * For technical or artistic reasons or due to the existence of special or exclusive rights, only one possible supplier or service provider exists. * Purchase of supplies or services on particularly advantageous terms;   **For supplies only:**   * Supplies quoted and purchased on a commodity market. * Products manufactured purely for the purpose of research, study, experimentation or development; * Additional deliveries for the partial replacement or the extension of existing supplies/installations to avoid incompatibility or technical difficulties.   **For services only:**   * Contract to be awarded to the winner of a design contest. | 1. Selection and evaluation | Possibility to restrict the number of participants down to 1. | LOW   * The CA chooses the economic operators for the negotiation. | LOW   * Reduced workload for the CA due to the small number of tenders to be assessed. * Negotiation skills are required to conduct the procedure properly. | HIGH   * The use of the procedure has to be exceptional and be easily challenged by prejudiced economic operators. * Greater potential for collusion/corruption due to the increased exercise of discretion by the CA. | LOW |

### Open procedure

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

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 submission of the tenders.

Since tendering is open to all interested candidates, including cross-border ones, the open procedure highly fosters competition, resulting in a better value for money for 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 to all types of contracts and can entail greater administrative burden. Complex or highly specialised contracts may be better allocated via a more selective process[[21]](#footnote-22).

### 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 cleaning, IT equipment, furniture, and the contracting authority wishes to draw up a shortlist.

#### Pre-qualification

As a first step, the requirements of the contracting authority 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 ESPD (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 when a prior information notice (PIN) is used 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.

### Competitive procedure with negotiation

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

In all cases, the contracting authority must duly justify the use of the competitive procedure with negotiation since it is only allowed under 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 adaptation of solutions already available;
* The contract includes design or innovative solutions;
* 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 the nature, complexity, or legal and financial matters.

#### Prequalification

In competitive procedure with negotiation, the contracting authority publishes a contract notice and all interested economic operators may request participation to the procedure. To do so, they must provide pre-qualification and selection-type information to demonstrate that they are qualified to perform the contract.

#### Negotiation and evaluation

The contracting authority may then choose at least three candidates and invite them to submit an initial tender as basis of 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 (MEAT).

|  |
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| HELP_GreenCross**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 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.sigmaweb.org/publications/Public-Procurement-Policy-Brief-10-200117.pdf>

### Competitive dialogue

Contracting authorities who carry out complex projects might be unable to define the means of meeting their needs or of assessing what the market can offer in terms of technical or 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. Like for the competitive procedure with negotiation, the contracting authority must **justify the use of competitive dialogue only under a limited number of circumstances** (see section 1.5.3 Competitive procedure with negotiation).

#### Prequalification

First, a shortlist of at least three economic operators is selected on their capacity to perform the contract, like in the competitive procedure with negotiation.

#### Dialogue

Then, the contracting authority issues the invitation to participate only to the shortlisted economic operators, and it then 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** ensuring 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 MEAT criteria.

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| **red-warning-sign  Competitive dialogue is very demanding for contracting authorities** |
| Contracting authorities should be aware that the competitive dialogue is a very demanding procedure in terms of internal human resources, because **it requires both an intense use of internal staff and high levels of expertise** as it is 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. |

### Innovation partnership

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

The underlying logic of the innovation partnership is that offers 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 per the competitive procedure with negotiation and the competitive dialogue, all providers interested in the contract may request participation in response to a contract notice. The contracting authority selects minimum three candidates for their capacities in the fields of research and development as well as performance of innovative solutions.

Selection criteria shall use criteria for the selection of the partner that presents the best capacity both in the field of research and development and to supply the real scale implementation of the innovative solutions, based *e.g.* on his part performances, references, team composition, facilities, quality insurance systems, etc. 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 resulting solutions.

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

#### Negotiation and contract implementation

Once the tenders are 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, except the subject matter, the award criteria and the minimum requirements set out in procurement documents, may be negotiated. 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 points out 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 with a view to limiting the number of tenders which require negotiation and thus potentially eliminate some tenderers from the process.

After the award of 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 the completion of works, manufacturing and delivery of products or services.

The contracting authority must pay the participating partners’ remuneration 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 such 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, *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 in case the targets and minimum requirements are met (e.g. not even if better solutions have emerged in the meantime on the market).

### Design contest

The 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 signature of the corresponding contract. The negotiated procedure without prior publication of a contract notice can be used for that purpose (see section1.5.7 Negotiated procedure without prior publication).

On top of the design contract, addition, 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.

### 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 CA.

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** |
| * **An open or restricted procedure has not attracted any tenders or any suitable tenders**, provided all those who submitted tenders are included in the negotiations and the specifications of the requirement are not altered substantially. **No suitable tenders** 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. * Cases of **extreme urgency justified by unforeseeable circumstances**. 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 have prepared the project and/or the technical specifications in a diligent way. * The **contract can be performed only by a particular economic operator** 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. | | |
| * **New works or services in case of repetition of similar works or services** 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. | | * **Supplies quoted and purchased on a commodity market**. * **Purchase of supplies on advantageous terms**, from a supplier definitively winding up a business, the receiver or liquidator of a bankruptcy, from an arrangement with creditors or a similar procedure. * The **products are manufactured purely for the purpose of research**, experimentation, study or development. * **Additional deliveries either for the partial replacement or the extension of existing supplies/installations** 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. |
|  | * The **contract follows a design contest** and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; in the latter case. |
|  | * For technical or artistic reasons or due to the existence of special or exclusive rights, **only one possible supplier or service provider exists**. | |

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

Before deciding on the use of 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.

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| **red-warning-sign  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 such a procedure was justified whereas this procedure 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. |

### 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 among Member States. In addition, they usually have, by essence, a very limited cross-border dimension.

As a result, the specific light regime for such services contracts is applicable with the threshold of EUR 750 000, which is much higher than the threshold that applies to services under the full regime.

The light regime applies to the procurement of health, social and other services that fall within the CPV codes listed in Annex XIV of Directive 2014/24/EU.

The list of those services includes, for example:

* Health, social and related services;
* Administrative, social, educational, health care, and cultural services;
* 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.

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| --- |
| **red-warning-sign  Practices from the former Directive 2004/18/EC might lead to error** |
| In the former public procurement Directive 2004/18/EC (Classical Directive), there was a distinction between services from Annex II A and Annex II B for priority services.  Directive 2014/24 abolishes that distinction and introduces a "light" procurement regime that applies to the procurement of health, social and other services that fall within the CPV 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 the 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 provisions complying with the principles of transparency and equal treatment of economic operators, taking into account the specificities of the services.

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

### Framework agreements

Framework agreements are not a specific procedure nor a type of contract but consist more of a **tool that is recommended for established and repetitive needs** when the amount as well as the exact time of occurrence of their need is not known in advance. It falls under the tools and techniques for aggregated procurement defined in the EU legislation.

Framework agreements can be applied to works, supplies or services and are concluded within one contracting authority (or between several CA) 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 for the selection and evaluation of tenders. Following the receipt and evaluation of tenders, the contracting authority awards the framework agreement to one or more economic operators.

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

The rationale behind the framework agreement of purchasing is to achieve savings, in both the costs of the procurement thanks to economies of scale and the time spent in 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. Also, framework agreements can also be easily combined with joint procurement such as in the examples below.

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| --- |
| HELP_GreenCross**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>

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| --- |
| HELP_GreenCross**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> |

## Plan the procedure

At this stage, it is recommended to establish a comprehensive planning of 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 been already defined: need to be satisfied, team and stakeholders, subject matter, duration and value of the contract as well as the procedure.

|  |
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| HELP_GreenCross**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 or **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, this can be done within a few hours of work of the core team with a simple planning tool such as the one presented hereafter (see section 1.6.2 Simple planning tool). |

The contracting authority should elaborate a comprehensive timetable, standard tools or rules (e.g. for communication with tenderers) and a system to record 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, so that progress can be tracked during the course of implementation for 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).

### Planning complex contracts

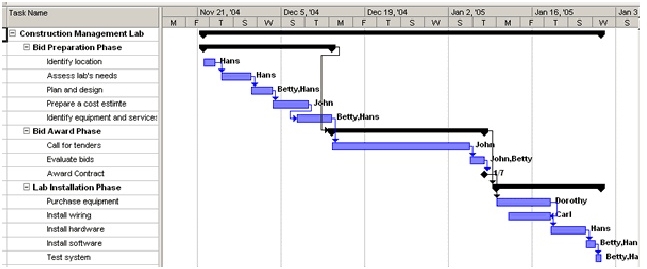
For complex contracts, a Gantt chart can be established in order to take into account all the required tasks, distribute responsibilities and clearly identify the causal relationships between the steps of the process.

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 for the completion of 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 necessary for its completion. Arrows connecting the tasks represent the causal relationship between some of the tasks (see example below) [[22]](#footnote-23).

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, therefore is 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 functionalities but is easier and faster to use.

### 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.

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 |
| 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.

# 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 so, it is necessary to:

* **Draft** **clear procurement documents** which include a clear presentation of the need and the subject matter of the contract in the technical specifications and a transparent definition of exclusion grounds, selection and award criteria;
* **Set sufficient time limits** in order for tenderers to adequately prepare their proposals;
* **Advertise properly** the contract or invite candidates to tender and provide clarifications if needed.

## Draft procurement documents

The drafting of procurement documents is a crucial step of the procurement procedure. This is how the contracting authority will convey its needs and its related objectives and requirements to the market, namely to the economic operators.

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 |
| Invitation to tender, or invitation for pre-qualification | The invitation is a **brief letter** 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. |
| Contract notice | The contract notice is the document that **formally and publicly launches the procurement procedure**. Depending on the contract value and on national rules, the contract notice is 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 on the contract and refers to the main relevant bodies and indicates where to access the full procurement documents. |
| Technical specifications | The technical specifications are the **key document** of the procurement dossier. They may include general background information on the contract, description of the subject matter, exclusion grounds, selection and award criteria, as well as the specific scope of work for the economic operator.  This document primarily aims to provide economic operators with the necessary information to prepare their tenders or requests to participate. Also, technical specifications might serve to protect the contracting authority at a later stage by setting out a common and transparent information basis with the tenderer(s). It thus prevents tenderers from claiming that they did not have knowledge of certain circumstances during the award or implementation phases.  In the field of services, technical specifications are often referred to as Terms of Reference (ToR). In some cases, ToR include more documents in addition to the technical specifications. |
| Instructions to tenderers | The instructions consist of **guidelines with formal rules** regulating the procurement procedure.  These rules aim to support economic operators in the preparation and submission of 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, it is often required to submit the financial and technical proposals in separate sealed envelopes).  It is recommended to include a **formal compliance check-list** to help tenderers prepare the documentation and also facilitate the verification of documents by the contracting authority/Evaluation Committee. |
| European Single Procurement Document (ESPD) | The ESPD is a **self-declaration 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 a preliminary evidence of fulfilment of the conditions required in public procurement procedures. 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. As of October 2018, the ESPD must be provided exclusively in electronic form[[23]](#footnote-24). |
| Draft contract | A draft contract may be included in the procurement documents to provide clear information to economic operators on the contractual arrangements. A draft contract is a **detailed legal document**, which generally indicates the contract value, subject matter, duration and timeframe, payment conditions, as well as many legal provisions including protection of parties, representations, warranties, indemnifications, terms and all applicable laws and regulations. |

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

### Set up the ESPD

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

The ESPD enables economic operators to electronically self-declare that they fulfil the required conditions to participate in a public procurement procedure. In other words, the ESPD consists of a formal statement from economic operators to confirm that they comply with the grounds for exclusion and that the selection criteria are fulfilled.

Only the successful tenderer will need to provide full documentary evidence related to this self-declaration to the contracting authority. In the future, even this obligation could be lifted once evidence can be linked electronically to national databases.

The figure below presents the main logic of the ESPD.

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

Source: European Commission, DG GROW, 2016.

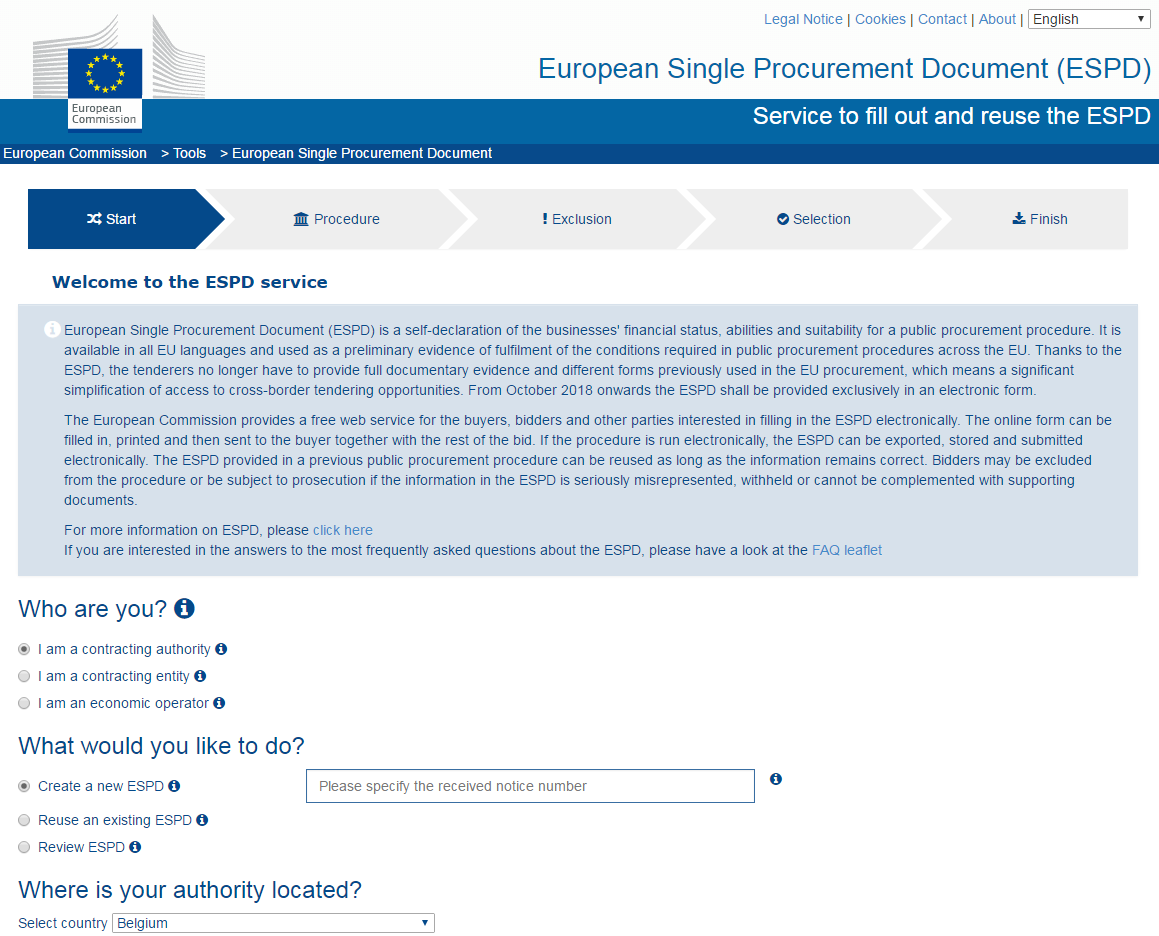
#### How does the ESPD work?

Until EU Member States implement exclusive electronic public procurement as of 18 October 2018, 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 in their own e-procurement platforms, or use the ESPD tool developed by the Commission (see Figure 5 below).

The EC has actually developed a [tool](https://ec.europa.eu/growth/tools-databases/espd/filter?lang=en) that allows contracting authorities to create their ESPD and attach it to tender documents[[24]](#footnote-25). It is then possible for contracting authorities to tailor the ESPD to their needs and to export it in machine-readable format.

Figure 5. Online tool to create and use the ESPD



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

The ESPD must be included alongside the other procurement documents. Also, the contract notice should indicate that candidates or tenderers are required to fill in and submit a 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 and up-to-date supporting documents or other documentary evidence via any national database, the successful tenderer is not required to submit the supporting documents.

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 continues to be 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 in all 23 EU languages: <https://ec.europa.eu/growth/tools-databases/ecertis/>

It helps find out what evidence is requested by a contracting authority (e.g. as exclusion ground or selection criteria) or 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.

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| **red-warning-sign  e-Certis is a reference tool, not a legal advice service** |
| The reliability of the system e-Certis depends on the information provided by the different public procurement bodies in all Member States, and the regular update of this information.  Hence, 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 which helps users identify and recognise the certificates and attestations that are most commonly requested in the context of procurement procedures of different Member States.  In case of 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. |

### Draft contract

Contracting authorities are recommended to 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 clauses or contract terms shifting risks to the contractor that are totally beyond its control should be avoided, as they 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 “special conditions” and “general conditions”, the latter being standardised, and the former being tailored to each specific procurement procedure. In case of doubt, contracting authorities should always look for appropriate legal advice.

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

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| **red-warning-sign  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. |

## Define specifications and standards

### Specifications drafting

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

The purpose of the specifications is to present a clear, accurate and full description of the contracting authority’s needs to the market, 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. 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.

Specifications usually describe the needs of the contracting authority, the subject matter of the contract with the service, supply or work to be provided, the inputs together with the expected outputs and outcomes as well as the standards required and some background and context material. When drafting the specifications, the fact that it has a direct influence on cost must not be forgotten.

There are three main types of specifications either 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 reflect value for money and may not allow the tenderer to bring any added value or innovation. They 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 the description of a need completed with a statement of expected benefits rather than a description of inputs and deliverables.

The latter two types of specifications can be combined and require 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 those 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 stakeholders;
* Have clearly defined, achievable and measurable inputs, outputs and outcomes;
* Provide sufficiently detailed information that allows economic operators to submit realistic and tailored tenders;
* Take into account as much as possible the views of the contracting authority, of potential users or beneficiaries of the contract and of 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 design for all users where the procurement is intended for use by natural persons, either general public or staff of the contracting authority;
* Be approved by the contracting authority’s relevant hierarchy depending on the applicable internal rules;
* In the case of works technical specifications, 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 time schedule;

If relevant, 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 cover all possible modifications. They must also indicate the conditions under which they may be used (see section 5.3 Deal with contract modifications).

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| HELP_GreenCross**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 the fact that they have not reflected properly the need of the contracting authority and the results which are 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 compared to what was initially planned. Contracting authorities would have to then pay attention to 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 particularly tailored to the need of the contracting authority.  Furthermore, using specific expertise on the subject matter (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 determine 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 present the needs and expectations accurately and should get the 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”.

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| **red-warning-sign  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 using tailor made specifications either intentionally or unintentionally that favour particular suppliers.  This sometimes happens where inexperienced staff is 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 can 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. Indeed, 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).

Yet, 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). At least, 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 so, 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 reveal whether there is a possibility that the draft specifications can be delivered by a contractor by methods other than those anticipated. If it can, and 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**, and not on input where the contracting authorities provides rather instructions to tenderers. They should set out the minimum requirements that 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 that case, it is crucial that the award criteria are thoroughly tested at procurement planning stage to ensure that they enable a fair, open and transparent evaluation. In extreme cases, 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 advertising of the procurement procedure.

### 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 heavy weight of public contracts in European economies (about 14% of GDP in the EU), public procurement seems a powerful tool to promote environmental, social and innovation goals as well as to stimulate the access of SMEs to public contracts.

There are three commonly used forms of strategic public procurement[[25]](#footnote-26):

* **Green public procurement (GPP)** consists in 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[[26]](#footnote-27);
* **Socially responsible public procurement (SRPP)** allows contracting authorities to take into account different social considerations, ranging from social inclusion to labour standards, or from gender equality to ethical trade[[27]](#footnote-28);
* **Public procurement for innovation (PPI)** allows 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 customer, this is a demand-side instrument to foster innovation while satisfying the needs of a contracting authority[[28]](#footnote-29).

The EU procurement legislative framework explicitly allows contracting authorities to make use of some **specific provisions to foster strategic goals** in procurement procedures. The may indeed:

* Include specific requirements (e.g. social or environmental) when using the best price-quality ratio as award criteria, 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 (LCC) when establishing the award criteria in order to foster more sustainable purchases. This practice might save money over the long term despite appearing on initial examination to be more costly (see section 2.3.3 Award criteria);
* Use procedures designed to foster 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 performance of the contract 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 EU rules on minimum standards applicable to all European workers);
* Reserve some service contracts to specific organisations provided that they meet with five conditions: pursue a public service mission; reinvest profits in the organisation's objective; 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 to organisations employing at least 30% of disabled or disadvantaged persons.

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| HELP_GreenCross**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 the participation in the tendering procedure to sheltered workshops and economic operators whose main goal is the integration of the disabled or disadvantaged, or to provide that the contract is performed by a sheltered workshop having these same main goals.  Tenders may be validly considered only if at least 30% of the staff employed in the performance of the contract is composed of disabled or disadvantaged persons. 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. |
| HELP_GreenCross**Common GPP criteria at EU level** |
| In order to facilitate the inclusion of environmental considerations in procurement procedures, the European Commission has developed practical sets of GPP criteria (technical specifications and award criteria) for different product groups which contracting authorities can directly use if they wish to procure green[[29]](#footnote-30).  In addition, DG ENV regularly publishes information and guidance to support contracting authorities in using GPP, amongst them:   * List of European and international eco-labels[[30]](#footnote-31); * Buying green! A handbook on green public procurement, available in all EU languages[[31]](#footnote-32) which provides guidance on how environmental considerations can be included at each stage of the procurement process in the current EU legal framework; * Compilation of good practice cases[[32]](#footnote-33) |

### Use of standards or labels

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

Standards or labels used in procurement procedures usually refer to quality assurance, environmental certifications, eco-labels, environmental management systems, as well as social requirements such as accessibility for disabled persons 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 Organization for Standardization (ISO).

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

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| HELP_GreenCross**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.  In case a contracting authority would like to mention a specific standard or a particular label, and thus explain 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 highly recommended to avoid restricting competition. |

## Define the criteria

Contracting authorities have to define the criteria for the choice of the best tender in the procurement documents. The criteria must be made available to the public in a clear and transparent way.

There are three groups 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 perform the contract;
* **Award criteria** determine which tenderer has developed the best proposal (i.e. the most economically advantageous proposal) to deliver the expected results and should be awarded the contract.

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| **red-warning-sign  Do not mix up the different criteria** |
| It is important to clarify the differences between the types of criteria that should not be confused neither by contracting authorities nor by economic operators.  The 3 types of criteria correspond to 3 different steps in the selection of the winning tender. They pursue different objectives and are meant to answer 3 different questions.    When defining the criteria, contracting authorities should have these questions in mind in order to avoid any confusion and the inclusion of inappropriate criteria. |

### Exclusion grounds

Contracting authorities must exclude from the procurement procedure all economic operators which are 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 the national transposition of the EU Directives.

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

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

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

* Criminal organisation;
* Corruption;
* Fraud;
* Terrorism;
* Money laundering;
* Child labour or other human trafficking.

Second, economic operators who have not duly paid their **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 where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed with delay of its breach of its obligations so that it was not possible to issue the payment in time.

In addition to mandatory exclusion grounds, contracting authorities are also recommended (or obliged depending on the national transposition of the EU Directives) to exclude from participation to 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 subject to insolvency proceedings;
* Serious professional misconduct affecting the economic operator’s integrity;
* Distortion of competition, for example either through the 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 the performance of a former public contract;
* Failure to provide information for the verification of absence of grounds for exclusion;
* Undue influence on the contracting authority to obtain confidential information, through undue influence on the decision-making process, the acquisition of confidential information conferring undue advantages to an economic operator, and the negligence of a contracting authority in providing misleading information.

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

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| HELP_GreenCross**State the criteria and their weighting in the contract notice or in the technical specifications** |
| The exclusion grounds, selection and award criteria, as well as their respective weighting must be stated either in the contract notice or in the specifications or other procurement documents.  The use of dedicated check-lists, standardised forms of contract notices or procurement documents help to avoid this happening. |

### Selection criteria

**Selection is about determining** **which economic operators are qualified to perform 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 perform the contract thanks to their:

* Suitability to pursue the professional activity;
* Economic and financial capacities; and
* Technical and professional abilities.

#### Defining the selection criteria

In fact, 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 and proportionate to the size and nature of the contract;
* Determined by taking into account the specific need of each contract and they must be relevant to the specific contract to be awarded. They must not be determined in an abstract way;
* Formulated in a simple way 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 synthetises the possibilities of selection criteria foreseen by the Directive 2014/24/EU that can be used by contracting authorities for the selection of tenderers.

Table 9. Examples of selection criteria

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| **Objective** | **Requirement for economic operators** |
| **Assess the suitability to pursue the professional activity** | Be enrolled in one of the official professional or trade registers[[33]](#footnote-34) kept in the corresponding Member State |
| Official authorisation to perform a certain type of services (e.g. civil engineers, architects) |
| Valid professional insurance certificate (it can also be requested only at the time of signing the contract). |
| **Assess the economic and financial capacity** | Minimum yearly turnover which must not exceed two times the estimated contract value (e.g. EUR 2 million where the contract value is EUR 1 million per year), including a certain minimum turnover in the area covered by the contract |
| Information on their annual accounts showing the ratios between assets and liabilities (e.g. minimum solvency level of 25% or more) |
| Appropriate level of professional risk indemnity insurance |
| **Assess the technical and professional ability** | Necessary human resources (e.g. qualifications of key staff) and technical resources (e.g. specific equipment) to perform the contract to an appropriate quality standard |
| Experience of the contractor itself – not of the individual staff member – to perform the contract to an appropriate quality standard (e.g. References from previous contracts within the last three years including at least two in similar contracts) |
| Skills, efficiency, experience and reliability to provide the service or to execute the installation or the work |

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| **red-warning-sign  Substantial changes of the selection criteria once set are not acceptable** |
| After publication of the procurement documents, only minor changes within the main selection criteria are acceptable, such as changes in the wording or the address for submission of application.  Changes in requirements such as the financial standing (yearly turnover or equity rate), the number of references or the insurance cover are considered significant changes and they require an extension of the application/submission deadline (see section 2.4 Set the time limits) or a cancellation of the procedure. |

#### Assessing the selection criteria

The methodology for the selection of 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 to deliver.

The selection criteria can be assessed thanks to:

* A “comply or fail” question;
* A weighting system of the criteria;
* An assessment methodology for more complicated contracts.

A numerical scoring methodology can also support contracting authorities to rank and shortlist a certain number of tenderers when needed. In restricted procedures, after screening out those tenderers that do not comply with 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 that case, contracting authorities must indicate, 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. 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 as well as the methodology for selection of tenderers must be transparent and made available in the procurement documents**.

When defining the selection criteria, common errors made by contracting authorities is that they:

* Fail to check that all the selection criteria are relevant and proportionate to a particular procurement, and simply reuse the same criteria in most procedures;
* Add questions without any thought as to the potential responses;
* Fail to publish the methodology for assessing and scoring the compliance with the selection criteria.

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| **red-warning-sign  Unlawful and/or discriminatory selection criteria** |
| The selection criteria must not be disproportionate or unfair and should not limit unnecessarily the number of tenderers. For example, contracting authorities must give a reasonable revenue requirement per year or may not distinguish between a public and a private reference. If in doubt, legal advice should be sought.  The examples below refer to cases where economic operators have been deterred from tendering because of unlawful selection criteria and have led to financial corrections:   1. *Obligation to already have an office or representative in the country or region or an obligation to have experience in the country or region;* 2. *Obligation to have a yearly revenue of EUR 10 million even if the contract value is only EUR 1 million;* 3. *Obligation to have minimum 5 similar references in the public sector only, and not in the private sector (e.g. for cleaning contracts), unless justified and non-discriminatory;* 4. *Obligation to provide references for previous works that are significantly higher in value and scope than the contract being tendered, unless justified and non-discriminatory;* 5. *Obligation to already have the qualification/professional certificate recognised in the country of the contracting authority at the time of submission of tenders, as it would be difficult for foreign tenderers to comply in such a short timeframe*; 6. *Obligations to comply with a particular professional standard without using the wording “or equivalent” (e.g. standards of the International Federation of Consulting Engineers (FIDIC), International Standards on Auditing issued by the International Auditing and Assurance Standards Board (IAASB), 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.).* |

### Award criteria

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

Contracting authorities have to base the award of contract on the **most economically advantageous tender (MEAT)**. The application of the MEAT criterion corresponds to three different approaches which all 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 the three above-mentioned methods, except in the cases of the competitive dialogue and the innovation partnership where the criterion of the best price-quality ratio should 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 only.

The approach chosen for the award criteria must be clearly stated in the contract notice. Furthermore, in the case of the best price-quality ratio, the detailed award criteria and their weightings 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[[34]](#footnote-35).

#### Price-only or lowest price

Firstly, the price only approach implies that the 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 relevant 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 can 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 contracting authority may prefer to define in detail the exact specification requirements and then select the compliant tender that offers the lowest price.

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

#### Cost-effectiveness, life cycle costing

Secondly, 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 through the duration of their life cycle. The life-cycle costs (LCC) cover indeed all costs incurred by the contracting authority, either one-off or recurrent costs[[35]](#footnote-36):

* 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. pollutant emissions).

Contracting authorities have to 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 so.

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| HELP_GreenCross**Calculation tools and resources on Life-Cycle Costing** |
| The National Agency for Public Procurement in Sweden has developed specific life-cycle costing (LCC) 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 for contracting authorities to assess LCC and CO2 emissions and compare tenders.  Available at: <http://www.smart-spp.eu/index.php?id=7633>  The European Commission proposes a calculation tool on LCC which aims to facilitate the use of LCC amongst public procurers. It focuses on specific product categories, such as Office IT Equipment, Lighting (Indoor Lighting), White Goods, Vending Machines and Medical Electrical Equipment.  Available at: <http://ec.europa.eu/environment/gpp/lcc.htm> |

#### Best price-quality ratio

Finally, 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.

For example, the best price-quality ratio is considered appropriate in the following cases:

* For works designed by the tenderer;
* For supplies that involve significant and specialised product installation and/or maintenance and/or user training activities. For this type of contract, in fact, the quality is normally of particular importance;
* For services linked to intellectual activity such as consultancy services where the quality is essential. Experience has shown that when procuring this type of service, best results in terms of best value for money are achieved when the best price-quality ratio is used.

The award criteria based on price-quality ratio will generally be scored by using a scoring system which 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, they should be stated in descending order of importance (see section 4.2 Apply the award criteria).

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

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

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| **Criteria** | **Sub-criteria** |
| **Price** | * Fixed price; * Rates (e.g. daily fees, unit costs); * Life-cycle cost. |
| **Quality** | * Technical merit; * Aesthetic and functional characteristics; * Accessibility and design for all users; * Social, environmental and innovative conditions; |
| **Organisation** | * Project management; * Risk analysis; * Quality control; |
| **Staff assigned to perform the contract** | Where the quality of the staff assigned has a significant impact on the level of performance of the contract:   * Qualification of staff; * Experience of staff. |
| **Service** | * 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 during the preparation of procurement documents and must not modify them afterwards.

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| **red-warning-sign  Never amend the award criteria during the procurement process** |
| The award criteria and their weightings are considered as substantial elements of the procurement documents and thus must not be amended after the publication of the contract notice.  Like for the selection criteria, if the award criteria included in the procurement documents are not correct and need to be modified, an extension of time limits is required (see section 2.5.2 Notices to be advertised).  In addition, clarifications with tenderers should not have the effect of changing the already submitted criteria 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 section 4 Evaluation of tenders), but it is important that they do not have any conflict of interest vis-à-vis 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, it is useless to establish one-size-fits-all award criteria. Nevertheless, in order to provide further guidance to procurement practitioners, it is possible, on the one hand, to point out the main mistakes that should be avoided and, on the other hand, to list some examples of do’s and don’ts when designing the award criteria.

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| **red-warning-sign  Bad practices when defining award criteria** |
| The examples below are either bad practices or mistakes that have led to financial corrections 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. For example, quality is evaluated on the product’s durability and robustness when 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).* 4. *Arithmetic errors when adding up scores and ranking tenders.* 5. *Mixing selection criteria and award criteria when selection criteria are used as award criteria or criteria 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. It should be assessed at the selection stage, not at the award stage.* 6. *Use of average pricing, whereby tenders 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 average pricing methodology represents unequal treatment of tenderers, particularly those with valid low tenders.* 7. *Use of contract penalties as award criterion whereby 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 must simply be included in the terms of the contract.* 8. *Use of the duration of the contract as award criterion, whereas the duration of the contract should be defined in the procurement documents and should be the same for all potential contractors.* 9. *Use of gender equality as award criterion for example by awarding points on the basis of the gender composition of the team proposed by the tenderer. This is considered discrimination.* 10. *Use of contract “extras” as award criterion, for example by giving additional points to tenderers who offer free items in addition to those requested.* 11. *Use the level of subcontracting as award criterion in order to limit its use, 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 presents some examples of good practices when designing criteria.

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| HELP_GreenCross**Examples of do’s and don’ts in defining award criteria** |
| The following examples of award criteria aim to 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** | | Tenderer’s minimum opening hours from 08:00 to 16:00. Long opening hours will be evaluated positively.  🡪 Long opening hours are not defined by the contracting authority. | Minimum opening hours from 08.00 to 16.00. Longer opening hours up to 24/7 will be evaluated and weighted positive.  🡪 The tenderers compete between opening hours from 8:00-16:00 to 24/7. | | Days of delivery from ordering. Short delivery time will be evaluated positively.  🡪 Short time of delivery is not defined by the contracting authority, such as maximum days and days offered will be weighted positively. | Days of delivery from ordering within a maximum of 12 days. 4 days offered will be evaluated and weighted positive.  🡪 The tenderers compete between 12 and 4 days. No extra point will be awarded for a delivery time faster than 4 days.  The scoring model can be listed and published as follows:  ≤4 days: 5 points  5-6 days: 4 points  7-8 days: 3 points  9-10 days: 2 points  11 days: 1 point  >12 days 0 points | | Extra costs for urgent orders.  🡪 The contracting authority should provide an estimated number of “urgent orders” per year to enable tenderers to calculate the related costs. | Extra costs for urgent orders. The estimated number of “urgent orders” per year is 500.  🡪 The tenderers can calculate a total cost per year for urgent order which is realistic and transparent. | | Products warranty with a minimum of 2 years from production date.  🡪 No preferred warranty is defined by the CA. | Products warranty with a minimum of 2 years from production date. A warranty of 5 years will be evaluated and weighted positive.  🡪 The tenderers compete between 2 and 5 years in warranty. No extra points will be awarded for an offered warranty of more than 5 years. | |

#### 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 in the case of the price-only criterion where the ranking of tenders can be done easily through the comparison of 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 unique way to define the best price-quality ratio but two formulas are commonly used[[36]](#footnote-37):

* (a) a basic method with no weighting between price and quality:
* (b) a method applying a weighting for quality and price expressed in percentage (e.g. 60%/40%):

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

Both formulae give a final mark out of 100 points. The tender with the highest mark wins.

The example below shows the difference in calculation of results and ranking between the two methods for the case of three valid tenders (A, B, C).

Table 11. Example of calculation for the ranking of tenders

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Tender | Price | Quality score | (a) No weighting formula (a) | | (b) Weighting formula  40% for price, 60% for quality | |
| Calculation | Ranking | Calculation | Ranking |
| A | 100 | 62 |  | **1st** |  | 2nd |
| B | 140 | 84 |  | 2nd |  | **1st** |
| C | 180 | 90 |  | 3rd |  | 3rd |

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

## Set the time limits

The time limits that need to be set up at this stage of the process are the duration between the moment when the procurement procedure is made public and the deadline for the submission of tenders or requests to participate by economic operators.

In other words, contracting authorities can choose to let more or less time to economic operators to prepare their proposals, taking into account the size and complexity of the contract.

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

### 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 should be respected for the 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 via electronic means reduces substantially the minimum time limits.

Table 12. Minimum time limits above EU thresholds

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Receipt of requests to participate** | | **Receipt of tenders** | |
| **Procedure** | Ordinary submission | E-submission | Ordinary submission | E-submission |
| **Open** | – | – | 35 days without PIN  15 days with PIN | 30 days without PIN  15 days with PIN |
| **Restricted** | 30 days | 30 days | 30 days without PIN  10 days with PIN | 25 days without PIN  10 days with PIN |
| **Competitive procedure with negotiation** | 30 days | 30 days | 30 days without PIN  10 days with PIN | 25 days without PIN  10 days with PIN |
| **Competitive dialogue** | 30 days | 30 days | No minimum | No minimum |
| **Innovation partnership** | 30 days | 30 days | No minimum | No minimum |
| **Negotiated procedure without prior publication** | – | – | No minimum | No minimum |
| **Design contest** | – | – | 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 hereafter for the most commonly used procurement procedures: the open procedure and the restricted procedure.

As stated in the table above, the timetable of the **open procedure** is as follows:

* 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 in total 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) has been published within a minimum of 35 days and a maximum of 12 months before the date of the CN publication. The PIN also has to 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 prior to the deadline for submission of tenders, all clarifications should be published 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 after the conclusion of the contract (signature of all parties).

The timetable of the **restricted procedure** is as follows.

* Directive 2014/24/EU allows 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 number 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 where the contracting authority accepts that tenders may be submitted by electronic means;
* If a prior information notice (PIN) has been published electronically within a minimum of 35 days and a maximum of 12 months before the date of publication of the CN, the deadline for submission of tenders can be reduced to 10 days. As per the open procedure, the PIN also has to 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 after the conclusion of the contract (signature of all parties).

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| **red-warning-sign  Non-compliance with minimum time limits leads to financial correction** |
| 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 fails to give economic operators adequate time to participate.  If time limits are reduced due to publication of a prior information notice (PIN), contracting authorities must ensure that the PIN contains all of the information needed for the contract notice. |

### Extension of time limits initially set out

These time limits can be extended in order for economic operators to be aware of all relevant information regarding the procurement documents in the following situations:

* Important modifications of the procurement documents;
* Answers to requests for clarification are provided to potential tenderers less than 6 days before the deadline for receipt of tenders, or 4 days for 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, this information can only be accessed via in-situ visits, data not existing in machine-readable format or particularly large documents.

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| **red-warning-sign  Lack of publication of extended time limits in the OJEU for either receipt of tenders or for requests to participate** |
| The time limits for receipt of tenders (or receipt of requests to participate) must not be extended **without publication** in accordance with the relevant rules.  All time 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, 47and 27-31 of Directive 2014/24/EU. |

### Reduction of time limits: the accelerated procedure

The accelerated provisions foreseen by Directive 2014/24/EU enable contracting authorities to speed up a public procurement procedure when the normal time limits would be unrealistic for reasons of urgency. Although this does not constitute a separate procurement procedure (see 1.5 Choose the procedure), this practice is referred to as “accelerated procedure”.

The time limits can be shortened under the following conditions:

* The urgency renders impracticable the baseline time limit;
* The use of the accelerated procedure must be duly 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 thanks to the accelerated procedure.

Table 13. Accelerated time limits

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Procedure | Time limit for the receipt of requests to participate | Accelerated time limit | Time limit for the receipt of tenders | Accelerated time limit |
| Open | – | – | 35 days | 15 days |
| Restricted | 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 application of the accelerated procedure is a much-abused area and contracting authorities must be able to justify its use with clear and objective facts.

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| **red-warning-sign  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 should not be confused with the negotiated procedure without publication based on extreme urgency for unforeseeable circumstances which does not require the publication of a contract notice (see section 1.5.7 Negotiated procedure without prior publication). |

## Advertise the contract

Advertising the contract consists in making the procurement procedure public so that all interested economic operators can potentially 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.

On the one hand, advertising helps to foster 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. On the other hand, advertising allows to inform as many potential economic operators as possible about business opportunities in the public sector and therefore enables them to compete, which leads to the best value-for-money outcomes for contracting authorities[[37]](#footnote-38).

### 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 subject to the requirement to advertise in the OJEU may also be published in other international, national or local official journals or newspapers. In this context, contracting authorities have to 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 can have a potential cross-border interest should also be advertised in the OJEU. As a general rule, publication in the OJEU is open for any type of procurement below EU thresholds, even those which do not have a particular cross-border interest.

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| **red-warning-sign  If any doubt, advertise in the Official Journal of the EU (OJEU)** |
| Failure to advertise is one of the most serious errors.  Where contracts below the EU thresholds have a 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 cross-border interest of 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. |

### 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 the EU level in the OJEU, so that economic operators in all Member States have the possibility to tender for contracts for which they consider they can 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](http://simap.europa.eu/enotices/viewFormTypes.do), the online application to prepare and publish public procurement notices[[38]](#footnote-39).

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 at standardising the references used by contracting authorities to describe the subject of procurement contracts. The CPV codes may be accessed online, via the SIMAP website[[39]](#footnote-40).

Public procurement practitioners can also refer to the specific guidance developed by the EC to complete the standard forms to be used above EU thresholds[[40]](#footnote-41).

The essential documents to be advertised in the OJEU above EU thresholds are the three notices presented below.

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Notice acronym | Standard forms[[41]](#footnote-42) | Purpose | Mandatory? | Timeframe |
| **PIN** | [Prior information notice](http://simap.ted.europa.eu/documents/10184/99173/EN_F01.pdf) | Alerts the market to future contracts (including potential upcoming preliminary market consultations) | No | Between 35 days and 12 months prior to the publication of the CN or invitation to candidates |
| **CN** | [Contract notice](http://simap.ted.europa.eu/documents/10184/99173/EN_F02.pdf) | Launches a procurement procedure | Yes | – |
| **CAN** | [Contract award notice](http://simap.ted.europa.eu/documents/10184/99173/EN_F03.pdf) | Informs the market of the outcome of a procurement procedure | Yes | Within 30 days from the conclusion of the contract |

#### 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 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. In this context the PIN can also announce upcoming preliminary market consultations. This goes along with a regular planning of procurement procedures (most of the time annual planning) that contracting authorities should develop to foster the quality execution of public procurement in general[[42]](#footnote-43).

More recently, contracting authorities have been using the PIN on a contract specific basis. The PIN must be published at least 35 days before and not earlier than 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 mainly 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 amended otherwise an extension of time limits is required (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 recommended always to extend the deadline for submission of the tender.

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| **red-warning-sign  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[[43]](#footnote-44).  Compliance with the advertisement requirements of Directive 2014/24/EU is secured when the contract notice is published and that all information required by the standard form is provided in a clear and precise manner. |

#### Contract Award Notice (CAN)

The CAN aims to present the decision coming out of the procurement procedure (see section 4.6 Award the contract). Apart from the information on the award including mainly 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 data of the contract notice. However, the contracting authority needs to make the conscious decision to publish the CAN within the required timeframe.

In case of non-award, 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, a non-award 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 have to be indicated[[44]](#footnote-45).

In case of award, the CAN provides information about the tenders received (numbers of tenders and main characteristics of the tenderers), the name and details about the successful tenderer (i.e. the contractor) as well as 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 in 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 by the form [F14 Corrigendum - Notice for changes or additional information](http://simap.ted.europa.eu/documents/10184/99173/EN_F14.pdf), which has been created by the Publications Office of the EU. Additional instructions to use the corrigendum are published on the SIMAP website[[45]](#footnote-46).

### Access to tender documents

Contracting authorities must give unrestricted and full direct access free of charge to the procurement documents from the date of publication of the contract notice (CN). To do so, the contract notice specifies to interested parties the internet address at which the procurement documents are accessible.

Where 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 transmitted by other means. The potential tenderers or candidates may then access the procurement documents and submit their proposals via an electronic platform or using e-mail.

Similarly, contracting authorities must supply to all interested tenderers additional information related to the contract notice and the procurement documents. Therefore, contracting authorities have to 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.

# 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).

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| **red-warning-sign  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. |

## 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.

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| **HELP_GreenCross  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.

## Acknowledge receipt and open tenders

Whether tenders are submitted in paper or via electronic means, contracting authorities have 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, 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.

## 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 section 4 Evaluation of tenders).

The assessment of exclusion grounds and selection criteria should 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 (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 … |
| **Exclusion ground 1** | Compliant: Yes/No  Source: … (ESPD, other) | Compliant: Yes/No  Source: … (ESPD, other) | … |
| **Exclusion ground 2** | Compliant: Yes/No  Source: … (ESPD, other) | Compliant: Yes/No  Source: … (ESPD, other) | … |
| **Exclusion ground 3** | Compliant: Yes/No  Source: … (ESPD, other) | Compliant: Yes/No  Source: … (ESPD, other) | … |
| **Exclusion ground …** | … | … | … |
| **Requirements are met to be selected as tenderer** | 🞏 Yes  🞏 No, the tenderer is excluded from the procurement process. | 🞏 Yes  🞏 No, the tenderer is excluded from the procurement process. | … |
| **Selection criteria 1** | Compliant: Yes/No  or  Score: …  Source: … (ESPD, other)  Comment: | Compliant: Yes/No  or  Score: …  Source: … (ESPD, other)  Comment: | … |
| **Selection criteria 2** | Compliant: Yes/No  or  Score: …  Source: … (ESPD, other)  Comment: | Compliant: Yes/No  or  Score: …  Source: … (ESPD, other)  Comment: | … |
| **Selection criteria …** | … | … | … |
| **Tenderer selected: tender may be evaluated** | 🞏 Yes  🞏 No, the tender is excluded from the procurement process. | 🞏 Yes  🞏 No, the tender is excluded from the procurement process. | … |

First, the contracting authority will establish whether there are grounds for excluding economic operators from participating and if any derogation has been established (see 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, negotiate or participate in dialogue. In the case of the open procedure, the tenders that they have already submitted will be evaluated[[46]](#footnote-47).

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.

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| **HELP_GreenCross  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. |
| **red-warning-sign  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 should 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. |

### 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 is 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.

### 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.

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| **red-warning-sign  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.

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| **red-warning-sign  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.

### 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.

# Evaluation of tenders and award

The purpose of the evaluation of tenders is to identify which of the tenders, meeting exclusion grounds and selection criteria, is the most economically advantageous based on the published award criteria.

The evaluation of tenders should be undertaken 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.

## 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 the procurement process is involving all the necessary qualifications and expertise from the beginning (see section 1.2 Engage stakeholders).

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).

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 suitable Evaluation Committee that can be applied to most procurement procedures.

Table 16. Example of Evaluation Committee structure

|  |  |  |
| --- | --- | --- |
| **Chair** | **Secretary** | **Evaluators** |
| Ähnliches Foto | Ähnliches Foto | Bildergebnis für symbol staff |
| * Leads, coordinates, gives guidance and controls the evaluation of tenders; * Ensures that the evaluation is carried out in accordance with procurement law and Treaty principles; * Signs a declaration of absence of conflict of interest and confidentiality. | * Supports the chair and carries out the administrative tasks linked to the evaluation; * Drafts and records minutes of meetings and evaluation reports; * Does not have necessarily voting power; * Signs a declaration of absence of conflict of interest and confidentiality. | * Assess the tenders (independently or jointly) on the basis of the award criteria according to the evaluation method stated in the procurement documents; * Sign a declaration of absence of conflict of interest and confidentiality. |

Contracting authorities should require that all members of the Evaluation Committee sign a declaration of absence of conflict of interest and confidentiality (see 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).

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| **red-warning-sign  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. |

## 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.

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| **red-warning-sign  Modification of a tender during evaluation is forbidden** |
| Contracting authorities must not allow a tenderer to modify its tender during the evaluation process, for example through the submission of additional substantial information.  The chair of the Evaluation Committee and/or procurement officer in charge must ensure that only 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. |
| **red-warning-sign  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 the tender submission should be in writing. If the contracting has concerns about the clarity of the procurement documents, it should consider re-launching the procedure with revised specifications. |

### Price only

If the lowest price criterion is chosen, the evaluation method is rather simple and transparent since it only consists in comparing the different financial offers provided that the technical offer, if any, is compliant with the technical specifications.

Nevertheless, some important aspects[[47]](#footnote-48) 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 the 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.

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| **red-warning-sign  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 enhanced) and their evaluation will be irrelevant.  Such change should require the cancellation of the procedure because tenderers may have offered different prices and additional economic operators may have expressed an interest if they had known the real value of the contract. |

### 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 the calculation of life-cycle costs (LCC) has been made mandatory in the legislation of the Member States, that common method must be applied.

Life-cycle costs may cover costs borne by the contracting authority or other users as well as costs imputed to environmental externalities linked to the product, services or works during its life cycle, provided their monetary value can be determined and verified45.

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.

### 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 for support from external experts 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 followed45.

The evaluation of tenders should be carried out thanks to an **evaluation matrix** which, as for the assessment matrix for the selection of tenderers (see Table 15. Matrix for the assessment of exclusion grounds and selection criteria), should serve both as 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 members of the Evaluation Committee 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.

Table 17. Matrix for the evaluation of tenders based on the best price-quality ratio

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Tender ID** | | A, B, … | | | | |  | | |  | |
| **Evaluation** | | Evaluator(s) name: | | | | | Date: | | |  | |
|  | |  | | | | |  | | |  | |
| **MEAT** | Weigh-ting | | Score | **Category** | Weigh-ting | Score | | **Subset** | Weigh-ting | | Score |
| **Price** | 30 | | … | Cost | 30 | … | | Cost | 30 | | … |
| **Quality** | 70 | | … | Technical | 25 | … | | Relevance  Added value  Management | 12  5  8 | | …  …  … |
|  |  | |  | Delivery | 10 | … | | Responsiveness and flexibility  Communication  Risk management | 4  4  2 | | …  …  … |
|  |  | |  | Resources | 15 | … | | Relevance  Staff management | 10  5 | | …  … |
|  |  | |  | Environment | 10 | … | | Commitment/ measures  Targets | 7  3 | | …  … |
|  |  | |  | Social responsibility | 10 | … | | Commitment/ measures  Targets | 7  3 | | …  … |
| **TOTAL** | 100 | | **…** |  | 100 |  | | … | 100 | |  |

While conducting the evaluation, the Evaluation Committee should particularly pay attention to the following elements:

* 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 in order 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.

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| --- |
| **red-warning-sign  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 whereas these changes or additional aspects were 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 publication of the contract notice, the contracting authority has to:   * Either cancel the procurement procedure and re-launch it; * Or issue an erratum and possibly an extension of the deadline for submission of tenders. |

## Deal with abnormally low tenders

The evaluation of “abnormally low tenders” can be challenging for contracting authorities since there is no straightforward approach 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 performed properly[[48]](#footnote-49).

When the financial offer of a tender seems to be abnormally low, the Evaluation Committee should require clarification in writing from the tenderer. 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 explain the low offer, for example, innovative technical solutions, possibility of the tenderer to obtain State aid, or 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.

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| **red-warning-sign  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 claim a written justification from the tenderer clarifying the background for the low-price offer.  In case of rejection of the tender, the decision must be clearly justified in the evaluation report mentioning the answer from the tenderer.  In addition, some contracting authorities use a benchmark minimum offer price, often calculated by using a mathematical formula, and automatically eliminate tenders below this benchmark without first asking them to justify their low offers. This practice is unlawful and must be avoided. |

## Request clarifications

In the case of open and restricted procedures, the Evaluation Committee can request clarifications to tenderers on their tenders. It should be noted that other procedures also allow for clarifications and even foresee negotiations with the tenderers.

The requests for clarifications can only have the character of minor clarification 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 omission;
* Non-compliant aspects with the non-fundamental formal and/or 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 prior request for clarification or submission of additional documents.

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 request for clarification does not imply 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, with a clear indication of whether the answers received are satisfactory to the evaluators, and if they are not acceptable, of the reasons why.

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 evaluation45.

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| **red-warning-sign  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 in the evaluation of the tender, if applicable). |

## Finalise the evaluation and decide

The evaluation of tenders usually ends with the organisation of an evaluation meeting where each tender can be jointly analysed and discussed and where the Evaluation Committee members can make a common decision.

The decision of the Evaluation Committee is then communicated to the contracting authority as a recommendation to award the contract to a certain tenderer via a detailed evaluation report.

### Evaluation meeting

It is considered good practice to hold an evaluation meeting gathering all members of the Evaluation Committee. The meeting should be scheduled in advance by the chair so that the members of the Evaluation Committee 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 example 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 one single evaluation matrix per tender during the evaluation meeting.

During the meeting, the Evaluation 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 in the scores within the Evaluation Committee, specific measures to deal with this issue should be agreed in advance. These measures may consist in requesting clarification from tenderers or engaging expert advice. In that event, more than one moderation meeting would have to be held45. In case of disagreement between the members, the chair should ultimately make a decision and make sure the disagreement is reflected in the evaluation report.

The outcome of the meeting should be the choice of the winning tender which is to be communicated to the contracting authority in the evaluation report.

### Evaluation report

The recommendation for the award of the contract is contained in the evaluation report, which is normally prepared by the chair or the secretary of the Evaluation Committee with the support of the evaluators (see section 4.2 Apply the award criteria).

The evaluation report should be clear and sufficiently detailed to demonstrate how the decision to award the contract was taken.

It should describe how the different criteria have been applied and what is the outcome of the evaluation 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 a list of attendance 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: |  |
| 1. Introduction    1. Name and address of the contracting authority    2. Composition of the Evaluation Committee    3. Timetable of the procurement procedure 2. Background and context    1. Description of the contract (subject matter and value)    2. Choice of the procedure and justification in the cases of competitive procedures with negotiation, competitive dialogue and negotiated procedure without prior publication    3. Appointment of the members of the Evaluation Committee    4. Published criteria    5. List of tenderers 3. Evaluation activities    1. Assessment of exclusion grounds    2. Assessment of selection criteria    3. Evaluation of tenders    4. Clarifications (if applicable) 4. Recommendation for the award of the contract    1. Final scoring and ranking    2. Proposed candidate(s) or tenderer(s) (including subcontractors and their corresponding shares, if any) and justification    3. Unsuccessful candidate(s) or tenderer(s) and justification    4. Rejection of abnormally low tenders and justification    5. Where applicable, reasons why the contracting authority has decided not to award a contract    6. Where applicable, reasons why other means of communication than electronic means have been used for the submission of tenders    7. Where applicable, conflicts of interests detected and measures taken 5. Annexes    1. Evaluation matrix(ces)    2. List(s) of attendance to evaluation meeting(s)    3. Signed declarations of absence of conflict of interest and confidentiality    4. Other relevant documents (e.g. clarifications, working papers) | | | |

In the framework of national reporting on public procurement, the European Commission can request to any European contracting authority an individual report on the procedures used for the award of a particular contract. In this context, contracting authorities should make sure to 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, but 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.

|  |
| --- |
| **red-warning-sign  Lack of transparency and equal treatment during evaluation** |
| If the scores given to each tender are unclear, unjustified, lack transparency or have not been recorded fully, 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 selection of tenderers and on the award of contracts.  The chair of the Evaluation Committee should ensure that there is written justification for each score given during the evaluation of tenders.  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. |

## Award the contract

On the basis of the recommendation of the Evaluation Committee, 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.

### Notification of tenderers and standstill period

Once the award approval has been given, contracting authorities must as soon as possible communicate in writing to the successful tenderer that its tender has been accepted for the contract award.

The unsuccessful tenderers also need to be informed about the award conclusion 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. It is also usual to include a summary table of the scoring and final ranking of the different tenders.

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, it may also happen that the contracting authority decides not to award the contract. Non-awards are mainly 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 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[[49]](#footnote-50).

|  |
| --- |
| **red-warning-sign  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 elements 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. |

### 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 after the contract signature by both parties, 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 coming out of the procurement procedure, meaning that contracting authorities may publish a contract award notice whether the contract is finally awarded or not. In the case of non-award, the publication of the contract award notice is not mandatory but is considered a good practice since it informs about the reasons of the decision.

The content of the contract award notice is presented above in section 2.5.2 Notices to be advertised.

|  |
| --- |
| **HELP_GreenCross  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.  As soon as it is noticed 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. |

# Contract implementation

After the award of the contract, the successful tenderer becomes the contractor in charge of implementing the contract through the delivery of works, 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 multiple stakeholders, are carried out over long periods of time and consume 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 elements 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 eventual termination of the contract before its end;
* Complaints and remedies mechanisms;
* Closing of the contract.

## 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 foster knowledge-sharing, common understanding and a greater anticipation of possible problems or risks.

It is in the contracting authority’s own interest to make the relationship work, as the costs of early termination of the contract, the consequences of poor performance or unplanned changes of economic operator are highly damaging[[50]](#footnote-51).

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.

An initial meeting or kick-off meeting should always take place at the launching of the implementation. It should gather physically 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;
* 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, will have to be ensured to develop mutual trust and understanding and ensure a joint approach to delivery.

## Manage the contract

### 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 usual and easy-to-use contract management tools.

Table 19. Common tools and techniques for contract management

|  |  |  |
| --- | --- | --- |
| Tool/Technique | Description | Applicable to |
| **Inaugural kick-off meeting** | Physical meeting between the main stakeholders from the contracting authority and the contractor which allows to:   * Build trust between parties; * Agree on a common understanding of the subject and scope of the contract; * Help the contractor understand expectations and underlying objectives; * Define the work plan; * Plan the frequency of communication, the progress reporting, review meetings and feedback loops. | All contracts |
| **Progress reports** | Timely reporting at a high and/or summary level on progresses and achievements according to the work plan. | All contracts |
| **Interim reviews**  **(e.g. via regular review meetings)** | Review by the contracting authority of the tasks accomplished and/or interim deliveries. Interim reviews allow to:   * Adapt the timeframe if necessary; * Valid minor adjustments of the implementation; * Formulate recommendations; * Issue interim payments. | All contracts |
| **Self-assessment** | Self-assessment of the procedure by the contracting authority thanks to a **control** **checklist** covering of all stages of public procurement (see 6.4 Checklist for the control of public procurement). | All contracts |
| **Issue logs** | 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 |
| **Service level agreements** | 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.  These requirements are incorporated into the contract (often in schedules) and must be closely monitored. | Complex contracts |
| **Gateway review** | Mechanism for reviewing procurement procedures at several key milestones in their development, before important decisions are taken.  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). | Complex contracts |
| **Risk management** | Identification, analysing and monitoring of all kinds of risks throughout the contract implementation.  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.  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.  A follow-up of the risks should be then conducted at key stages of the contract implementation (see section 5.2.2 Risk management). | All contracts |

### Risk management

Complex procurement procedures consume significant amounts of time and effort and may involve a large number of staff within the contracting authority as well as external stakeholders. In this context, the combination of many different factors and influences leads to a number of risks which need to be properly identified, assessed, mitigated and monitored during the course of the procedure 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.

|  |
| --- |
| HELP_GreenCross **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:   * 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; * 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;
* Include the allocation of ownership of individual risks;
* Allocate responsibilities for the conduction of the risk assessment as well as its review and monitoring on a regular basis.

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 risk register for a procurement procedure

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Risks** | **Source** | **Potential consequences** | **Impact** | **Likelihood** | **Mitigation measures** | **Person in charge** |
| (…) | 🞏 Internal  🞏 External | (…) | 🞏 Low  🞏 Medium  🞏 High | 🞏 Low  🞏 Medium  🞏 High | (…) | (…) |
| (…) | 🞏 Internal  🞏 External | (…) | 🞏 Low  🞏 Medium  🞏 High | 🞏 Low  🞏 Medium  🞏 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 and their causes. This can go for instance from changes in staff (either within the contracting authority or the contractor) to low quality of delivery or unexpected conflict of interests.

Many risks involve the contractor being unable to deliver, or not delivering to the right level of 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 come from the contractor itself but also from other factors can cannot be controlled by the parties involved (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 occurrence of the risks and qualify it (high/medium/low);
* Define mitigation measures to reduce the risk taking into account their relative costs and benefits;
* Finally, identify which party and person is best able 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 the setting 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 benefits.

They aim to ensure that the procurement is soundly based, well planned, that all appropriate stakeholders are involved, so that the objectives are achieved. They should only be applied to complex, strategically important or high-risk projects.

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 be taken at the very early stages to verify 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 agreed upon, 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 delivery. |

### 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 verified or audited.

The systems for recording information can be manual or electronic or mixed, 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 as well as dialogue or negotiation, if any.

The documentation must be kept for a period of **at least three years from the date of award of the contract**.

In the context of **ESI Funds**, it is essential to record a complete audit trail to demonstrate the eligibility of expenditure and **to keep it according to the delays 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[[51]](#footnote-52).

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 for the control of public procurement can also provide useful information as to the necessary documentation to prepare in case of audits (see 6.4 Checklist for the control of public procurement).

## 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 in accordance with the EU and national procurement legislation.

However, in some very specific cases, the modification of contracts during their term is allowed as derogation from the general rule because of specific circumstances, or they represent only a small part of the overall contract value (see below 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 duly justified. The burden of proof for the circumstances allowing for reliance on this derogation rests with the contracting authority.

|  |
| --- |
| **red-warning-sign  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 specificities of their contract and the relevant circumstances which 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 foresee all of the possible changes and put them in the procurement documents in very clear clauses. This is not necessarily always possible for every modification but care should be taken in the phase of preparation 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 to assess 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 for the period 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.

|  |
| --- |
| **red-warning-sign  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 stakeholders to review the scope and risks, including the availability of a sufficient budget. |

The options and the relevant questions contracting authorities need to pose to themselves before deciding a contract modification are outlined in the table below.

Table 23. Modifications of contracts without a new procurement procedure

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| GENERAL RULE | A new contract for additional tasks should be tendered in accordance with the EU Directive and national rules during its term.  However, as an exception to that general rule, **in specific exceptional circumstances the contract may be modified without a new public procurement procedure**.  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. | | | | | | | | |
| MODIFICATION IS NOT SUBSTANTIAL  (based on the value) | **None** 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: | | a) the modification is below the EU thresholds | AND (meaning, a and b have to be fulfilled at the same time) | 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. | Are you certain that even such a low-value modification does not alter the overall nature of the contract or framework agreement? | | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If all are "yes", proceed with modification. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If "no", check other possibilities, **tender out new contract.** |
| MODIFICATION IS NOT SUBSTANTIAL  (irrespective of the monetary value) | Modifications are allowed when they are not substantial. A modification of a contract or a framework agreement during its term is considered to be **substantial** when it renders the contract or the framework agreement **materially different** in character from the one initially concluded. **Whether or not the modification is substantial is for the contracting authority to decide, document and justify on a case-by-case basis.**  HOWEVER: | | Regardless of the situation described above (non-substantial modification based on the value), modifications are **always** considered substantial if one or more of the following conditions are met: | 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.  **In other words, if other economic operators could have participated under those new conditions.** | 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.  **In other words, if the economic operator is more highly remunerated, which could have attracted other economic operators*.*** | c) the modification extends the scope of the contract or framework agreement considerably.  **In other words, such a changed scope could have attracted other economic operators.** | 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). | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If all are "no", check for other possible circumstances which render the modification substantial, before proceeding with modification. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If any of these is "yes", **DO NOT proceed** with the modification.  Check other possibilities, **tender out new contract.** |
|
| FORESEEN CHANGES  (irrespective of their monetary value) | Were the modifications foreseen 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? | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If all are "yes", proceed with modification. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If "no", check other possibilities, **tender out new contract.** |
| NECESSARY ADDITIONS | 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? | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If all are "yes", proceed with modification. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If "no", check other possibilities, **tender out new contract.** |
| UNFORESEEN CIRCUMSTANCES | Has the need for modification been brought about by circumstances which a diligent contracting authority could not foresee? | Are you sure that the contracting authority was diligent when foreseeing? | 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? | | | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If all are "yes", proceed with modification. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If "no", check other possibilities, **tender out new contract.** |
| REPLACEMENT OF CONTRACTOR | 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. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  If there is a "yes" on either a, or b with all sub-questions, or c, proceed with modification. | https://upload.wikimedia.org/wikipedia/commons/thumb/7/7b/Traffic_lights_3_states.svg/2000px-Traffic_lights_3_states.svg.png  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%. Example1: 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.

## Deal with complaints and remedies

Economic operators can launch legal actions to request the enforcement of their rights under public procurement European or national rule in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement[[52]](#footnote-53).

Remedies are regulated by several EU Directives[[53]](#footnote-54) 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 reclaiming of grants already made.

Furthermore, non-respect of 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 for legal advice on handling a complaint via their respective national public procurement authorities.

## Terminate a contract during its term

It can happen that contracting authorities have to terminate a contract during its term when they become aware that the contract is breaching the EU or national legislation.

Regarding the European procurement legal framework, contracting authorities are allowed to terminate a contract during its implementation when one of the following grounds occur:

* 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 contractor should have been excluded from the procurement procedure because of a serious infringement of the EU legislation declared by the Court of Justice 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.

## 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.

At the 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 feed-back and recommendations regarding their performance.

Similarly, it is important that the contracting authority draws some conclusions internally and identify **key take-aways from the work achieved** which can be recorded in the contract file. For example, the contract manager may answer the following questions in a simple form:

* 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 stakeholders 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 stakeholders 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.

# **Toolkit**

## Most common errors in public procurement

Errors in public procurement are understood as infringements of public procurement rules, regardless of the stage of the procedure and on their impact on the final results of the public contract.

They are usually detected during internal financial controls and audits, review procedures triggered by appeals of economic operators against decisions of contracting authorities, or during audits and checks performed by external bodies[[54]](#footnote-55).

The table below presents the most common errors detected in the past years by the Commission services, in particular during the audit of ESI Funds. For each type of error, guidance and advice are provided in one of the sections of the present document.

|  |  |
| --- | --- |
| **Most common errors** | **Most relevant section of the guidance** |
| **Choice of the procedure** | **Chapter 1** |
| 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 |
| **Publication** | **Chapter 2** |
| 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 |
| **Technical specifications and criteria** | **Chapter 2** |
| 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 |
| Mix-up of selection and award criteria |
| **Selection, evaluation, award** | **Chapters 3 and 4** |
| Lack of transparency and/or equal treatment during evaluation | 3.3 Select tenders  4 Evaluation of tenders and award |
| Modification of selection/award criteria after opening of tenders, resulting in incorrect acceptance of tenderers | 3.3 Select tenders  4.2 Apply the award criteria |
| Modification of a tender during evaluation |
| Negotiation during the award procedure |
| Arithmetic errors when adding up scores and ranking tenders |
| Use of average pricing |
| Inadequate 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 |
| **Contract implementation** | **Chapter 5** |
| Award of additional works/services/supplies contracts without competition when none of the exceptional circumstances stated in Directive 2014/24/EU is demonstrated | 5 Contract implementation |
| Change in the scope and/or value of the contract |

## Resources and references

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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>

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

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| HELP_GreenCross **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, enhancing horizontal governance and improving the design and implementation of public administration reforms.  SIGMA has developed an **extensive material 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, advices, practical examples and recommendations to contracting authorities to comply EU public procurement legislation and make the most out of effective procurement procedures. They contribute to the improvement of 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> |

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| HELP_GreenCross **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: [oe.cd/procurement-toolbox](file:///C:\Users\User\Desktop\DG%20REGIO%20PP\03%20Working%20docs\oe.cd\procurement-toolbox) |

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| HELP_GreenCross **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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### Integrity and conflict of interest

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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>

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## 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 to achieve its primary goal.

To avoid errors and to build the best specifications possible, it is therefore very useful that contracting authorities carefully review and self-assess their own work, for example thanks to the following checklist.

If the specifications are clear, comprehensive and compliant, all answers should be “Yes” or “N/A” if irrelevant. In the case of a “No” answer, a comment and/or a justification must be provided and the specifications should be improved.

|  |  |  |
| --- | --- | --- |
| **Questions** | **Yes, No, N/A** | **Comments** |
| **Before drafting the specifications** |  |  |
| 1. Has the contracting authority researched the market and/or consulted internal or external stakeholders? |  |  |
| 1. Has the contracting authority considered alternative delivery mechanisms, including cooperating with other procurers? |  |  |
| 1. Has the contracting authority identified useful sources of information and gathered relevant documentation, including examples of previous specifications for similar purchases? |  |  |
| 1. Has the contracting authority carried out a risk assessment and allocated risks appropriately? |  |  |
| 1. Has the contracting authority considered division into lots? |  |  |
| 1. Has the contracting authority ensured that funding is available? |  |  |
| **Context and subject matter** |  |  |
| 1. Do the specifications contain background material to help the tenderers understand the requirements in context? |  |  |
| 1. In case of an important volume of background material, are the supporting documents easy available for all interested tenderers? (e.g. access to data room, send electronically upon request) |  |  |
| 1. Do the specification accurately identify the contracting authority’s needs and requirements? |  |  |
| 1. Is the subject matter of the contract reflecting priorities of the contracting authority? |  |  |
| 1. Are the specifications consistent with the business case? |  |  |
| 1. Do the specifications not include items that could be covered better elsewhere through another contract? |  |  |
| 1. If applicable, do the specifications fit with standard specifications template in use in the contracting authority? |  |  |
| **Delivery** |  |  |
| 1. Has the contracting authority determined precisely the scope and the range of goods/services/works required? |  |  |
| 1. Do the specification accurately define the required outputs and/or outcomes? |  |  |
| 1. Do the specifications present a realistic timetable for the procurement procedure and the implementation of the contract? |  |  |
| 1. Do the specifications state clearly the contract period and any possible extensions? |  |  |
| **Criteria (either included in the specifications or in another procurement documents)** |  |  |
| 1. Do the specifications detail exclusion grounds, selection criteria and award criteria as well as their respective weighting, scoring and evaluation method? |  |  |
| 1. Are the award criteria linked to the subject-matter of the contract? |  |  |
| 1. Are the award criteria based on the most economically advantageous tender (i.e. either price-only criteria, cost-effectiveness or best price-quality ratio)? |  |  |
| 1. Has the contracting authority ensured that selection and award criteria are clear to all? |  |  |
| 1. Has the contracting authority tried trial runs to test the selection and award criteria? |  |  |
| **Review** |  |  |
| 1. Are the specifications clear complete, reliable and proofread? |  |  |
| 1. Are the specifications readily incorporated into a contract? |  |  |
| 1. Are the specifications not asking for irrelevant information? |  |  |
| 1. Do the specifications have a version numbering control mechanism (e.g. version 1, version 2, final version)? |  |  |
| 1. Are the specifications validated and signed off by a person/body with the necessary authority within the organisation? |  |  |

## Checklist for the control of public procurement

Procurement procedures are often checked *ex-post*, in particular in the context of ESI Funds controls and audits. Yet, if contracting authorities (CA) would carry through a self-assessment of their on-going work during the preparation and implementation of procurement procedures, numerous errors could be avoided.

Checklist should not be used only by controllers and auditors, but also by practitioners while performing their tasks to verify if they are on the right track and if they do not overlook an important aspect of the process.

To avoid errors, it is therefore very useful that contracting authorities review this checklist as a self-assessment during the planning of the procurement and at each stage of the procedure.

If the procurement procedure has been conducted correctly, all answers should be “Yes” or “N/A” if irrelevant. In the case of a “No” answer, a comment and/or a justification must be provided and the process should be improved.

|  |  |  |
| --- | --- | --- |
| **Questions** | **Yes, No, N/A** | **Comments** |
| **Definition of the need** |  |  |
| 1. Were the needs the procurement procedure aimed to satisfy clearly identified by the CA? |  |  |
| 1. Did the CA consider all reasonable alternatives? |  |  |
| 1. Was the number/scope necessary or would fewer/less not be sufficient? |  |  |
| 1. Were the technical requirements indispensable or would a lower level not have sufficed? |  |  |
| **Procurement team** |  |  |
| 1. Was a procurement team formed at the planning stage of the procurement procedure? |  |  |
| 1. Did the procurement team or did the senior management of the CA authorise key steps in the procurement? |  |  |
| 1. Where the CA engaged external stakeholders to contribute to the procurement procedure, were they free from influence of particular interests of economic operators? |  |  |
| 1. Did all the persons involved in the procurement procedure, and in particular external stakeholders, sign a declaration of absence of conflict of interest and confidentiality? |  |  |
| **Choice of procedure** |  |  |
| 1. Was the choice of the procurement procedure motivated and documented in accordance with the principles of competition, transparency, non-discrimination/equal treatment and economic proportionality? |  |  |
| 1. Was the procurement procedure chosen adequate to the specific circumstances and was it admissible? |  |  |
| 1. If exceptional negotiated procedures were used, did the CA give sufficient and reasonable reasons for its option (detailed explanation as to why an open or restricted procedure was not possible)? |  |  |
| 1. For below threshold procurements, can it be confirmed that there are no elements to substantiate an infringement of national public procurement legislation? |  |  |
| 1. If the CA the accelerate procedure, was this duly justified? |  |  |
| **Contract value** |  |  |
| 1. Did the CA identify the full contract value and include options and provisions for renewals? |  |  |
| 1. Was the estimated contract value based on realistic and up-to-date prices? |  |  |
| 1. Was the estimated contract value in line with the final cost of the contract awarded? |  |  |
| 1. 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** |  |  |
| 1. Was the contract advertised in the OJEU, and in relevant national publications if needed? |  |  |
| 1. Were the minimum time limits (depending on whether a PIN was published) complied with? |  |  |
| 1. As of 18 October 2018, did the CA check the availability of e-submission and make sure it worked? |  |  |
| 1. Were all procurement documents accessible to all tenderers in the same way (i.e. specific documents were not easier to obtain for domestic tenderers)? |  |  |
| 1. Did the CA make sure that the use of the European Single Procurement Document was available above EU thresholds? |  |  |
| 1. Was the use of EU grant funding indicated in the contract notice (note that this is not compulsory, but is good practice for EU grant supported projects)? |  |  |
| 1. Did the contract notice or related documents clearly state the criteria to be employed for selecting capable tenderers and evaluating the most economically advantageous tender? |  |  |
| 1. Were weights for the award criteria listed in the contract notice or in a related procurement document? |  |  |
| 1. Did the technical specifications allow equal access to compete to all tenderers and without creating unjustified obstacles to competition, e.g. avoid setting national standards without recognising the possibility for equivalent standards? |  |  |
| 1. Were requests for information from tenderers responded to with equal treatment to all tenderers and within the time limits? |  |  |
| **Procurement documents** |  |  |
| 1. Could tenderers access all relevant information straight from the procurement documents? |  |  |
| 1. Did the CA make sources of information beyond the procurement documents equally available for all economic operators? |  |  |
| 1. Did tenderers fully understand, without any ambiguity, which documents and declarations had to be presented with the tender? |  |  |
| 1. 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? |  |  |
| 1. Was there a specific request for economic operators to comply with social and labour law obligations including international conventions? |  |  |
| 1. When the CA set social or environmental conditions for the performance of the contract, were these compatible with EU law and was adequate information given to the tenderers? |  |  |
| 1. Were any unjustified references to a specific make or source, a particular process, trademark, patent, type, or specific origin of production excluded from the technical specifications, thereby preventing the CA from favouring or eliminating specific undertakings or products? |  |  |
| 1. Were there no inconsistencies between the several procurement documents? |  |  |
| **Criteria** |  |  |
| 1. 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? |  |  |
| 1. 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? |  |  |
| 1. Did the CA clearly define the award criteria? |  |  |
| 1. Where the award criteria target the best price-quality ratio, were they different from those defined for the selection of tenderers? |  |  |
| 1. Where the award criteria target the best price-quality ratio, were they linked to the subject matter of the contract? |  |  |
| 1. Were the weighting/scoring coherent, convincing and concise, leaving little scope for arbitrary evaluation? |  |  |
| 1. Were the award criteria suitable for selecting the tender that offers the best value for money? |  |  |
| **Variants** |  |  |
| 1. If variants were allowed, was the award criteria that of the most economically advantageous tender? |  |  |
| 1. Was the admissibility of variants displayed in the contract notice? |  |  |
| 1. Did the CA state the minimum requirements to be met by the variants in the procurement documents? |  |  |
| **Selection** |  |  |
| 1. Did the CA only assess tenders submitted within the time limit and meeting formal requirements? |  |  |
| 1. Was the selection of tenderers independently conducted? |  |  |
| 1. Were the reasons for the selection and rejection of tenderers in line with the published criteria and properly documented? |  |  |
| **Evaluation and award** |  |  |

|  |  |  |
| --- | --- | --- |
| 1. Was the set-up of the Evaluation Committee appropriate for the subject matter of the contract? |  |  |
| 1. Did all members of the Evaluation Committee sign a declaration of absence of conflict of interest and confidentiality? |  |  |

|  |  |  |
| --- | --- | --- |
| 1. Were the award criteria used to evaluate the tenders and the related weightings those and only those set out in the procurement documents? |  |  |
| 1. 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? |  |  |
| 1. 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? |  |  |
| 1. If any tender seemed “abnormally low”, did the CA request in writing the reasons justifying the abnormally low tender price? |  |  |
| 1. Is there a complete evaluation report signed by all members of the Evaluation Committee? |  |  |
| 1. Was the contract actually awarded to the tenderer chosen by the Evaluation Committee? |  |  |
| 1. Were all unsuccessful tenderers notified with the correct information, within the relevant timescale and a “standstill period” applied before the contract signature? |  |  |
| 1. Was the contract award notice published in the OJEU within 30 days of the contract signature date? |  |  |
| 1. 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? |  |  |
| **Contract modifications** |  |  |
| 1. If any additional works/services/supplies were awarded without competition, did all of the relevant exceptional conditions apply? |  |  |
| 1. If any, did the modification of the scope occur without questioning the initial decision to award the contract to the contractor? |  |  |
| 1. Were contracted timescales altered without putting into question the original decision to award the contract to the contractor? |  |  |
| 1. Provided that a modification of the contract value did not alter the overall nature of the contract, was the modification below EU thresholds? |  |  |
| 1. Provided that a modification of the contract value did not alter the overall nature of the contract, was the modification below 10% of the initial contract value for services and supplies, and below 15% for works? |  |  |
| 1. If any, did the modification of the contract value occur without altering the economic balance in the favour of the contractor? |  |  |
| **Record keeping** |  |  |
| 1. Did the CA keep a physical or electronic record of the key documents of the procurement procedure?  * Contract notice (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). * Proof or 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. |  |  |

## Template declaration of absence of conflict of interest and confidentiality

**Declaration of absence of conflict of interest and confidentiality**

|  |  |
| --- | --- |
| **Contracting authority** | *[Full name]* |
| **Title of contract** | *[Title and number if applicable]* |
| **Type of contract** | *[Works/Supplies/Services]* |
| **Procedure** | *[Open/Restricted/Negotiated/Direct award/Competitive dialogue/Competitive procedure with negotiation/Innovation partnership/Other]* |
| **Contract value** | *[Amount and applicable currency]* |
| **Date of dispatch of contract notice** | *[If applicable]* |

I, the undersigned, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ , having being appointed to take part to the [project team/Evaluation Committee] for the abovementioned 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.”*

* that, 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 the subcontractors proposed;
* that 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;
* that, if I discover during the course of the [project/evaluation] that such a conflict exists or could arise, I will inform the contracting authority without delay;
* that, 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 that if I do so, I should not be treated unfairly or be sanctioned;
* that 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:

**ACKNOWLEDGEMENT**

This document has been produced under the supervision of a working group representing: the European Commission Directorates-General responsible for managing the European Structural and Investment (ESI) Funds (namely, the Directorate-Generals for Regional and Urban Policy, for Employment, Social Affairs and Inclusion, for Agriculture and Rural Development, and for Maritime Affairs and Fisheries); the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs; and the European Investment Bank.

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13. 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. [↑](#footnote-ref-14)
14. As a general indication, one can consider that the initiation of the procurement procedure is the point in time when the contracting authority choose the type of procedure to be followed and decides definitively whether a call for competition is necessary for the award of the public contract. [↑](#footnote-ref-15)
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